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Gull Laboratories Inc. v. Louis A. Roser Company : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GULL LABORATORIES, INC.,	:	
a Utah corporation,	:	
	:	
Plaintiff-Respondent,	:	
	:	
vs.	:	Case No. 15721
	:	
LOUIS A. ROSER COMPANY,	:	
a Utah corporation,	:	
	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

Appeal from the Judgment of the Third District Court
Salt Lake County, The Hon. Dean Conder, Judge

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FILED

MAY 25 1978

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NATURE OF THE CASE

This is an action for property damage arising from the loss of the contents of a laboratory flask.

DISPOSITION IN LOWER COURT

This case was tried to a jury in December 1977. The jury returned a special verdict finding plaintiff thirty per cent negligent and defendant seventy per cent negligent in causing the loss. The jury found damages to plaintiff in the amount of \$65,197.00. The lower court entered judgment for the plaintiff in the sum of \$45,637.90 with costs. The lower court thereafter denied defendant's Motion for a New Trial.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the judgment of the lower court and a new trial on all issues.

STATEMENT OF FACTS

This lawsuit arises out of an incident which occurred upon the business premises of Gull Laboratories, Inc., sometime during the last half of February 1976.

At that time, plaintiff-respondent Gull Laboratories, Inc., (hereinafter "Gull") was an experimental laboratory in the process of starting up a business to produce diagnostic products and services.

Defendant-appellant Louis A. Roser Company (hereinafter "Roser") was in the business of selling, installing and servicing industrial refrigeration equipment.

The evidence is conflicting as to whether the events giving rise to the incident occurred during the week of February 16-23 or February 23-27, 1976. (R528, 586, 667, 671-72) Towards the beginning of the week in question, some of Gull's employees observed a malfunction in the operation of a small walk-in cooler within the laboratory Gull leases from Fur Breeders Agricultural Cooperative. (R528) Gull alerted Fur Breeders' office which sent repairmen to try to correct the problem. (R Id.) The repairmen visited the laboratory sometime between Wednesday and Friday of the week in question, but were unable to correct the specific malfunction. Fur Breeders' repairmen then called defendant-appellant Roser and asked that a serviceman be sent out to work on the cooler. (R528)

On Friday afternoon, Roser's lead repairman Elmer J. Meyer made a service call at Gull Laboratories. (R667) Upon arrival, Mr. Meyer was taken to the laboratory cooler by one of Gull's lab technicians, Jack Carpenter. (R662, 690-91) The lab cooler is located between the laboratory and glassware preparation room. Together

these rooms comprise the west portion of Gull's business premises. (R530, 647) The dimensions of the cooler are approximately 12'x6'x8', and it is entered through a door on the east side of the cooler. (R556, 663)

The refrigeration unit Roser was called upon to service is suspended from the ceiling in the southwest corner of the cooler, the bottom of the unit being approximately 5-1/2' above the cooler floor. (R648-49) On the south wall of the cooler are four shelves (R588, 664) used to store chemicals; the top shelf lies approximately 10" below the bottom of the refrigeration unit. The compressor for the cooler is located outside on the north wall of the cooler. (R648)

Mr. Meyer was familiar with the equipment involved (R643, 646) and quickly commenced repairs. Meyer asked Carpenter for a small step ladder (R649, 691) so that he could more easily reach the unit. (R656) The evidence is in conflict as to whether Mr. Meyer was furnished with a step ladder or a small portable stool, but regardless, one or the other was made available to and used by Meyer. (R649-50, 663, 691)

Mr. Meyer testified that while in the cooler the only materials he touched were upon the top shelf on the south side of the cooler (R664, 667), the shelf nearest

in proximity to the refrigeration unit. Meyer carefully moved some of the vials and flasks on that shelf to the side to clear them from the work area and provide him with a clear space upon which to place his tools. (R664) Meyer further testified that, while in the cooler, he did not hear any bottles or flasks tip over, nor did he notice any spillage. (R657, 667-68) After servicing the unit within the cooler, Meyer made adjustments to the compressor located on the outer wall of the cooler. (R650-51) He then left Gull Laboratories. While the evidence indicates that Mr. Meyer's visit left some dirt and grime within the laboratory near the cooler (R529, 588, 692, 723), there is no evidence of any lack of care or cleanliness on Meyer's part within the cooler itself.

Sometime during the week following Meyer's service call to Gull Laboratories, Roser was informed by one of Gull's agents that there had been a vial spillage discovered in the lab cooler after Mr. Meyer's visit. (R443) Roser's operating manager, Mr. Glenn A. Roser, Jr., thereafter called Gull's office to offer assistance. (R442)

Mr. Roser spoke with Dr. Myron Wentz, primary owner of Gull, who informed Mr. Roser that following the Roser serviceman's visit, an Ehrlenmeyer Flask had

been found tipped over on its shelf in the cooler with its contents spilled down the side of the wall and onto the floor of the walk-in cooler. (R536-37) Mr. Wentz did not allege that anyone had witnessed the accident, only that the spillage had been discovered, and Gull intended to hold Roser responsible.

The flask contained a conjugate which Gull intended to use, in diluted form, as a part of a testing kit for diagnosing three of the four viral diseases caused by the Herpes virus. (R495) Hopefully, the kit was to be marketed, conditions permitting, sometime after May 1976. (R506 et seq.) In testing disease, the diluted conjugate is applied to a microscope slide (known as a substrate) containing a cell or tissue infected by the specific disease being tested for (R507) and to which blood serum from the person being tested had been applied. If the person has had the disease for some time, his/her body system will have built up specific antibodies against the disease. (R510) If present in the applied serum, these antibodies will attack the virus in the infected cell or tissue. (R Id.) If this occurs, the diagnosis is that the person has the specific disease, even though the virus itself may be incapable of detection. (R. Id.) This joining of the viral particle and specific antibody

are unobservable even under a microscope without the use of the conjugate. (R511-12) The conjugate contains other antibodies which latch onto the antibodies in the patient's serum in the same way as the patient's antibodies latch onto the viral particle. (R511) When treated with a fluorescein, the antibodies within the conjugate act as a marker, making the linkage of the antibodies and viral particles observable through the use of a special microscope. (R511-12)

The conjugate, in this instance, was anti-human globulin prepared from an animal serum. To prepare the conjugate, human blood is drawn from the donor and allowed to clot. The globulins (natural human antibodies within the blood) ooze out of the clot as serum which is then collected. Through various laboratory techniques, the preparer then seeks to isolate the specific globulin or globulins for the disease he wishes to test for, in this case the herpes virus. These isolated substances are known as antigens. In this instance, the specific antigens isolated were identified as IgA, IgG and IgM. (R512-13) Each antigen is then injected into an animal, in this case a goat. (R511) The goat's system views the injected antigen as foreign substance and builds up its own antibodies to the antigens, in this case the human antibodies.

After allowing the animal's system to build up the antibodies for a period of time, the goats are then bled, and their serum tested to determine the titer, or quality concentration, of antibodies in the specific serum. The goat serum is then fractionated. This process hopefully results in additional purification and a serum of sufficient quality and titer for the particular test you wish to run. The titer must be high enough to provide maximum brilliancy when viewed under the fluorescein microscope, yet must fall within the range of permissible titers for that particular test as established by government testing agencies.

The serum is then conjugated. In conjugation, fluorescein is added to the serum in predetermined amounts to provide a "tagging" effect when viewed under a fluorescein microscope. (R507) When applied to the substrate, the conjugated antibodies from the goat serum attack the specific antibodies in the patient's serum in the same manner as when the human antibodies were initially injected into the goat in the form of antigens. If the test components have been properly prepared, the conjugate will not react unless the specific antibody which was injected into the goat is present in the patient's serum. (R511-12)

It is very important that both the antigen and the conjugate be carefully prepared as as to be monospecific

for the particular antibody you wish to produce. (R512-13) The same is true of the viral particle on the substrate slide vis-a-vis the disease for which you are testing. If antibodies other than those of the disease being tested for are present in the conjugate, they will couple with similar antibodies in the patient's serum and produce a positive test. This result will occur even in the absence of the viral disease for which you are testing.

Conjugates for such diagnostic testing can be purchased commercially or prepared individually. Gull states that it chose to prepare its own so as to be able to more carefully control the quality of the test. (R515-17) Gull claims that the special techniques which went into the preparation of its conjugate created a unique product. Dr. Wentz testified that the conjugate's unique nature was derived from the specificity of reaction between the viral particle on the substrate slide and the "tagged" antibody from the patient's serum. Dr. Wentz also testified that the conjugate was of a sufficiently high titer to produce a reactive brilliancy under the microscope which could not be attained through the use of commercially obtainable conjugates. (R609-10)

This alleged uniqueness was controverted by evidence showing that the conjugate had never been tested against commercially prepared conjugates outside of Gull's own testing system. (R575) Furthermore, testimony by the president of a competing microbiological research laboratory, Dr. Nadeem Muna, was to the effect that there were commercially available conjugates which would perform acceptably for Gull's needs. (R694) Dr. Muna also testified that the Gull process was not unique, implementing only standard technology. (R695)

Whatever its worth, Gull had produced 104 ml. of a conjugate which was stored in a 250-ml. uncapped Ehrlenmeyer Flask. This flask was positioned upon the "middle" shelf on the left side of the lab cooler during the afternoon in question. (R591) Testimony adduced at trial indicated that the flask was found lying on its side, on that same shelf, sometime after Mr. Meyer had completed repairs within the cooler.

The evidence is conflicting as to whether the contents of the flask were a total loss. Dr. Wentz claims that the amount of conjugate remaining in the toppled flask was insignificant (R734) and the spilled contents unsalvageable. (RId.) Dr. Muna, on the other hand, testified as to procedures Gull could have used to salvage a portion of the contents and return them to usable

form. (R706) He also illustrated, by example, how a substantial portion of the conjugate should have remained in the tipped flask. (R707-709) Nevertheless, during the week following the accident, Dr. Wentz met with another Gull agent, Mr. David Gillen, and with Mr. Gillen's assistance, prepared a document to be submitted as a claim against Roser alleging the conjugate to be a total loss. This document, which contained Dr. Wentz's estimates of the cost to reproduce the lost conjugate, was introduced at trial as Defendant's Exhibit "16". (R578-81)

Later at trial, however, Gull introduced Plaintiff's Exhibit "13", which was purported to be a summary from Gull's records of the actual cost to reproduce the lost conjugate. (R559-61) The exhibit was admitted over counsel's objection that the summary was in violation of the best-evidence rule. (R561) Although many of the figures on Exhibit P13 closely approximate Gull's original estimates on Exhibit D16, there is a large disparity between the estimated laboratory processing costs for the conjugate shown on the two exhibits.

Dr. Wentz claims the discrepancy is a result of Gull's inability to reproduce an identical conjugate, despite time-consuming attempts to do so. Following the

accident, Gull decided against re-immunization. The decision was largely attributable to the fact that the IgM antigen, which Dr. Wentz claims was the key component of the original conjugate (R514, 571) had been expended in the original immunization and an additional supply was unobtainable. (R572) That antigen had not been prepared by Gull, but by Dr. Stephen St. Joer at Penn State University. (R572)

Gull was eventually able to reproduce two of the tests contemplated in the original kit through the use of bleedings taken from the original goats. These bleedings had been taken concurrently with those used to produce the lost conjugate, but were not considered optimum at the time. Through undisclosed purification procedures, Gull was able to use those bleedings to produce a substitute conjugate with satisfactory results. (R603) This procedure, however, is claimed to have resulted in higher costs than originally estimated.

At trial, the court also allowed, over counsel's objections, evidence and testimony as to the costs incurred by Gull in: (1) Starting up the laboratory. The admitted evidence showed the extent of Dr. Wentz's initial investment in the laboratory, including indebtedness incurred. (R500, 503) (2) Operation of a laboratory. The admitted

testimony included cost estimates of laboratory equipment and inventory (R498, 504), as well as the salaries paid Dr. Wentz and his employees. (R502-03) (3) Market value of lost conjugate. Although no market for the product had been established at trial, the court allowed both testimony by Dr. Wentz and argument by Mr. Richman as to the market value of the conjugate in completed form. (R555, 596, 615, 625) Thusly, evidence of lost sales and profits from the conjugate was allowed to reach the jurors for use in their deliberations despite previous instruction by the court to Mr. Richman that such evidence was to be inadmissible on the grounds of relating to a new business. (R554-55)

The special verdict returned by the jurors found Gull to have been 30% negligent in causing the loss of the conjugate and Roser to have been a 70% cause. Damages were found for Gull in the amount of \$65,197.00. This amount is identical to that shown as the cost to reproduce the lost conjugate set forth in Plaintiff's Exhibit "13".

ARGUMENT

Introduction

Rule 59(a) of the Utah Rules of Civil Procedure enumerates the permissible grounds upon which the court

is justified in granting a new trial. Defendant's petition for relief is founded upon the following bases contained therein:

(a) Grounds

* * *

(1) Irregularities in the proceedings of the court, jury * * * by which either party was prevented from having a fair trial.

* * *

(3) Accident or surprise, which ordinary prudence could not have guarded against.

* * *

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law.

(7) Error in law.

POINT I

The Court Committed Prejudicial Error
In Receiving Exhibit P-13 in Evidence.

A. The court erred in admitting Exhibit P-13 in evidence.

The record shows that Gull claimed Exhibit P-13 as a summary of that portion of its business records pertaining to the cost to reproduce the lost conjugate. On page 559, beginning at line 6, it reads:

Q Dr. Wentz, I had you what has been marked as Plaintiff's Exhibit P-13 and ask you if you can identify that?

A This is an itemizing of the costs to reproduce the conjugate based on company records as to costs incurred.

Q You call them "company records," are they your records?

A Yes.

Q And who prepared the items on Exhibit P-13?

A These were prepared by myself.

Q And what were you referring to when you prepared those items and made those computations?

A I took into consideration all facets that dealt specifically with remaking this conjugate.

Q Were those obtained from your business records?

A Yes, they were.

Q And the first item you have on there is what?

Mr. Berry: Your Honor, I object on the ground there is no proper foundation laid for the admission of this exhibit.

The Court: Have you shown this exhibit to counsel?

Mr.
Richman: Yes, he has a copy.

Mr. Berry: Seems to me like his books and records would be the best evidence of whatever it cost, if that's what it's intended to prove.

The Court: Is this a summation of what is on the books and records?

Mr.
Richman: Part of the books and records he kept himself.

Mr. Berry: I don't think it's on the books and records, your Honor. I haven't seen it on the books.

The Court: Overruled. That will be subject to cross-examination, and I'll let him answer.

[Emphasis added]

Regardless of what Gull now chooses to designate the exhibit (R195, but see assertions at R169, 586), there can be no doubt that the jurors regarded the exhibit as a summary of allegedly existing business records and, upon receipt of the exhibit into evidence, weighed it as such. Gull is, therefore, now estopped to deny its claim that P-13 is a summary and is consequently bound by the law pertaining thereto.

Admitting the introduction of a summary of business as an exception to hearsay evidence is a rule of convenience only. B. Jones, Evidence, at 473 (5th Ed. 1958).

The rule is stated in Jones on Evidence:

§244--Summaries of Multiple Writings.--

Another exception to the best evidence rule, based on necessity, arises when the primary source of proof consists of numerous documents which cannot be conveniently examined in court, and the fact to be proved can only be ascertained by an examination of the whole collection. It is well established that in such a case a summary * * * may be given in evidence by any person who has examined the documents and who is skilled in such matters, provided the result is capable of being ascertained by calculation.

* * *

To the application of this rule, it is essential that the original records or writings be first duly identified and that a sufficient foundation be laid so as to entitle the records or writings themselves to be admitted in evidence. Also, the admissibility of the records themselves as evidence must be established, and they must be available to the opposite party for cross-examination. [Emphasis added]

Utah follows a rule that requires before admission of a summary that the records be produced and made available to the opposite party for purposes of cross-examination. In Sprague, et al., v. Boyles Bros. Drilling Company, 4 Utah 2d 344, 294 P.2d 689 (1956), in an action by a general contractor and surety to recover damages for breach of contract, the court said:

It has been held, and we believe the ruling to be a salutary and expedient one, that where original book entries, documents or other data are so numerous, complex or cumbersome that they cannot be conveniently examined by the fact trier, or where it would materially aid the court and the parties in analyzing such material, that a competent person who has made such examination may present such evidence. This is subject to the limitation that the evidence must be shown to be developed from records, books or documents, the competency of which has been established, the records must be available for examination by the opposing parties, and the witnesses subject to cross-examination concerning such evidence. * * * [Emphasis added]

In Nalder v. Kellogg Sales Company, 6 Utah 2d 367, 314 P.2d 350 (1957), the court said a summary of profit

and loss statements was inadmissible where it was not shown to have been prepared by a person competent to do so, who was subject to cross-examination, or based on other records and data available for examination.

An earlier federal case emphasizing the same points is Berthold-Jennings Lumber Co., et al., v. St. Louis Railroad, et al., 80 F.2d 32 (1935). In Berthold-Jennings the Court said:

While, under certain limitations, an expert may give a summary of his examination of voluminous records, if proper foundation has been laid, with reference to such records so as to make them competent evidence, still to be admissible the records must at least be produced and made available to the opposite party for the purpose of cross-examination.
80 F.2d at 44

In applying these principles to the facts of this case, it is evident that the court erred in admitting the exhibit. The record shows that the exhibit was admitted over defendant's vigorous objection and motion that the testimony relative to Exhibit P-13 be stricken. (R561)

In contrast to the rule stated previously, Jones on Evidence, supra, the records and books from which the summary was compiled were never sufficiently identified so as to make ascertainable exactly what went into the total of \$65,197.00 Gull claims as the cost of reproducing the lost conjugate.

No sufficient foundation was laid to allow the records to be admitted into evidence, even should they exist. The record contains no testimony indicating the type or regularity of the entries, the accounting procedures used or even whether the computations had been rechecked for errors, despite the fact that Dr. Wentz admitted that any records kept were not kept in great detail. (R573)

The record is also void of any testimony that Dr. Wentz was the custodian of the records, but alleges only that records were kept. Thus, an additional basis for excluding the exhibit is established--the evidence was not submitted by a person possessing the requisite competence. Without testimony establishing himself as the custodian of the records, Dr. Wentz is unable to testify as to the validity of the originals and, a fortiori, the summary.

Furthermore, the original records were not available for examination for the opposing party. Mr. Richman offered to supply the original records only if subpoenaed by the court. (R584, 586) The burden of production, however, is on the party seeking admission of the evidence. Although the record clearly shows that Gull failed to sustain this burden, the court nevertheless admitted the exhibit into evidence.

B. The court's error in admitting the evidence was prejudicial.

If in answering the Special Verdict the jury had come up with a figure for damages other than \$65,197.00, it might be argued that the receipt of Exhibit P-13 into evidence was merely harmless error. However, it seems clear that Exhibit P-13 was the only evidence employed by the jury in affixing the amount of damages.

Gull's original estimate of the cost to reproduce the lost conjugate was properly admitted as Exhibit D-16. Exhibit P-13 was later introduced containing conflicting estimates. (R 584, lines 1-9) While Dr. Wentz's testimony attempted to reconcile the discrepancies between several of the items contained in the two estimates (R582-83, 585-86), there is no evidence on the record indicating any basis for the discrepancy between the conflicting processing component estimates of \$14,400 and \$62,400. In the absence of any substantiating evidence reconciling these discrepancies, it becomes obvious that the only source from which the jurors could have derived the \$65,197.00 figure was the improperly admitted Exhibit P-13.

POINT II

Ordinary Prudence Could Not Have Guarded Against the Receipt of Exhibit P-13.

This Court is empowered by Rule 59(a)(3) to grant a new trial for surprise that ordinary prudence could not have guarded against.

In Martin v. Hill, 3 Utah 157, 2 P. 62 (1882), the court stated that a party alleging facts constituting a legal surprise is bound to show them by the best evidence in his power, and the affidavit thereof should be made by the attorney, and not the client. It further said the verdict must be shown to be mainly attributable to the surprise in order to reverse a judgment therefor.

Crellin v. Thomas, 122 Utah 122, 247 P.2d 264 (1952), is an example of a similar factual situation in which a new trial was granted for surprise. Crellin was an action for slander. The plaintiff claimed that she had been slandered because she was called a whore. The defense counsel made numerous inquiries but was unable to turn up any background on her. However, one of the persons whom he talked to before the trial to get background information called him after the verdict in the first trial and volunteered the information that the plaintiff's place of employment was in Ely, Nevada, as a dance hall girl. When this was checked out, it was

determined that the plaintiff had worked as a percentage girl in the Green Lantern and a place called Rhiney's, and thereafter one Harold E. Woods testified that Rhiney's was a good whorehouse. The defendant in Crellin was surprised to learn of the background when the person who gave the background had previously declined to furnish any information. At the second trial, the jury verdict was returned for the defendant, and this was affirmed.

Gull seeks to differentiate Crellin on the ground that it pertained to the post-trial discovery of new evidence which would have aided the petitioner at trial. Such distinction is without merit. The issue is not solely whether the petition for a new trial is predicated on the discovery of new evidence, but goes to the materiality of the event constituting the surprise and the magnitude of the injustice done. Hilliard, New Trials at 521.

The pertinent facts show that while defense counsel exercised more than "ordinary prudence" throughout the course of the trial, he was still unable to guard against the receipt of Exhibit P-13 in evidence. At no time prior to Gull's introduction of Exhibit P-13 were any facts brought to counsel's attention which would have put an "ordinarily prudent person" on notice that such evidence would be introduced.

Dr. Wentz aided in the preparation of Exhibit D-16, Gull's original reproduction cost estimate, several days after the alleged incident occurred. As both parties were aware, the document was prepared as a claim to be submitted against Roser. (R585) Defendant was aware of the circumstances and attention surrounding the preparation of that document and was led to believe that the amount indicated thereon would be Gull's final claim. Nothing which transpired thereafter gave defendant any cause to dispel such belief.

In accord with ordinary prudence, defendant deposed Gull's alter-ego, Dr. Wentz, in an effort to avoid the duplication of time and expenses customarily arising when the same person is both deposed and compelled to answer interrogatories.

Dr. Wentz testified, both in his deposition and then later at trial, that the alleged uniqueness of the lost conjugate must be credited to a specific antigen prepared by a Dr. Stephen St. Joer. (R267-68, 514, 606) Unfortunately, this special antigen had been totally expended in the initial immunization and is now irreplaceable. (R268, 572-73) Furthermore, Dr. Wentz testified that he had found a suitable substitute for his work which could be made compatible for testing purposes

through standard laboratory techniques. (R271-72) This testimony led defendant to reasonably believe that due to the discovery of such a readily available substitute, and in light of Gull's duty to mitigate damages (R66), the value of Gull's reproduction costs would be no more if not far less than the amount originally estimated in Exhibit D-16.

In light of Dr. Wentz's testimony, I was very surprised to find that Gull was now representing the cost to reproduce the conjugate as \$65,197.00, far in excess of its original estimate of \$38,308.75. Inasmuch as the verdict has already been shown to be attributable to the surprise (POINT I), these factors require a reversal of the trial court verdict and the granting of a new trial.

POINT III

The Evidence is Insufficient To Justify the Verdict.

The return of a verdict based on the jurors' conceptions as to the sufficiency of the evidence is clearly the province of the jury, subject only to the trial court's discretion to grant a new trial where the returned verdict is clearly against the weight of the evidence presented. In instances where the verdict is clearly contrary to the permissible evidence, it is an abuse of that

discretion to deny the petitioning party a new trial. Where such an abuse is shown, the proper remedy is reversal of the trial court's ruling and the granting of a new trial. Holmes v. Nelson, 7 Utah 2d 435, 326 P.2d 722 (1958).

In the instant case, the answer to Question IV of the Special Verdict finding that Roser was thirty per cent negligent in causing the loss of the conjugate is clearly contrary to the evidence.

Instruction No. 12 set forth the standard by which the jurors were required to evaluate Elmer Meyer's actions while within the Gull Lab cooler. That standard is one of what a reasonable and prudent person would have done under the circumstances, the amount of caution required varying in accordance with the nature of the act.

Uncontroverted evidence given during trial aptly illustrates Meyer's compliance with this standard. In order to safely service the suspended cooler, Mr. Meyer requested and used the aid furnished to him by Jack Carpenter; whether it was a portable stool or stepladder is unimportant. While servicing the equipment, Mr. Meyer carefully moved the vials and flasks in closest proximity to the refrigeration unit to the side in order to reduce the chance of jostling any of the bottles and to provide

a clear place for setting any necessary tools. (R664)
Mr. Meyer further testified that while in the cooler he did not bump any of the shelves, nor did he hear any flasks tip, nor did he at any time notice any spillage. (R667-68)

Gull, on the other hand, was unable to provide any evidence as to specific acts of negligence on Mr. Meyer's part while he was in the cooler. Instead, Gull bases its argument as to Mr. Meyer's negligence upon insignificant circumstantial evidence.

Mr. Richman questioned Mr. Meyer's competence and care as a serviceman on the basis of his age, education, sight and hearing, yet was unable to establish any deficiency in Mr. Meyer's proficiency as a result of any one of these characteristics.

Gull introduced testimony to show that Mr. Meyer left dirt, grime and cigaret butts in various areas of the laboratory in attempting to establish an inference that Mr. Meyer may have been careless while servicing the refrigeration unit. It is interesting to note, however, that despite multiple testimony as to Meyer's house-keeping procedures during the service call, no evidence was introduced showing any uncleanness or any improper actions within the cooler itself; no dirt, grime or cigaret butts were found therein. The only evidence offered

by Gull as to the alleged negligent nature of Mr. Meyer's actions was the fact that the spilled conjugate was discovered following Mr. Meyer's visit.

Mr. Meyer testified that he was aware that the Gull premises were used for laboratory work. The service he was called upon to perform, however, could hardly be classified as dangerous or risk-laden in nature. Further, Mr. Meyer was never alerted to the fact that any particular flask containing irreplaceable material was present in the cooler. The mere fact that chemicals were contained in the cooler would not necessarily lead a reasonably prudent person to such an assumption.

In light of these facts, to say that Mr. Meyer performed in other than a reasonable and prudent manner under the circumstances is clearly contrary to the evidence presented.

POINT IV

The Damages Awarded Were Excessive And Unjustified Upon the Evidence.

When the court finds a verdict is grossly disproportionate to any amount of damages that could have been fairly awarded, it can do one of two things. It can either grant a new trial unconditionally, or it can award a new trial conditionally unless the prevailing party consents to a remittitur.

In Wheat v. Denver & Rio Grande, 122 Utah 418,
250 P.2d 932 (1952), the court states:

We do not doubt that when a verdict is so grossly disproportionate to any amount of damages which could have fairly been awarded as to make manifest that the verdict was so suffused with passion and prejudice that the defendant could not have had a fair trial on the issues, the trial court should unconditionally grant a new trial. We say this notwithstanding certain statements in our cases which may be interpreted to give a contrary impression.

In Lodder v. Western Pacific Railroad, 123 Utah
316, 259 P.2d 589 (1953), the court states:

We * * * do not agree with the defendant's contention that the amount of the verdict was so excessive as to require a holding as a matter of law that the jury was actuated by passion and prejudice. We recently said that where "the verdict is so excessive as to show that it must have been motivated by prejudice or ill will * * * it should be unconditionally set aside." But we find no case where this court has held that as a matter of law passion and prejudice were shown merely by the excessive amount of the verdict, so we have not indicated how great an amount or percentage or reduction would be required to make such a showing, but we have approved reductions as high as fifty per cent, and required a reduction of seventy per cent of punitive damages, or about sixty-three per cent of the total verdict. * * *

In Lodder at page 594 there was a schedule showing the names of cases, amounts of jury verdicts, amounts of dollars of remission approved by the court, and also the approximate percentage of net verdict constituting remission.

In The State of Utah by and through its Road Commission v. Kendell, 20 Utah 2d 356, 438 P.2d 178 (1968), the court states that the trial court may, in the exercise of sound discretion, order a remittitur in lieu of granting a new trial where damages appear to have been given under the influence of passion or prejudice.

In the instant case it appears clear that the jurors were prejudiced against the defendant. The amount awarded Gull, incident to the jury's acceptance of Gull's cost estimates in Exhibit P-13, clearly exceeds what the evidence shows to be a reasonable reproduction cost for the lost conjugate.

Dr. Wentz testified that, following the loss of the conjugate, various procedures were used in attempts to duplicate the original conjugate. Gull first rebled the original goats, but determined that the required titer was lacking. No attempts at reimmunization were made since the principal reagent, the antigen supplied by Dr. St. Joer, was no longer available. Commercially available conjugates were then tested but, according to Dr. Wentz, were found unsuitable. The reproduced conjugate for the two tests now being marketed was obtained through the refinement of original bleedings from the original goats. These bleedings had previously been

classified as less than optimum when compared with those used to produce the lost 104 mls.

In light of these facts, Gull's estimates contained in Exhibit P-13 cannot withstand scrutiny. Gull was compensated for the labor expended in reimmunizing the goats, although, upon the facts, no reimmunization occurred following the determination that Dr. St. Joer's antigen was no longer available. The same holds true for the costs of the reagents and goat maintenance. If bleedings already in existence at the time of the loss of the conjugate were used, it can hardly be argued that additional expense was incurred in obtaining these bleedings.

Even the initial rebleeding of the goats to determine the remaining potency of the serum could have resulted in only minimal costs. With the testing procedures having already been established, and supposedly recorded, the determination that rebleedings from the goats would be unsuitable for the desired purpose would require minimal effort.

The remaining component of P-13, the labor expended by the laboratory in antiserum processing, also appears to be somewhat inflated. At no time during trial did Gull document the procedures composing this portion of the estimate, nor why this later estimate differed so

greatly from Gull's original estimate set forth in Exhibit D-16. In addition, no foundation was ever laid for the admission into evidence of any records of documents which could possibly shed some light on this large discrepancy.

Inasmuch as there was no evidence from which the jurors could justifiably arrive at such amount, it is obvious that extraneous factors were taken into account. Likely substitutes are the passion and prejudice engendered by improper testimony and argument relating to the loss sustained by Gull in starting up the business, the time setback occasioned by the loss of the conjugate, and the resulting loss of sales occasioned thereby.

Furthermore, there still remains serious question as to the validity and alleged uniqueness of the Gull testing process. In awarding damages, the jurors apparently ignored the testimony of Dr. Muna. His testimony is that commercially available conjugates were available which would have been sufficient for Gull's intended purpose, and should Gull choose to manufacture its own conjugate, a conjugate of sufficiently high titer could be produced in any amount for approximately \$1,040.00.

The jurors must therefore have accepted Gull's assertion that the conjugate and testing process were unique. This assertion was uncorroborated by the evidence

presented and was directly controverted by Dr. Muna's testimony. The only witnesses Gull provided in attempts to establish the uniqueness of the system admitted to being unfamiliar with antihuman conjugates and to having never seen or tested the lost conjugate; (R139, 643, 649, 670) indeed no one has outside Gull's own employees. The only witness who had actually used a small sample of the original conjugate described it not as unique, but only as "very acceptable." (R727)

Serious flaws exist in Gull's own reasoning as to the uniqueness of the conjugate. Dr. Wentz testified as to the importance of careful preparation of the antigen; failure to make it monospecific may ruin the whole test. He also described the antigen prepared by Dr. St. Joer as a critical component of the original conjugate. Interestingly enough, Dr. Wentz also testified that he had no knowledge of the exact procedures used in Dr. St. Joer's preparations, nor that he had retested St. Joer's antigen prior to immunization of the goats. (R606)

Dr. Wentz also testified that the specificity of the viral test resulted from the fact that a human antibody is specific for only one antigen, or human virus. The injected antigens in this case, however, were not the virus itself, but human globulins, or antibodies. The record is void of any evidence showing that the

antibodies produced in the goat's system in response to the injected human antibodies were specific for the virus being tested in the same manner as the human antibodies are specific for that virus.

Both Dr. Wentz and Dr. Muna testified as to the difficulty of isolating a specific viral disease particle for preparation of the substrate slide. Without a monospecific viral particle and conjugate, non-specific reactions between the various viruses and antibodies then present would destroy the value of the test. As pointed out by Dr. Muna, however, the use of a red counter stain, as used by Gull, can mask any non-specific reactions which would occur in the test, despite the absence of the virus-antibody reaction you were seeking to obtain. (R702, 705) As a result, the important negative control aspect of the testing system is seriously undermined.

The verdict was also excessive in allowing Gull damages for the loss of the entire 104 mls. in the face of evidence showing part of the solution to have been salvageable. Dr. Muna testified as to the laboratory procedures which could have been used to repurify at least part, if not all, of the spilled conjugate into a usable solution. (R706) Dr. Wentz testified, however, that he determined the spillage to be unsalvageable,

yet failed to refute Dr. Muna's assertions or explain why he had determined it to be unsalvageable.

Dr. Muna also demonstrated how, given the size of the flask and viscosity of the conjugate, a substantial portion of the contents should have remained in the flask despite its tipping. (R707) In Mr. Richman and Dr. Wentz's repeat of the same demonstration, a smaller flask was used. (R821) Naturally, when the smaller flask is tipped, less solution would remain than when the larger flask is tipped. Dr. Wentz's statement that the conjugate remaining in the flask was "insignificant" was misleading inasmuch as Dr. Wentz later stated that even a small amount of the lost conjugate would be extremely valuable. (R828)

POINT V

The Court Committed Error in Law in Ruling on Admissibility of Evidence.

When a trial court improperly receives inadmissible evidence, the court is under a duty to grant a new trial. The receipt into evidence, above counsel's objections, of improper exhibits or testimony, constitutes error in law and gives the losing party an absolute right to a new trial. Case law on the subject supports this position.

In Bowden v. The Denver & Rio Grande Western Railroad, 3 Utah 2d 444, 286 P.2d 240 (1955), the court stated that where error is both substantial and prejudicial, and when there is a reasonable likelihood that the result would have been different without it, such error should be regarded as sufficient to upset a judgment or grant a new trial.

In Coleman v. Dennis, 1 Wash. App. 299, 461 P.2d 552 (1970), the Court of Appeals said that granting a new trial was not discretionary with the trial court if based upon a ruling as to the admissibility of evidence.

In Townsend v. U. S. Rubber Company, 74 N.M. 206, 392 P.2d 404 (1964), the New Mexico Court states that the proper remedy for disposing of evidence erroneously admitted during the course of trial is to grant a new trial upon proper motion.

As previously set forth in Point I, the court clearly erred in allowing the admission of Exhibit P-13 in that no proper foundation had been established as to the record from which the summary was allegedly prepared.

Further error was committed in allowing Dr. Wentz to testify, and Mr. Richman to argue, that the loss of the conjugate resulted in lost sales of \$104,000. The evidence was permitted despite the absence of any evidence establishing a market for the conjugate or that

any substantial quantities had ever been sold. Compounding the error is the fact that the court had already instructed Mr. Richman, in chambers, that any evidence as to lost profits or sales would be inadmissible. (R554-55)

Defendant was further prejudiced by the court's allowance of Dr. Wentz's testimony concerning the loss incurred in starting up Gull Laboratories. Over my objection, Dr. Wentz was allowed to testify as to the costs and debts incurred by Gull in obtaining inventory, equipment and employees for the business.

These errors of law were clearly prejudicial to the defendant. The returned Special Verdict awarded Gull damages in the amount of \$65,197.00, an identical amount to the estimate set forth in Exhibit P-13. While the major component of this sum, \$62,400.00, was allocated to laboratory labor expended on serum processing (Exhibit P-13), there was no evidence to show what factors were taken account of in arriving at that amount. Dr. Wentz testified only that:

* * * I have understated the hourly rate in that I set the hourly rate for laboratory performance--all of the employees at Gull Laboratories--at \$60 an hour, which has to be the best bargain in the world.
(R585)

Since those same costs objected to as illustrating loss incurred in starting up the business, i.e., employees' salaries, inventory and equipment, are certainly

included in Dr. Wentz's stated reproduction cost estimate, it is a reasonable assumption that the same costs were included in the jurors' verdict. As such the evidence is prejudicial.

Jones states:

* * * Error being established, it is said that a new trial will be granted unless it can be seen that the admission or exclusion of evidence can have had no influence upon the jury. * * *

4 Evidence at 1846

The burden, then, is one of showing that the evidence could have had no possible influence upon the jury. Upon the facts herein, this burden is not met. Therefore, the trial court's denial of defendant's motion for a new trial constitutes an abuse of discretion and, as such, must be corrected.

CONCLUSION

This Court should grant a new trial because:

1. The court committed prejudicial error in receiving Exhibit P-13 in evidence;
2. Ordinary prudence of defense counsel could not have guarded against the receiving of Exhibit P-13;
3. The verdict is against the law;
4. Insufficiency of evidence to support the jury verdict;


5. Excessive damages were awarded under the influence of passion and prejudice;

6. Error in law was committed in the receipt of material evidence.

DATED this 25 day of May, 1978.

Respectfully submitted,

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Certificate of Mailing

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Appellant to Glen M. Richman, Attorney at Law, 79 South State Street, Salt Lake City, Utah 84111, postage prepaid on this 25th day of May, 1978.

Martha Kline Haley