

1998

Mark S. Dalebout v. Union Pacific Railroad Company, a corporation: Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ET NO. 980163-CA

MARK S. DALEBOUT,

Plaintiff and Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Defendant and Appellant.

) CASE NO. 980163-CA
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) PRIORITY NO. 15
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REPLY BRIEF OF APPELLANT

On Appeal from the Second Judicial District Court
of Weber County, State of Utah
The Honorable Roger S. Dutson

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FILED

Utah Court of Appeals

SEP 25 1998

Julia D'Alesandro
Clerk of the Court

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Defendant/Appellant Union Pacific Railroad Company (hereinafter “Union Pacific”) hereby submits its Reply Brief addressing issues raised in the Brief of Appellee Mark S. Dalebout (hereinafter “Dalebout”).

RESPONSE TO PLAINTIFF’S STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED

Dalebout sets forth facts which he characterizes as being in addition to the facts stated in Union Pacific’s Brief. For the most part these facts are merely a restating of the facts Union Pacific marshaled. In a few instances they are not relevant to the issues of this appeal. With regard to additional testimony of Dr. Bryan, however, Dalebout takes out of context an isolated fact testified to implying the doctor was speculating with regard to other portions of his testimony when he was not. With regard to his own additional testimony Dalebout misquotes the record.

Testimony of Charles Robert Julian

Dalebout first sets forth testimony of Charles Robert Julian. All of the facts Dalebout cites were stated in Union Pacific’s marshaling of the evidence.

Testimony of Dr. Donald W. Bryan

Dalebout sets forth additional testimony of Dr. Donald W. Bryan. In Union Pacific’s marshaling of the evidence it stated that Dr. Bryan testified he apportioned Dalebout’s injury 80% to his preexisting condition and 20% to his injury and that the injury plus the degenerative disc disease resulted in Dalebout’s pain and problems. Union Pacific did not specifically state that the deposition was taken for trial purposes although Union Pacific

essentially set forth this fact when it stated that Dr. Bryan testified via a video deposition.

Union Pacific did not specifically state that it questioned Dr. Bryan about Dalebout not being a surgical candidate as this was not helpful to Dalebout's case and did not tend to prove his damages. However, Union Pacific agrees that Dr. Bryan testified to a reasonable degree of medical probability that Dalebout was not a surgical candidate. Union Pacific also did not state that the doctor testified he talked to Dalebout about surgery as this was not relevant to any of the issues raised on appeal. Union Pacific did not specifically state that Dr. Bryan testified that the injury caused an acceleration of Dalebout's normal degenerative process and the injury made him a lot older, faster. Union Pacific agrees the doctor did testify to this, however, the particular quote is not particularly relevant to the issues and was covered in substance by Union Pacific setting forth the doctor's testimony about the injury and its relationship to the degenerative process.

Finally, with regard to Dr. Bryan's testimony that litigation is a factor in a plaintiff's perceived pain and when the litigation ends the pain tends to lessen, Union Pacific did not set forth the statement that ". . . Dr. Bryan stated he would not begin to speculate as to the cause of the effect litigation may have on pain. Bryan Depo. at p. 28." (Brief of Appellee at p. 6.) Union Pacific did not set this forth because this phrase is taken out of context and distorts Dr. Bryan's testimony. At page 25, not 28, of his deposition, Dr. Bryan did explain an opinion he held using the words "I won't begin to speculate as to the cause but I have to assume it has to do with some psychosocial, economical values-factors, unrelated to the organic problem itself. You could--anybody can speculate any way they want." However,

the context of this statement is important. Regarding this topic Dr. Bryan was asked:

Q. Doctor, you've talked a couple of times about some people with a lot of pathology in their back and no pain, some people with a little pathology and a lot of pain. Is it known in the orthopedic circles about the effects of litigation, worker's comp claims, a pending claim, on a patient's pain?

A. Yes.

MR. ROSSI: Objection as to the form of the question and relevance.

Q. And what is that effect, Doctor?

MR. ROSSI: Objection as to relevancy.

THE WITNESS: Well, if -- to answer the question, there are multiple articles in the literature about litigation. And from the standpoint of us as physicians, it would be far less--it would be far easier for us to treat our patients if litigation were out, there were no litigation at all. It always compromises our ability to try to make patients better.

Q. And why is that?

A. I won't begin to speculate as to the cause but I have to assume it has to do with some psychosocial, economical values--factors, unrelated to the organic problem itself. You could--anybody can speculate any way they want.

If you go out and take a hundred patients that have had an injury on the job and had an operation on their back, you take another patient, hundred, who have not had any injury on the job, maybe an injury out in their backyard lifting a garbage can, and you compare the two with regard to results, you'll see about 20 percent of those seem to get better who have litigation and the workman's comp injury or the automobile accident or whatever it is, and you get at least 80 or 90 percent of the other patients getting better. How you interpret it is up for grabs. It's just a fact of life and there have been multiple studies done about it.

Dr. Bryan Deposition, p. 24, line 18-p. 26, line 5. He went on to say:

Q. Earlier, when we were talking about litigation, you mentioned the word "you can speculate any way you want," but isn't it the case that studies

in the medical journals have shown that litigation seems to be a factor in pain?

MR. ROSSI: Objection as to the form of the question and relevancy.

THE WITNESS: No question about it.

Q. Now if you would answer.

A. No question, it always plays a role. And you have to take that into consideration in trying to evaluate the patient, trying to determine--and I have already done that. When I say there's 20/80, I've already considered all of that.

Q And that's known from journal articles studied?

A Yes. There are a lot of articles in the literature about it.

Dr. Bryan Deposition, p. 27, line 20-p. 28, line 12.

When Dr. Bryan's testimony is examined in context it is clear that he was not testifying that he would have to speculate as to whether or not litigation is a factor in a patient's perceived pain as Dalebout seems to imply. Rather, Dr. Bryan was explaining that litigation is a factor in a patient's perceived pain and that although he did not know the reason why this is true and could only speculate as to that, it is a known fact in studies and articles in medical journals. Dr. Bryan went on to state that he had applied this specifically with regard to his opinion of Dalebout's condition and that after the litigation ended he would expect to see a lessening of perceived pain.

Testimony of Mark S. Dalebout

Finally, Dalebout sets forth additional testimony of plaintiff Mark S. Dalebout. First he sets forth testimony regarding the liability phase of the trial. Union Pacific adequately

covered the evidence on liability in its marshaling of the evidence but even if additional facts could have been stated, liability is not an issue in this appeal and thus the facts are not relevant. Next Dalebout states he testified to a 50 pound lifting restriction, that his pain is quite a bit worse than it was right after the accident and has progressed from his back to his legs. Union Pacific stated all of these facts in its marshaling of the evidence. Dalebout states he testified that he pays for his own medication in the amount of \$15.00 a month. Union Pacific did not specifically state this in its marshaling of the evidence, however, it is not significant to the issues Union Pacific has raised.

Dalebout sets forth the following additional testimony: “In the job description for an engineer, there is an 83 pound lifting requirement so that engineers can move drawbars (part of the coupling device on railroad cars and engines). Trial Transcripts at pages 173-174.” Brief of Appellee at p. 5. This is a misquotation of the Trial Transcript. The actual testimony is as follows:

Q There’s a requirement in here that you must carry or push or pull up to 25 pounds and occasionally assist in the movement of weights up to 83 pounds infrequently. Do you know what they mean by that, that you have to assist somebody with 83 pounds?

A That would be something to do with the alignment of a draw bar.

Q What’s a draw bar?

A What’s a draw bar is here’s a car and this is the draw bar and it’s a big--that’s where the knuckle is hooked to, there’s a knuckle, like I was explaining, then the draw bar that goes back into the car.

Q This is part of the couplers for the car?

A Yes. And sometimes that's misaligned like that. That's the only think [sic] I can think would be 83 pounds.

Q Have you missed any time from work because of your low back injury other than that first ten days?

A No.

Q How do you feel about your job and working on the railroad?

A I feel like I can perform my job, that's--

Trial Transcript, p. 173 line 13-p. 174, line 8 (emphasis added). Dalebout went on to explain his reference to the draw bar on cross examination. At page 195 of the Trial Transcript Dalebout explained that moving draw bars was generally not his job. If he might have to move a draw bar he would possibly try and go back and help the conductor do the work but that has not happened in the last four years he has worked. Dalebout also confirmed he could do the type of engineer jobs he wants.

Union Pacific did not marshal the evidence regarding the draw bar because Dalebout testified that he did not have to lift 83 pounds, he only had to assist in lifting 83 pounds and there is no restriction on Dalebout preventing him from assisting in such a lift. When the Trial Transcript is properly cited, there is no evidence Dalebout is precluded from doing any part of his job description.

ARGUMENT

I. THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE SPECULATION REGARDING THE POSSIBILITY OF FUTURE SURGERY

Dalebout's first point on this issue is that the standard of review is that which applies

to expert testimony. Union Pacific disagrees as this is not an issue particular to expert testimony, it is a general issue on admissibility of evidence as to whether or not the trial court should have allowed in speculation regarding only a possibility of future surgery regardless of who was testifying. Nonetheless, Union Pacific undertook its review based upon the more restrictive standard of abuse of discretion.

On the substantive side Dalebout raises four principal arguments:

First, Dalebout contends that Union Pacific failed to timely object to the testimony of Dr. Bryan by waiting until trial to object. Dalebout makes this argument without citation to any authority. Dalebout's argument is wrong because the Utah Rules of Civil Procedure state most objections to deposition testimony can be raised at trial for the first time.

Rule 32(b), Utah R. Civ. P., provides that when a deposition is used in a court proceeding "Subject to the provisions of Rule 28(b) and Subdivision (d)(3) [(c)(3)] of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying." 32(c)(3)(A) provides that objections to the competency of testimony "are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time." Pursuant to these rules Union Pacific did not need to raise its objection that Dr. Bryan's testimony regarding a 30% possibility of future surgery was speculative and not competent evidence of future damages. Union Pacific was entitled

to raise the objection at trial as it did do.¹ See also, Redevelopment Agency of Salt Lake City v. Barrutia, 526 P.2d 47, 50 (Utah 1974). In that case a deposition was taken for use at trial. In discussing the deposition the court stated that pursuant to the Utah Rules of Civil Procedure, “defendant’s asserted objections could have been made at the trial and they were not waived by failure to make them during the course of the deposition.” The trial court in that case followed the same process as in this case--the deposition was taken and tape recorded and prior to playing the recording to the jury counsel argued their objections and the court ruled thereon. Thus, Dalebout’s first contention is wrong and the objection was not waived.

Second, Dalebout contends that Union Pacific somehow opened up the subject to speculation by questioning Dr. Bryan about whether it was probable Dalebout would need surgery in the future. Union Pacific did not open up the area for speculation, however. Union Pacific asked Dr. Bryan whether it was probable Dalebout would need surgery in the future and the doctor answered no. There is no basis for Dalebout to argue, and Dalebout cites no authority, that eliciting a correct opinion based on probabilities then allows a jury to hear speculation about possibilities.

Third, Dalebout contends that Dr. Bryan’s testimony as to a 30% chance of surgery went to general damages and Dalebout’s concern and worry about his future well being and

¹Union Pacific did timely object at trial to Dr. Bryan’s testimony and preserved the error for appeal. The objection with citations to the Trial Transcript are set forth on pp. 1-2 of Union Pacific’s Brief of Appellant.

was therefore admissible. Dalebout cites no authority supporting that the doctor's speculation is proper to prove general damages. In this case, the doctor's testimony was that at most there was a 30% chance of future surgery and if this occurred it would be only 20% due to the accident; i.e., there was no substantial chance of a surgery as a result of the accident. Deposition of Dr. Bryan, p. 68 lines 6-19 and p. 60 line 2-p. 61 line 8. Thus, Dalebout's fear could not be reasonable and the speculative testimony should not have been allowed. Also, no such argument was made at the trial when this testimony was admitted and, despite assertions to the contrary, Dalebout did specifically ask the jury in closing argument to award damages for future surgery based on the 30% chance, see Trial Transcript p. 232 line 19 - p. 233 line 1, and Dalebout's counsel specifically argued that there was a 30% chance of back surgery and if that happened Dalebout would be unable to work, see Trial Transcript p. 234 lines 10-12. Thus, the evidence was not admitted as to general damages but was admitted and argued to support damages for future medical costs and impairment of earning capacity.

Fourth, Dalebout argues that nothing was awarded for a future surgery making erroneous admission of the testimony harmless error. However, this is not harmless error because the evidence was the only basis upon which the jury could have awarded Dalebout damages for impairment of earning capacity in accord with his counsel's argument that if he had the surgery he would no longer be able to work for the Railroad and would incur a future wage loss. See Union Pacific's argument on this point in the initial brief at pp. 24-28. Also, it is likely the admission of the evidence affected the jury's determination of Dalebout's

future pain and suffering. The size of the award for this compared to Dalebout's actual losses is very disproportionate.

Finally, Dalebout attempts to distinguish Union Pacific's authorities that speculative medical testimony regarding possibilities rather than probabilities is not admissible even in an FELA case. Dalebout cites no contrary authority because he cannot. See, e.g., Shelton v. Thomson, 148 F.2d 1, 3-4 (7th Cir. 1945) where the court held that to recover for permanent injury the consequences relied on must be reasonably certain to result and this rule of law is too clear for debate.²

²In discussing this issue the court in Shelton stated:

"Courts have had many occasions to pass upon the phase of permanency of injuries in personal injury cases. So frequently have they spoken and so uniform is their language that we are not warranted in elaborate citation of decision or discussion of the rule laid down. We quote from an Illinois decision as this injury occurred in Illinois, Lauth v. Chicago Union Traction Co., 244 Ill. 244, 251, 91 N.E. 431, 434. There the court said, speaking of alleged permanent injuries: "To form a proper basis for recovery, however, it is necessary that the consequences relied on must be reasonably certain to result." The court then quoted from Strohm v. New York Lake Erie & Western Railroad Co., 96 N.Y. 305, as follows:

'Further consequences, which are reasonably to be expected to follow an injury, may be given in evidence for the purpose of enhancing the damages to be awarded; but to entitle such apprehended consequences to be considered by the jury they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative, or merely possible are not proper to be considered in ascertaining the damages. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to so develop. To entitle a plaintiff to recover

Instead, Dalebout seeks to distinguish Claar v. Burlington Northern R. Co., 29 F.3d 499, 503 (9th Cir. 1994) as Claar dealt with causation rather than a possibility of surgery. Dalebout's attempt to distinguish Claar is unavailing, however, because Union Pacific cited Claar for the proposition that expert testimony cannot be speculative in any context whether used for causation or damages. Dalebout ignores Mayhew v. Bell Steamship Co., 917 F.2d 961, 963, 964 (6th Cir. 1990) and Robinson v. Hreinson, 17 Utah 2d 261, 409 P.2d 121, 125 (1965) applying this same principle in Jones Act cases (which look to the FELA) and Utah law. Dalebout seeks to distinguish Wood v. Day, 859 F.2d 1490, 1493 (D.C. Cir. 1988) which applies this principle in general federal law but in citing a portion of Wood Dalebout actually supports Union Pacific's argument. Dalebout says in Wood "the District Court ruled that the doctor 'was not able to render an opinion as to the likelihood of surgery with the requisite degree of certainty.'" Brief of Appellee at p. 9. This is exactly the situation that occurred in this case, Dr. Bryan stated that there was only a 30% chance of surgery i.e. a

present damages for apprehended future consequences there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.'

"Our concern is not over the rule of law. That is too clear for debate."

148 F.2d at 3-4.

In Shelton the First Circuit Court of Appeals held that whether or not plaintiff had a permanent injury was a question for the jury as the medical evidence was hopelessly in conflict. 148 F.2d at 3-4. In the instant case there was no conflict in medical evidence, there was only the testimony of Dr. Bryan that there was only a 30% possibility of surgery.

possibility and not a probability. Therefore, according to Wood, the testimony should have been excluded.

Lastly, Dalebout seeks to distinguish Herber v. Johns Manville Corp., 785 F.2d 79 (3d Cir. 1986). He does this in an improper way. Dalebout quotes a portion of the case selectively bolding and underlining a single word. The quote Dalebout cites from Herber is “if the prospective consequences **may**, in reasonable probability be expected to flow from the past harm, plaintiff is entitled to be indemnified for them.” Herber, 785 F.2d at 81 (emphasis as in Brief of Appellee at p. 10). Dalebout bolded and highlighted the word “may” apparently attempting to assert that the standard is all damages that “may” flow from an injury are compensable. However, as stated in Herber, the law is that for a future injury to be compensable it must be shown to be a reasonable medical probability. Herber, 785 F.2d at 82. Thus, what should have been highlighted and bolded is the portion of the quote saying “in reasonable probability”. This was the holding of the Herber court and Dalebout’s attempt to alter the holding by selectively underlining and bolding the word “may” is improper and a graphic illustration that his attempts to distinguish the cases relied on by Union Pacific are unavailing.

Speculative medical testimony regarding possibilities rather than probabilities is not admissible in FELA cases, general federal law cases, other states cases or Utah cases. See Claar, Mayhew, Herber and Robinson supra. Allowance of the testimony of Dr. Bryan that there was a 30% chance of surgery was clear error whether examined under a correctness standard or abuse of discretion. The trial court’s ruling should be overturned and the case

remanded for a new trial on damages.

II. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY WITH REGARD TO FUTURE SURGERY, FUTURE WAGE LOSS OR IMPAIRMENT OF EARNING CAPACITY; DENYING UNION PACIFIC'S MOTION FOR A DIRECTED VERDICT ON THESE ISSUES; AND DENYING ITS MOTION FOR J.N.O.V./NEW TRIAL AS THERE WAS NOT SUFFICIENT EVIDENCE THAT DALEBOUT WOULD HAVE TO HAVE A FUTURE SURGERY OR THAT DALEBOUT WOULD HAVE AN IMPAIRMENT OF FUTURE EARNING CAPACITY.

Union Pacific does not dispute that the jury instruction on medical costs in general was correct in requiring the jury to award only expenses that will be required and given in the future. Union Pacific's contention is that because future surgery was not proven as a probability but was extensively discussed in the testimony at trial the trial court should have specifically told the jury that it could not award damages for future surgery either by way of an instruction or as a directed verdict on that point. See R. 590 Trial Transcript p. 260 lines 12-15 objecting to the jury being allowed to consider future surgery costs and pp. 209-10 requesting the court to direct the jury that they may not award damages for a future surgery under the damages jury instruction.

Although the jury did not award any damages for a future surgery (probably because Dalebout presented no evidence as to the actual costs of such a surgery) it did likely consider the issue in its determinations on future pain and suffering. It is impossible to show that the jury was affected in its determinations on future pain and suffering in hearing the testimony with regard to future surgery as an award of pain and suffering is not something dependent upon figures and calculations. However, it can be logically shown that it is likely this

affected the jury. The jury instruction on pain and suffering directed the jury to make general considerations:

In awarding such damages, you may consider any pain, discomfort, and suffering, both mental and physical, its probable duration and severity, and the extent to which the plaintiff has been prevented from pursuing the ordinary affairs of life as previously enjoyed. You may also consider whether any of the above will, with reasonable certainty, continue in the future. If so, you may award such damages as will fairly and justly compensate the plaintiff for them.

No definite standard or method of calculation is prescribed by law to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for pain and suffering, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

R. 464, Jury Instruction No. 27. The award for future pain and suffering was very large. One of the pieces of evidence as to Dalebout's future was that he had a 30% chance of surgery along with the attendant operation and a steel cage being placed inside of his back. There was also testimony that if he had this surgery he would be unable to work in the future. Based on this and the size of the award it is likely it was a factor in the jury's minds.

The issue of impairment of earning capacity should have also never been allowed to go to the jury--there should have been no jury instruction, the trial court should have granted Union Pacific's motion for directed verdict on this issue or should have ruled in Union Pacific's favor on the motion for J.N.O.V. Absent the speculative surgery there was no basis to allow the jury to consider the issue.

Dalebout cites the following evidence he maintains supports allowing the jury to

consider impairment of earning capacity: Dalebout suffered a permanent injury which is worsening, he had a lifting restriction of 50 pounds, he continues to have a lot of pain in his low back and pain in his legs and his condition has slowly gotten worse. Dalebout also cites to the “fact” that engineers are required to be able to lift 83 pounds to move draw bars although as discussed previously the actual testimony was that engineers must be able to assist in lifting 83 pounds to move draw bars.³ Dalebout then concludes that this evidence establishes a permanent injury with on-going symptoms that will impact him in the future with regard to future wage loss and impairment of earning capacity and that therefore the jury was properly allowed to consider impairment of earning capacity.

However, Dalebout does not show how this evidence in any way proves impairment of earning capacity. While it shows he has a permanent injury it does not show he cannot work or will not be able to work in the future at any job he desires.⁴ Dalebout also fails to show how any reasonable jury could take this information and make a reasoned calculation of damages for future impairment. Dalebout does not even attempt to distinguish Nelson v.

³In a different section of his Brief Dalebout cites the following additional evidence he asserts supports an instruction on future impairment: that Charles Julian testified that Dalebout no longer participated in recreational activities, that Union Pacific’s representative testified that Dalebout would lose approximately \$78,000 per year if unable to work and would not guarantee accommodation, that Dr. Bryan testified Dalebout had a permanent injury requiring future medical treatment and pain and that Dalebout testified his condition is deteriorating, the pain increasing, and that he was concerned regarding his ability to do his work.

⁴There was evidence at trial that Dalebout’s doctor expected he would be able to work in the future as did Dalebout himself.

Trujillo, 657 P.2d 730 (Utah 1982), DeChico v. Metro-North Commuter RR, 758 F.2d 856, 861 (2d Cir. 1985) or Fashauer v. New Jersey Transit Rail Operations, Inc., 57 F.3d 1269, 1284 (3rd Cir. 1995) which support Union Pacific's argument that similar or even stronger evidence was not sufficient to allow a jury to find future impairment. Based on this this Court should rule as did the Utah Supreme Court in Nelson:

Plaintiff has pointed to no evidence in the record upon which the jury could assess damages for future loss of earnings. A jury instruction on future loss of earnings is improper where there is no evidence upon which a jury could reasonably base such an award. [Citations omitted.] In the case at bar, "the jury had no basis, except pure guesswork, for estimating earnings reasonably certain to be lost in the future." [Citation omitted.] The \$150,000 general damages in this case, and the trial court's expressed surprise at the size of the verdict (in contrast to the \$12,000 awarded at the first trial) suggest that this erroneous instruction affected the size of the verdict to the detriment of the defendant. We must therefore remand this issue for a new trial.

657 P.2d at 735.

III. THE TRIAL COURT ERRED IN FAILING TO REMIT THE VERDICT BECAUSE IT WAS EXCESSIVE AND NOT SUPPORTED BY THE EVIDENCE.

The jury award in this case has no rational justification as to future impairment or future pain and suffering. Dalebout's treating physician testified that the accident was only 20% responsible for the injury, Dalebout had missed almost no work in the past and he should have been able to keep working in the future. There was no basis for the jury to find a future impairment and at least this award should have been remitted. The award for future pain and suffering also was unsupported and should have been reduced. Union Pacific did marshal the evidence and it is insufficient to support the verdict in these respects.

IV THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY FROM DALEBOUT'S TREATING PHYSICIAN REGARDING THE EFFECT OF LITIGATION ON DALEBOUT'S PERCEIVED PAIN AND SUFFERING WHILE LITIGATION WAS ACTIVE AND AFTER THE LITIGATION ENDED.

As discussed with regard to the statement of facts, when Dr. Bryan's testimony is taken in context it is clear that litigation does have an effect on a patient's perceived pain. Dr. Bryan referred to numerous studies and that this was a well known fact in medical circles although he could not speculate as to why this occurs. Dr. Bryan testified that he did apply this to Dalebout with regard to his apportionment, yet he was not allowed to explain this to the jury. Obviously the jury found that Dalebout would have a large amount of pain and suffering in the future as shown by the size of its award. Dr. Bryan's testimony that the pain and suffering would likely decrease in the future would likely have impacted the jury's award. Pain and suffering is not capable of being determined exactly. Had the jury heard that after litigation typically patients have less pain and suffering this would have been an important factor for them to consider.

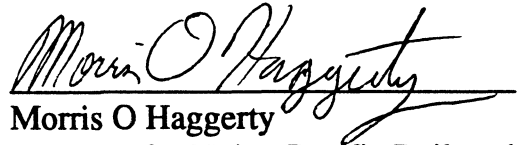
CONCLUSION

The trial in this matter was permeated by the issue of speculation regarding future surgery. Objections were timely made and it did have an impact as it provided the only basis for the award for impairment of earning capacity and likely influenced the verdict as to future pain and suffering. Therefore, Union Pacific seeks a ruling that the speculative testimony of Dr. Bryan regarding a 30% chance of a future surgery should not have been admitted and that the admission affected Union Pacific's substantial rights. Thus, this was reversible error

and the case should be remanded for a new trial on damages.

Alternatively, Union Pacific seeks reversal of the trial court's ruling on its Motion for Directed Verdict and Motion for J.N.O.V./New Trial with a holding that a directed verdict or J.N.O.V. should have been granted, that no damages should have been awarded for future surgery or future wage loss or impairment of earning capacity and a reversal of the jury award as to the award for future wage loss or impairment of earning capacity.

DATED this 31st day of July 1998.


Morris O Haggerty
Attorney for Union Pacific Railroad

CERTIFICATE OF SERVICE

25th day of September, 1998

I hereby certify that on the ~~31st day of July, 1998~~, a true, correct and complete copy of the foregoing was delivered upon the following attorneys in the following manner indicated below:

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