

1992

Michael H. Suhr v. The Utah Department of Transportation, State of Utah : Brief of Appellee

Utah Court of Appeals

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920218-CA

IN THE UTAH COURT OF APPEALS

MICHAEL H. SUHR,)	
Plaintiff/Appellee,)	
vs.)	Case No. 920218-CA
THE UTAH DEPARTMENT OF)	
TRANSPORTATION, STATE OF)	
UTAH,)	Priority No. 16
Defendant/Appellant,)	

BRIEF OF APPELLEE

APPEAL FROM A JUDGMENT UPON A JURY VERDICT ENTERED
BY THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR BOX ELDER COUNTY, STATE OF UTAH,
THE HONORABLE F. L. GUNNELL, PRESIDING

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JUL 9 1992

COURT OF APPEALS

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COURT OF APPEALS

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter under Utah Code Annotated 78-2A-3(2)(j) (1992) providing for jurisdiction in the Court of Appeals over cases transferred from the Supreme Court. Jurisdiction of this appeal was conferred on the Supreme Court by Utah Constitution Article VIII, Section 3, and Utah Code Annotated 78-2-2(j) (1992).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

None.

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STATEMENT OF THE FACTS

Defendant correctly cites its burden on appeal to marshal all of the evidence supporting the verdict. Defendant fails to meet that burden. Following are facts which defendant failed to marshal, but which are of record and strongly support the jury verdict.

On the evening of November 8, 1988, plaintiff, Michael H. Suhr, was driving a semi-truck in a northwesterly direction along Interstate 84 in Box Elder County approximately five miles northwest of Snowville, Utah. This is an interstate highway with limited access. All fences along said highway system are owned, installed and maintained by the defendant. (Jury Instruction No. 27).

Just as nightfall was arriving plaintiff's truck hit an 800 pound black steer standing in the plaintiff's traffic lane. The pavement at this location is black asphalt. Suhr's truck was damaged and he sustained personal injuries in the accident.

The fences required to protect the interstate in that area are a "Type B" fence as mandated by both UDOT and federal requirements. (TR 290, 291). Plaintiff's Exhibit 9, which is included in the Addendum of this Brief, shows the design requirements for Type B fence. The requirements specify two inches of clearance between the ground and the bottom wire of the

fence. The requirements also specify that the top wire of the fence shall be 52 inches above ground level.

In close proximity to the accident site is an area where water erosion cut a channel beneath the freeway fence. Plaintiff referred to this location as the "washout". This washout had been eroding for approximately 20 years. (TR 137) UDOT had been dumping fill in the washout three, four or five times every year. (TR 138) UDOT stated its reason for dumping fill in the washout was so that animals could not get out beneath the fence. (TR 223)

Utah Highway Patrol Trooper Paul Stephens investigated the accident and returned to the scene the next afternoon to check the fence. When asked whether the 800 pound steer could have entered the freeway at the location of the washout, Trooper Stephens indicated that a steer of that size could get its neck under the fence and might be able to push its way underneath. He claimed to have seen steers do this before due to the tremendous amount of lift which an 800 pound animal can apply. (TR 86) Trooper Stephens indicated the distance from the bottom of the washout to the lowest wire of the fence was approximately 18 to 24 inches. (TR 93)

Tom Wilcock was called and testified that he had over 30 years experience handling cattle. He was the owner of the black steer which was hit. He testified that the day after the accident he inspected the fence in the area of the washout.

The bottom of the fence would have been bent like you was going out. That spot, I believe, served as a

rub for the cattle to stick in their heads and rub their neck. (TR 335 19-22)

Tom Wilcock testified that based upon the condition of the fence and his knowledge of cattle, the steer could have gone under the fence in the washout. (TR 336)

Clinton Burt was qualified by plaintiff as a cattle expert. He testified that barbed wire would tend to discourage cattle from rubbing against it but field fencing does not have barbs to discourage a cow from pushing against it. (TR 358) When asked whether an 800 pound steer could get underneath a fence with a clearance of approximately 20 inches Mr. Burt responded:

Oh yeah, if it's loose. If it's tight it can't make it, but if it's loose they'll just keep working until they get up on their shoulders and then go, especially if there's something they can reach for. (TR 359 L 8-11)

When asked whether he had observed any tracks in the dirt in the area of the washout, Trooper Stephens stated:

No. But there again, I didn't go down and do a total hands on. (TR 93)

Records from the National Climatic Data Center show that at the time of the accident there had been no rainfall in Snowville during the month of November. They additionally show that the last previous rainfall in Snowville had been 25 days prior to the accident and that there had only been .07 hundredths of an inch of rainfall during the entire month of October, 1988 at Snowville. (Addendum Ex. #14) All witnesses agreed that without moisture, tracks would be very difficult to observe. (TR 159)

UHP Trooper Stephens testified that the lowest strand of fence above the washout was field fence, lacking any barbs, and actually quite smooth. He acknowledged it was not likely there would be any hair caught on the fence by a steer going under it. (TR 110, 111)

A unique feature of this location of the interstate is a box culvert running beneath the traveled portions of the highway. The structure actually consists of two separate concrete tunnels, one beneath the lanes of traffic going each direction. Between these tunnels in the median there are concrete wing walls and two short sections of wire fence. This location is portrayed in Exhibits 3, 21, 22, 23, 24 and 25, which are attached to this Brief in the Addendum in numerical order. UDOT fence requirements for this location are standard Type B fence requiring two inches clearance from the ground to the bottom wire and 52 inches from the ground to the top wire. The photographs show that the fence in the median area is loose, sagging, and less than 36 inches in height. These photographs were taken three years after the accident but undisputed testimony established the condition of the fence on November 9, 1988 to be essentially the same as in the photos. (TR 328)

When asked whether the 800 pound steer could have gone over the fence in the median section, Tom Wilcock replied:

Yes. That median fence has always been suspect in my mind. If I had 300 of them, (cattle) 299 could find their way over it if they wanted. (TR 336 L 21-23)
(parenthetical word added)

At the time of the accident the gate depicted in Exhibit No. 24 was closed, so that the cattle on the north side of the freeway could wander into the culvert and fenced median area but could not continue on through to the south. (TR 154, 330)

A steer entering the culvert from the north would arrive at open space in the median, where it would find itself boxed in. The only way out would be back through the tunnel to the north or over the sagging fence. Cattle expert Clinton Burt provided critical insight into the conditions in the median area of the culvert:

Q. If a cow is frightened will it react quite suddenly?

A. Usually yeah. We try to work them real careful for that reason. Not too much noise.

Q. I want to give you the same hypothetical as far as the steer, about 18 months old, about 800 pounds. If it were frightened could it jump over a fence where the top wire was about 36 inches?

A. I imagine it could if there was no other place to go. It would have to be kind of boxed in.

Q. If it were boxed in do you think it would do that?

A. Yes. (TR 360 L 14-25, TR 361 L 1)

After being shown various photographic exhibits, including those attached in the Addendum of this Brief, Burt was asked:

Q. Now I'll represent to you and I think the photographs depict, that there are lanes of interstate highway on either side of this area. If an 18 month old steer were to walk down this culvert and that gate were closed, is it possible that while standing in this median area a semi or a horn might frighten the steer?

A. Well, I'm sure it is. When we work cattle in the corral we box them in. By nature they'll find the

spot that is the least resistant and that is why I say boxed in. Sometimes it might even be me that's the least resistance.

Q. Do they become much more nervous when they're boxed in?

A. They're more nervous when boxed in.

Q. When boxed in they are nervous?

A. Yes. **They're looking for a way out, regardless, if they get spooked. They'll find the best place they think they can make it.** (TR 361 L 23-25, TR 362 L 1-14)

On redirect Mr. Burt was asked:

Q. Are there also likely places where a cow will get out?

A. Well, it's like I said, **they'll find the least resistance.**

Q. If you had a field and one portion of the fence was only 36 inches high would you consider that a likely spot that a cow would get out?

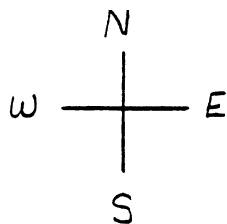
A. **According to those pictures I would think it's a likely spot in the middle, because you know, they can't get through that cement wall. If they're boxed in there and are looking for daylight or wherever to get out sometimes it's even over the top of anybody else that's there if they're that spooked.** (TR 364 L 20-25, TR 365 L 1-7)

On re-cross examination Mr. Burt was asked:

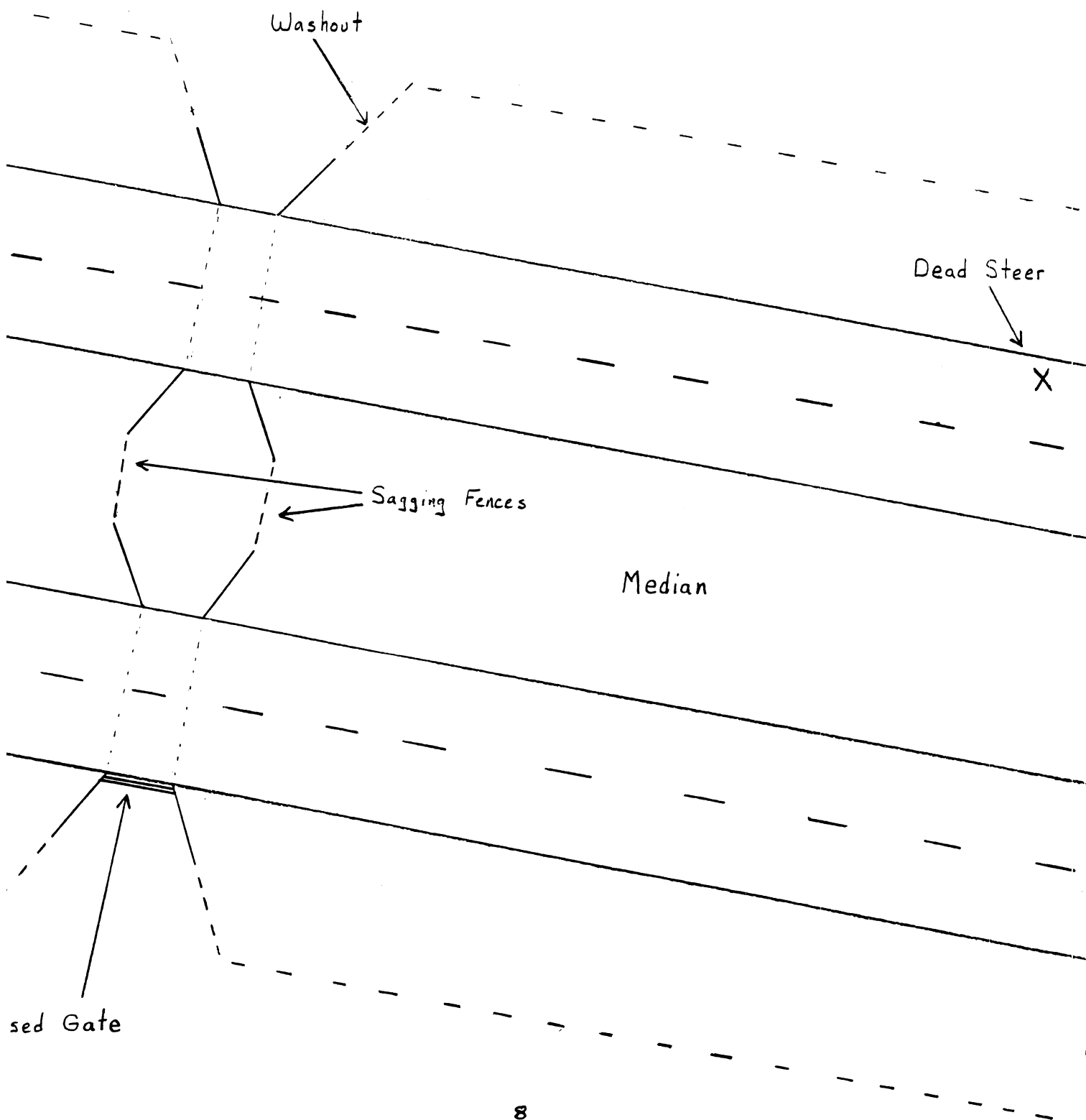
Q. I guess you're assuming that the steer didn't have a way out this way or that way, right, when you say this is a likely spot?

A. **Well they could get out - I mean, it would be likely to me, yes, according to the pictures and I don't know when they were taken or how close, but that fence is real loose. It's real short and it's about impossible to make a short fence tight, that's the thing.**

Both the washout and the sagging median fence are in close proximity to the accident location. (P. Ex. #1) UDOT employees and the Utah Highway Patrol Trooper checked the fence for a considerable distance in both directions from the accident site. They found no breaks or other problems. (TR 103 and TR 134, 135) The following page contains a sketch drawing of the interstate in the area of the accident. This drawing was not an Exhibit at trial but is a composite of numerous exhibits. It is intended to assist the reader in becoming oriented to the photographic exhibits which are included in the Addendum.



Pasture with Cattle



This is a Composite Drawing taken from Plaintiff's Exhibits 3, 5, 6, 21, 22, 24. It is intended to show the general layout and is not to scale.

Defendant's Statement of Facts relies heavily on testimony from Rod Arbon, a UDOT employee. In quoting Arbon defendant fails to follow the acknowledged requirement of marshalling all evidence in support of the jury verdict. Much of Arbon's testimony as cited by defendant does not support the jury verdict. Rod Arbon was totally discredited in the eyes of the jury. Mr. Arbon was called as an adverse witness by the plaintiff and questioned about his investigation following the accident. He testified that he looked closely for tracks where the steer might have exited the pasture, but found none. He testified that he expected to see tracks because there had been a rain storm just a day or two earlier and the ground was soft and moist so that tracks would be more visible. He testified it is much more difficult to see tracks if the ground is dry and hard. (TR 159) He stated that this rain storm was "key" to him in his investigation. (TR 161)

Following this testimony plaintiff produced the records from the National Climatic Data Center showing that there had been no rainfall for 25 days prior to the accident and that there had been only .07 hundredths of an inch moisture in the 39 days preceding the accident. (Ex. #14 in Addendum)

At best, Mr. Arbon's testimony represents lousy recollection, at worst, fabrication. The records from the weather service were totally un rebutted.

Mr. Arbon was a poor witness, as evidenced by the critique offered by the trial judge in chambers, mercifully outside the hearing of the witness:

THE COURT: I think his experience as a witness so far is he hasn't always responded the way the person asking him the questions would expect him to. (TR 174)

THE COURT: I think he's very **confused** and I'm trying to help unconfuse him as to what is expected. (TR 184)

THE COURT: I think it's very clear that this man is **confused** as to where he is looking at it and what he's supposed to be testifying about. Not necessarily what his answer is. I **don't think he's known from the time he got on the witness stand what his answer was supposed to be.** (TR 185)

THE COURT: I'll certify him as an adverse witness but I don't think this jury perceives him as being anti or pro anybody at this point. Just **confused.** (TR 188)

THE COURT: This guy is obviously just **really confused.** (TR 189)

Instructions 18 and 20 advised the jurors that they could believe or disregard any witness in accordance with the credibility they determined the witness to deserve. After Mr. Arbon's imaginary rain storm and the court's withering assessment of him as a witness, it is incredible that defendant's Brief alleges Arbon's claims of having seen a steer jump a five foot fence or that Wilcock had cattle further down the freeway were "unrebutted". The jurors' verdict confirms that in their eyes Arbon was discredited.

SUMMARY OF ARGUMENT

Viewed in the light most favorable to Suhr, there was an abundance of evidence adduced at trial from numerous witnesses supporting Suhr's theory that the steer had been in the pasture on the north side of the highway and that it escaped either beneath the fence at the washout or over the fence in the median area. The circumstances at the time of the accident were such that it would be highly unlikely to find direct evidence regarding how the steer entered the highway. The volume of circumstantial evidence is highly persuasive and was unanimously accepted by this jury. Because substantial competent evidence supports the jury's verdict, it should be affirmed as a matter of law.

ARGUMENT

POINT I

THERE WAS SUFFICIENT EVIDENCE OF A CAUSAL CONNECTION BETWEEN THE DEFENDANT'S NEGLIGENCE AND PLAINTIFF'S INJURIES.

Federal and state requirements mandate Type B fence with a maximum clearance of two inches from ground level to the lowest wire and a minimum height of 52 inches from ground level to the top wire. Defendant's opening statement promised the jurors that the evidence would show the fence in the location of the accident met established standards. (TR 44, 51) Subsequently the evidence showed that the clearance beneath the fence at the washout was 18 to 24 inches and the height of the median fence

was sagging at less than 36 inches. The lowest wire in the area of the washout was field fence containing no barbs and, therefore, having nothing to prevent a steer from pushing against it. Not only was the median fence more than 16 inches too low, all experts agreed that a sagging fence would make it much easier for a steer to escape than would a tight fence of the same height. It is beyond dispute that the defendant was guilty of negligence in its maintenance of the fences. The evidence also strongly indicated negligence in the overall design of the fences, culvert and drainage.

Trooper Stephens and UDOT employees checked all freeway fences within approximately one mile of the accident location and found no other points where the integrity of the fence was in question.

Four witnesses with extensive experience with cattle testified concerning the conditions of the fence at the washout and median locations and provided their opinions as to whether the steer entered the freeway at one of those two locations. It is obvious from the trial court's statements and the jury's verdict that Rod Arbon was discredited. His testimony, having no value in the eyes of the jury, will not be reviewed here.

Trooper Paul Stephens testified that the steer could have gotten far enough under the fence to force its way through at the washout. Trooper Stephens was not asked about the median fence and there is no indication he even inspected it.

The steer owner, Tom Wilcock, stated that the steer could have gone under the fence at the washout. When asked about the possibility of the steer going over the fence in the median section Wilcock stated that in his opinion 299 out of 300 steers could go over that section of fence if they wanted to.

Rancher Clinton Burt testified that if there were 20 inches of clearance beneath the field fence, such as in the area of the washout, the steer could have gone under the fence. Burt testified that noises easily spook cattle and that cattle do not like to be boxed in. When asked whether a steer the age and size in question could jump a 36 inch fence if it were boxed in Burt very directly answered "yes". Burt repeatedly explained that cattle find the point of least resistance or the best place they think they can get out. He testified that the fence in the median section constituted a likely spot where the steer escaped and that to him, according to the photographic exhibits, it was likely the steer went over the median fence.

Clinton Burt has been a cattle rancher his entire life. Defendant's Brief misrepresents two colloquialisms from Mr. Burt's testimony. When asked whether the specific steer could jump over a 36 inch fence Mr. Burt responded, "I imagine it could." (TR 360) In agricultural vernacular the word "imagine" is intended to convey belief or agreement, not hallucination. Mr. Burt also testified, "If they're boxed in there and are looking for daylight or wherever to get out, sometimes its even over the top of anybody else that is there if they're that

spooked." (TR 365) Mr. Burt clearly was conveying that an 800 pound steer would knock a human being down and run over the top of the person. Defendant's Brief at page 7 attempts to construe this statement as an indication the steer would leap high over the head of an individual and that this, therefore, corroborates Arbon's claims of a steer jumping a five foot fence. Defendant's misinterpretation of Burt's statement is as believable as the nursery rhyme where the cow jumped over the moon.

A review of all evidence presented to the jury leaves one persuaded that direct evidence as to how the steer exited the pasture would be highly unlikely. There were no eye witnesses, the ground was rock hard, and the fence was not likely to grab any hair or hide.

Direct evidence is not required for a verdict.

Jurors may not speculate as to possibilities; they may, however, make justifiable inferences from circumstantial evidence to find negligence or proximate cause. In such instances, circumstantial evidence is sufficient to establish a prima facie case of negligence, if men of reasonable minds may conclude that there is a greater probability that the conduct relied upon was the proximate cause of the injury than there is that it was not. Lindsay v. Gibbons and Reed, 497 P2d 28, 31 (Ut. 1972). Also see Mason v. Arizona Public Service Commission, 622 P2d 493 (Az. App. 1980), Holmes v. Gamble, 624 P2d 905 (Colo. App. 1980), Jacques v. Montana National Guard, 649 P2d 1319 (Mont. 1982) and Klossner v. San Juan County, 586 P2d 899 (Wash. App. 1978)

The circumstantial evidence in this case is compelling. It led eight reasonable jurors to unanimously conclude the steer got onto the interstate as a result of defendant's negligence. The jury's verdict should be affirmed.

POINT II.

THE CASES CITED BY DEFENDANT ARE EASILY DISTINGUISHABLE.

Defendant relies heavily on Rhiness v. Dansie, 472 P2d 428 (Ut. 1970). The following factual summary from the Rhiness opinion is critical:

. . . the defendant's land had a gate therein which was used by defendant and others. This gate was kept fastened by means of a chain with a snap on one end.

On the night in question the gate was partially open at the time of the collision. The defendant had been at the property on the day in question and observed at the time he left that the gate was securely fastened. Rhiness, 429 (emphasis added)

The court ruled there was no showing of negligence against the defendant. The court was obviously relying heavily on the fact that the gate was not under the exclusive control of this defendant and there was no evidence of this defendant having been negligent in his maintenance of the gate. Obviously an unknown third party had left the gate open following defendant's departure that day.

In Vanderwater vs. Hatch, 835 F2d 239 (Tenth Circuit, 1987) the evidence showed no evidence of any defects in the pasture fence. There was a five mile stretch of open range beginning one-half to three-fourths of a mile west of the accident scene. Plaintiff presented no expert testimony regarding negligence. The court ruled that a res ipsa loquitor instruction was not appropriate under the circumstances.

Unlike Vanderwater, the present case involves (1) two glaring defects in the pasture fence, (2) no open range, and (3) testimony from multiple experts regarding defendant's negligent conduct and the likelihood that this allowed the steer's presence on the freeway.

In Mitchell vs. Pearson Enterprises, 697 P2d 240 (Ut. 1985) the victim was found murdered in his hotel room and the crime was never solved. The court noted:

The fact that there was no evidence of forced entry into Mitchell's room could be probative of entrance by a person using an unauthorized master or room key. However, it could also be probative of entrance, at Mitchell's invitation, by a friend or colleague. Mitchell, 246. (emphasis added)

The decision turns on the fact that the hotel room was not under the exclusive control of the hotel company. The victim may well have unknowingly or under duress invited the assailant into the victim's room. Such circumstances would not constitute negligence on the part of the hotel.

In the present case there is no possibility that Suhr invited the steer onto the freeway.

Defendant cites Staheli vs. Farmers Cooperative of Southern Utah, 655 P2d 680 (Ut. 1982) a case in which plaintiff filed suit seeking to recover for grain stored with defendant and destroyed by fire. In its recitation of facts the court noted:

The portion of the cellar not leased to the (defendant) was retained and used by the owner for its purposes. There was no wall or partition between that part of the pit leased to the (defendant) and that part retained by (owner) for its own use. The farmers whose grain was stored in (owner's) potato cellar knew that the (defendant) was using that facility for their grain

because they had hauled their grain into and out of the potato pit. . . 681.

The (plaintiff) as well as agents of the (defendant) had unlimited access to the pit through both the end leased to the (defendant) and the end retained by the owner; there were transients who were observed in or around the potato pit on October 6, 1976 . . .

The court's opinion begins by recognizing the general rule of law that where goods baled for a fee are damaged, a presumption of negligence is imposed on the bailee. Two excerpts from the court's opinion are particularly relevant for the present considerations.

A predicate of the presumption, therefore, is that the bailee be in exclusive possession, and it is that proposition that gives logical force to the presumption. . .

This court has observed that the evidentiary rules governing bailement are in some respects similar to those governing the doctrine of res ipsa loquitor, although there are important procedural differences . . . Exclusive control of or responsibility for the instrumentality causing the injury is necessary to give rise to an inference of negligence under the doctrine of res ipsa loquitor. Staheli 683 (emphasis added)

Rhiness, Mitchell, and Staheli are concerned respectively with a gate, a hotel room, and a storage bin. The appellate court in Rhiness found the gate was not under the exclusive control of defendant, in Mitchell the hotel room was not under the exclusive control of defendant, in Staheli the storage bin was not under the exclusive control of defendant. These cases are all distinguishable from the present case. This fence was under the exclusive control of this defendant. There is no

conceivable theory whereby a third party suddenly caused the washout or the problems with the median fence. These cases give no support to defendant's position.

POINT III.

THE JURY'S VERDICT SHOULD BE AFFIRMED.

This trial lasted four long days. The jury deliberated four and three-quarters hours. Jury instructions 24, 25, 26, 32 and 33 all addressed the issue of causation, and are included in this Brief in the Addendum.

In denying the defendant's Motion for Judgment Notwithstanding the Verdict the trial judge offered valuable insights into the evidence and this jury;

The real question that the court has is there sufficient evidence that was placed before the jury to satisfy them by a preponderance of the evidence that there was in fact negligence, that there was in fact causation and there was in fact damages? I polled the jury and I think - let me say this for the record, I think that there were sufficient instructions on causation because the jury needed to understand what the court was expecting them to find before they could find liability. They've been referred to by plaintiff's counsel and the court has looked at them again and I'm satisfied that in fact they did that. I don't know if there's an objection on file to those instructions somewhere or not, but that can be raised in another forum for someone else.

In my judgment, on causation, the jury understood that there had to be a relationship of causation and negligence on the part of the state. In this case it related to the fencing and the maintenance of the fence.

I also am of the opinion that the court must consider the evidence in a light most favorable to the verdict. I agree with the interpretation and with the citation that plaintiff has given me. I think that's the law. It doesn't mean that I would have given the same verdict or that I even agree with the verdict. It

is just that there is sufficient evidence to show - to satisfy a jury, by a preponderance of the evidence, as to causation. That's really the question.

There was evidence back and forth on both sides and there was no actual testimony as to where the steer actually got out for sure, but there was testimony that it could have walked over one place and crawled over another place. The court notes that the jury was troubled by that and they felt that perhaps that was causation, the fact that the steer was hit in the immediate location of those two areas of the fence, very close to those two areas of the fence.

I don't recall that every being argued, really directly, but I think that the facts are consistent with the fact that the steer was hit very close to the defects in the fence, which adds, again, more weight to the fact that the steer, by a preponderance, got over the negligent portion of the fence, which relates then to the causation question. (January 8, 1992 Transcript of Findings and Ruling pages 2, 3, and 4)

The Utah Supreme Court recently reiterated the standards to be applied when reviewing a jury verdict.

. . . we defer to the jury and evaluate the evidence in a light favorable to the verdict. We accept the evidentiary inferences that tend to support the verdict rather than contrary inferences that support the appellant's version of the facts, even if we might have judged those inferences differently had we been deciding the matter in the first instance, and not as an appellate court . . . When the testimony of witnesses is in conflict, we accept that testimony which supports the jury's verdict, unless it is inherently implausible, and ignore the evidence which does not support the verdict, even if we might think it more convincing . . . for the appellants to overturn the jury verdict, therefore, they must set out in their briefs, with record references, all the evidence that supports the verdict, including all valid inferences to that effect, and demonstrate that reasonable people would not conclude that the evidence supports the verdict. Hodges v. Gibson Products Co., 811 P2d 151, 156 (Utah 1991)

. . . We exercise "every reasonable presumption in favor of the validity of a general verdict." To give effect to that presumption we look to pleadings, evidence, instructions, verdict forms and the manner in

which the case was tried to determine whether possible error in the verdict is reversible. . . General verdicts are to be construed with a view to sustaining the verdict and effectuating the intention of the jury if possible. Where that intention is not clearly apparent from the verdict itself inferences may be drawn from the evidence, the pleadings, the jury instructions and other relevant portions of the record. Hodges 164 (emphasis added)

In the present case there is no need to speculate as to how the jury viewed the issue of proximate cause. Page 2 of the Special Verdict Form, question number 2, appears as follows:

If defendant State of Utah was negligent as alleged, did such negligence proximately cause the plaintiff, Michael H. Suhr, to sustain injuries?

ANSWER: Yes

In King v. Fereday the Utah Supreme Court stated:

A trial court should grant a motion for judgment notwithstanding the verdict if, after viewing the evidence in the light most favorable to the nonmovant, it finds that no competent evidence supports the verdict. In reviewing the trial court's determination on such an issue, this court must apply the same standard. King v. Fereday, 739 P2d 618, 620 (Ut. 1987)

Issues of negligence and issues of proximate cause are usually factual issues and in most circumstances are not resolved as a matter of law. Apache Tank Lines, Inc. v. Cheney, 706 P2d 614 (Ut. 1985) and Unigard Insurance Company v. City of LaVerkin, 689 P2d 1344 (Ut. 1984)

In conclusion plaintiff refers the court to State v. Webster, 504 P2d 1316 (Nev. 1972) That case involved seven dark colored horses which had escaped from a pasture located near an unguarded entrance to a newly constructed controlled-access freeway on the evening of December 14, 1967. The facts indicate

that the accident occurred at around 11:00 p.m. on a "dark, moonless night". The trial court determined the state was negligent in failing to install a cattle guard at the freeway entrance and that such negligence was the sole proximate cause of the accident. A review of the opinion makes clear that no eyewitnesses observed the horses enter the interstate at this location. Rather, through a process of deduction, it was determined that this was the only location where the horses could have entered. The Nevada Supreme Court affirmed a judgment in favor of the plaintiff.

The jury in the present case consisted of eight reasonable people who were accepted by the defendant. They participated patiently and attentively throughout four days of trial. They received numerous instructions concerning the law with regards to causation. They deliberated almost five hours. They returned a special verdict which specifically found the negligence of the defendant to be the proximate cause of plaintiff's injuries. The jury was subsequently interviewed by the trial court and the judge found that the jury read and understood the instructions and in the court's opinion had properly applied them to the evidence.

The defendant's Brief does not come close to meeting the standard identified for reversal of a jury verdict. On the contrary, there is substantial evidence to support the jury's verdict and it should be affirmed as a matter of law.

CONCLUSION

There was an abundance of circumstantial evidence of causal connection between defendant's negligence and plaintiff's injuries. The cases relied upon by defendant are easily distinguishable in that the fence in this case was under the exclusive control of the defendant. The jury's verdict should be affirmed as a matter of law.

DATED this _____ day of July, 1992.

BEN H. HADFIELD
MANN, HADFIELD & THORNE
Attorneys for Appellee

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed postage prepaid to the following:

Debra J. Moore
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

BEN H. HADFIELD

tr/11:suhr.brf

ADDENDUM

Plaintiff's Exhibit 3 - Median Fence

Plaintiff's Exhibit 9 - Fence Specifications

Plaintiff's Exhibit 14 - Weather Records

Plaintiff's Exhibit 21 - Median Area

Plaintiff's Exhibit 22 - Median Fence with Yard Stick

Plaintiff's Exhibit 23 - Tom Wilcock at Median Fence

Plaintiff's Exhibit 24 - Box Tunnels with Closed Gate

Plaintiff's Exhibit 25 - Close Up Median Fence with Yard Stick

Jury Instruction No. 20 - Credibility of Witnesses

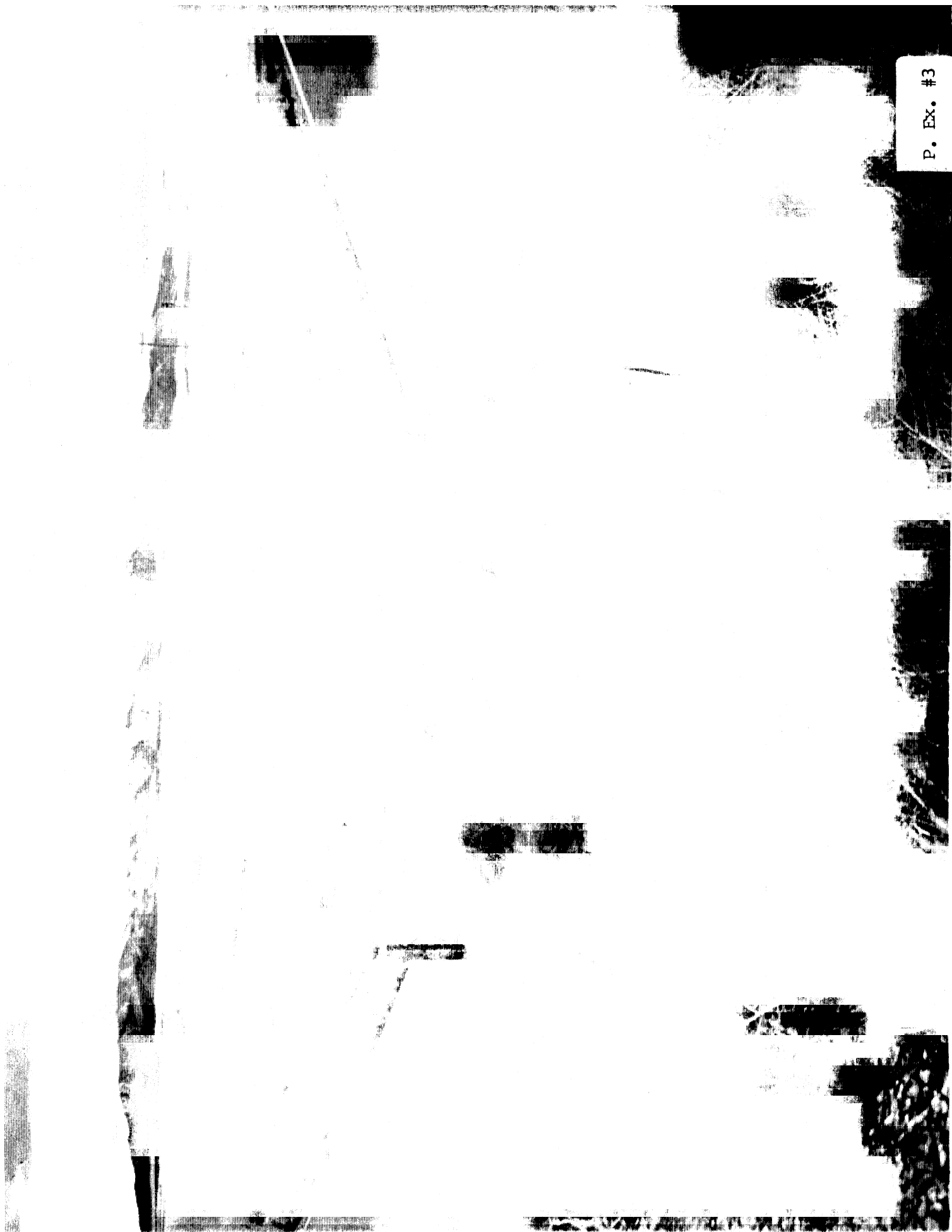
Jury Instruction No. 24 - Proximate Cause

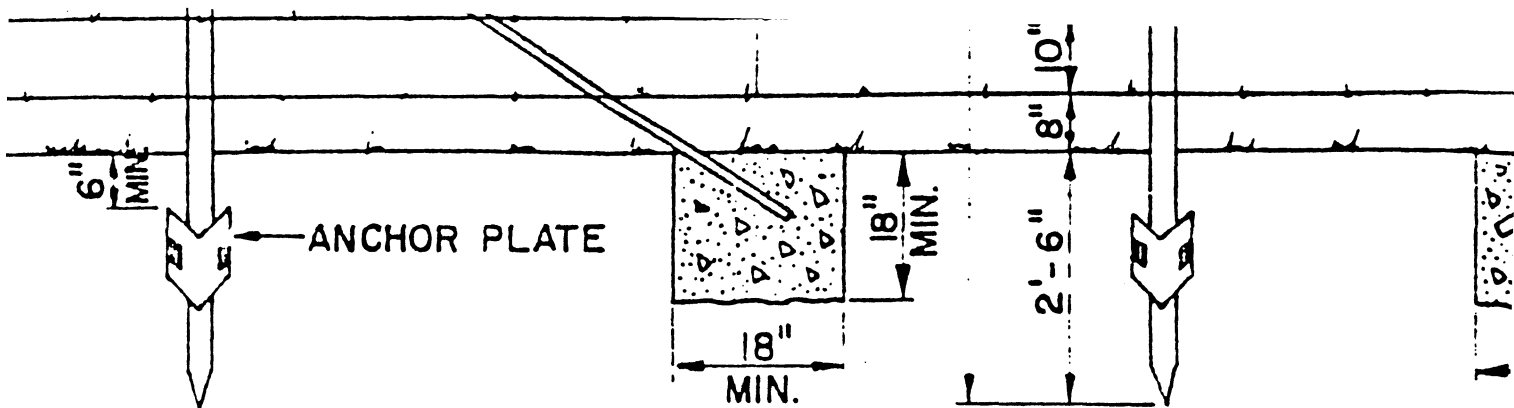
Jury Instruction No. 25 - Proximate Cause

Jury Instruction No. 26 - Negligence - Proximate Cause

Jury Instruction No. 32 - Definitions, Negligence - Proximate Cause

Jury Instruction No. 33 - Mere Fact that Animal Escaped Not Sufficient





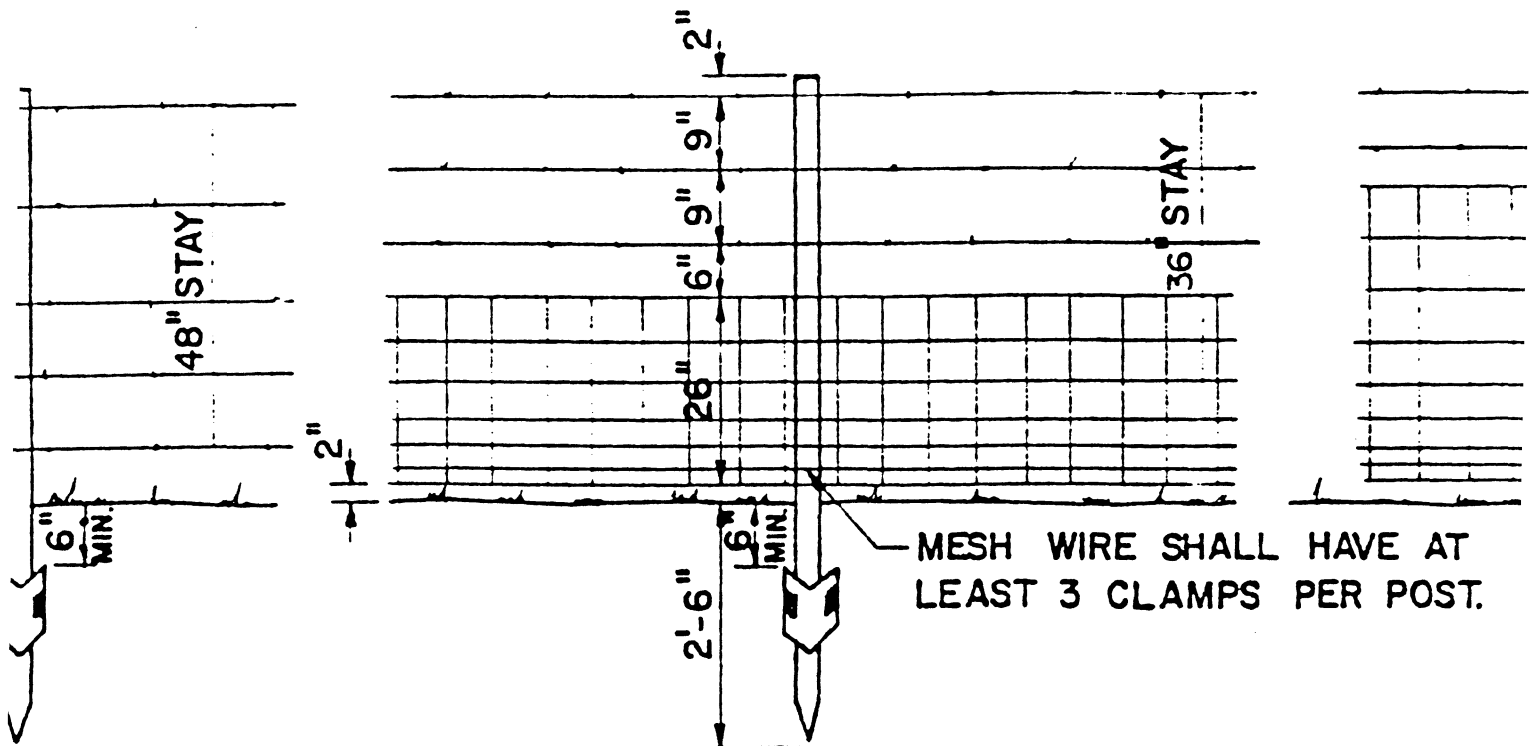
UBLE BRACE PANEL

BLOCK 9

CE LINE DEVIATIONS UP TO 30° AND
S NOT TO EXCEED 500 FEET.

TYPICAL INSTALLATION WITH METAL POSTS

(5) LINE POSTS AND BRACES SHALL BE
U, Y, CHANNEL, PIPE, ANGULAR OR (C)
APPROVED SHAPE AND ALL SHALL BE
7' LONG.



TYPE A

TYPE B

(7) NOTE: POST
D & E SHA
TALLATION

U.S. DEPARTMENT OF COMMERCE

Asheville, N.C.

I CERTIFY that the attached are authentic and true copies of meteorological records on file in the NATIONAL CLIMATIC DATA CENTER, ASHEVILLE, NORTH CAROLINA.




FCR RICHARD M. DAVIS
RECORDS CUSTODIAN
DATA ADMINISTRATOR
(Official Title)

.....

I HEREBY CERTIFY THAT RICHARD M. DAVIS RECORDS CUSTODIAN, who signed the foregoing certificate, is now, and was at the time of signing, DATA ADMINISTRATOR, NATIONAL CLIMATIC DATA CENTER, and that full faith and credit should be given his certificate as such. I further state that I am the person to whom the said custodian reports.

IN WITNESS WHEREOF, I have hereunto
subscribed my name and caused the seal
of the Department of Commerce to be
affixed on this date: **DEC 03 1991**

For the SECRETARY OF COMMERCE:

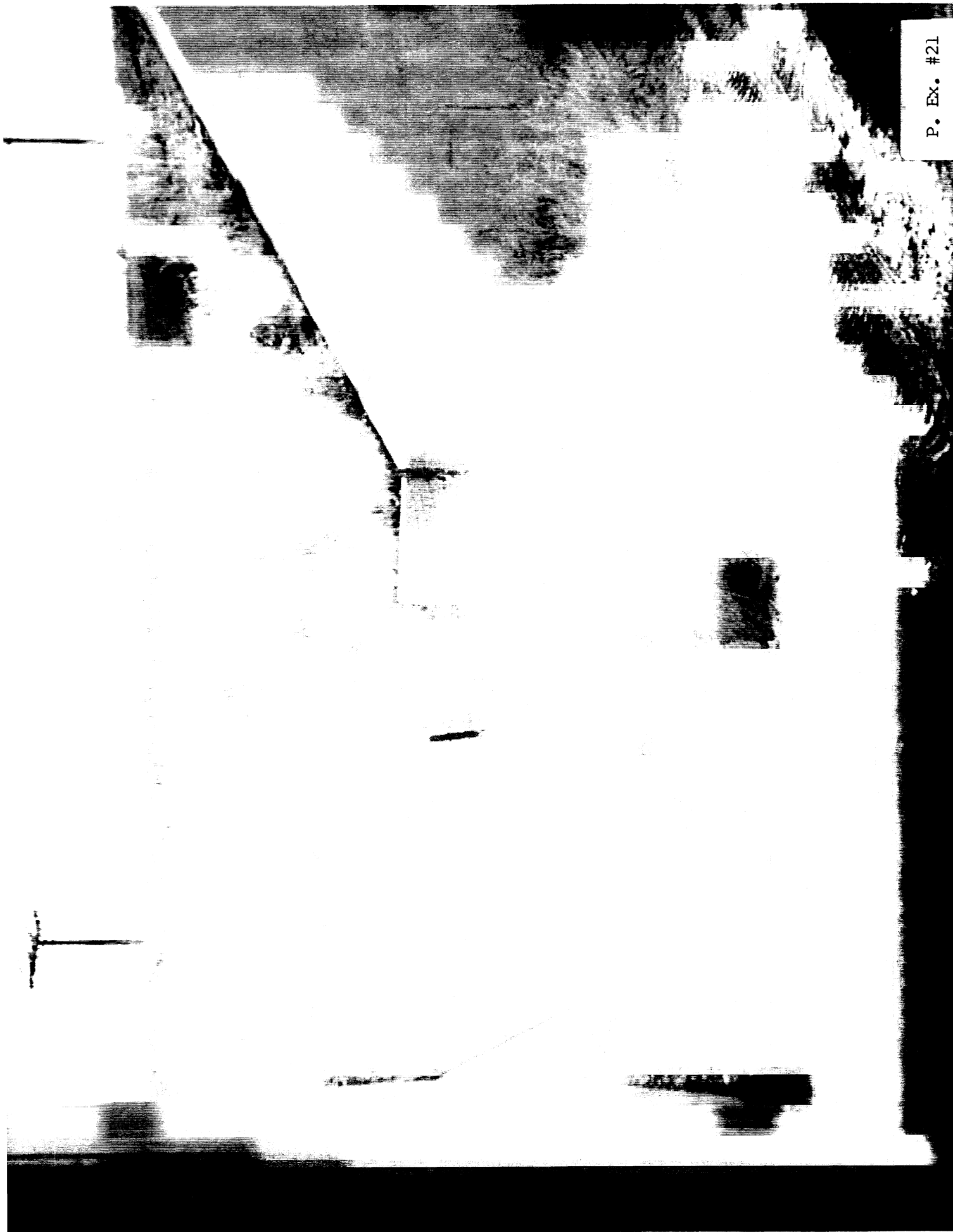


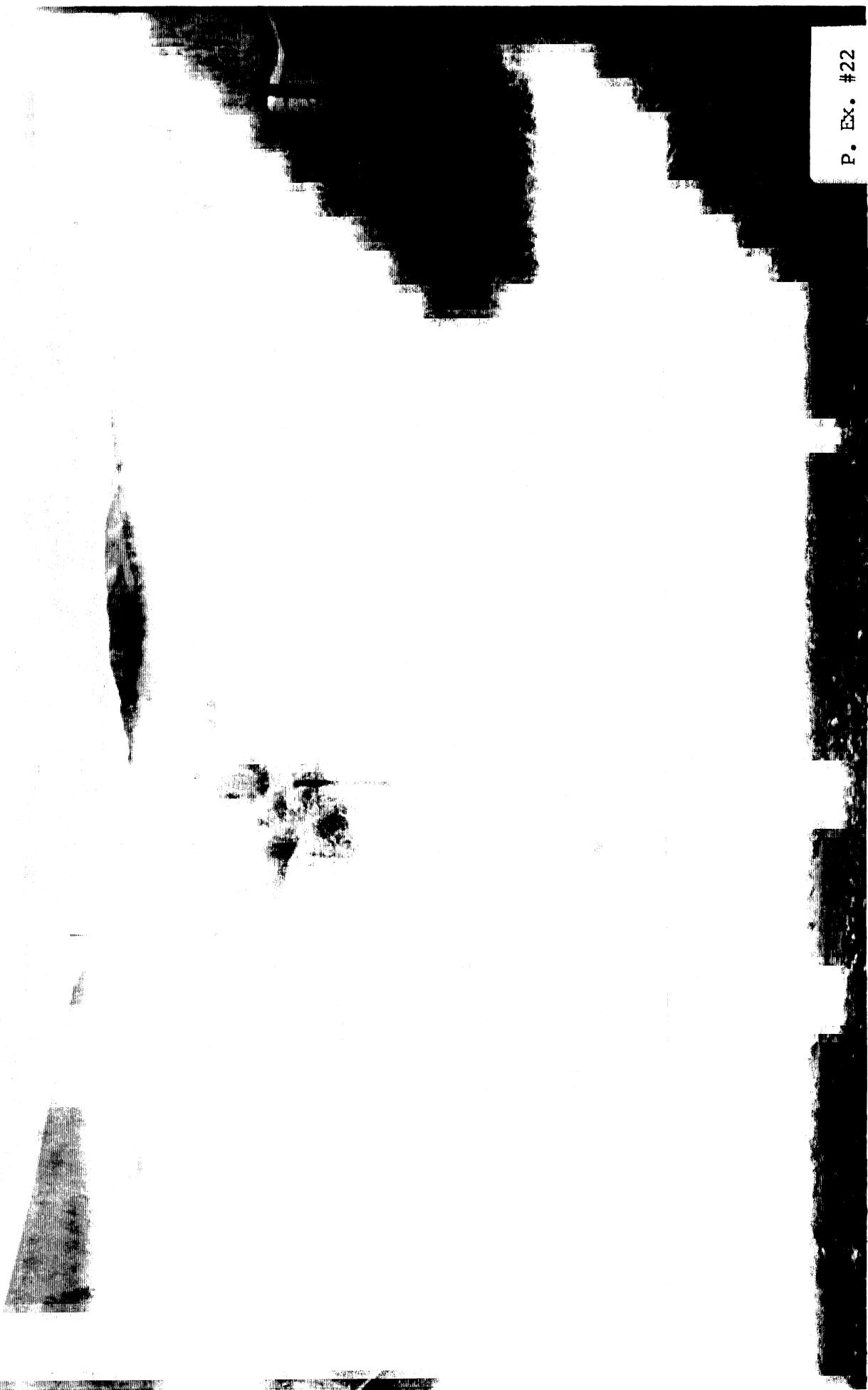
For KENNETH D. HADEEN
DIRECTOR, NATIONAL CLIMATIC DATA CENTER
(Certifying Officer)

state

1990

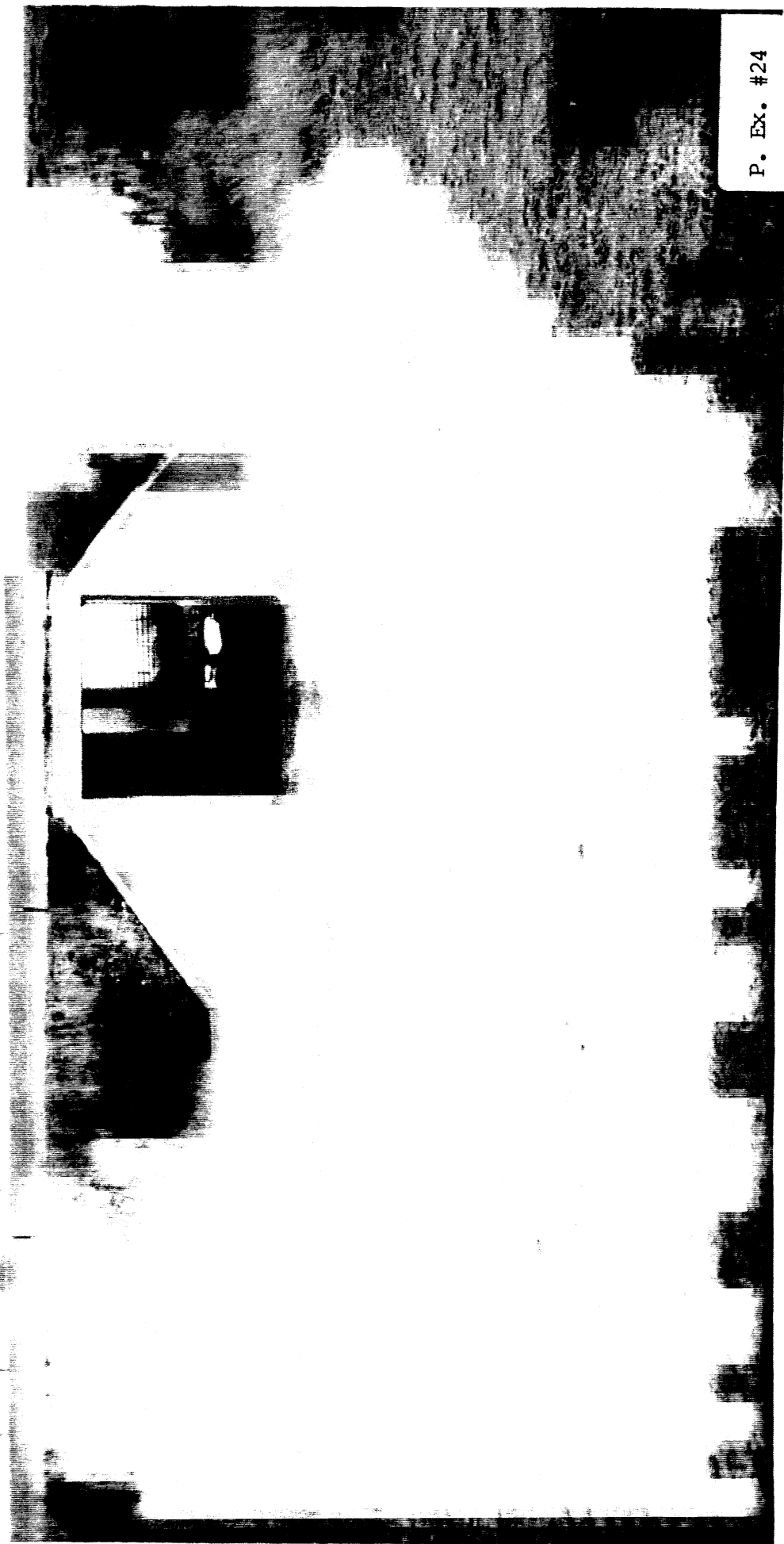
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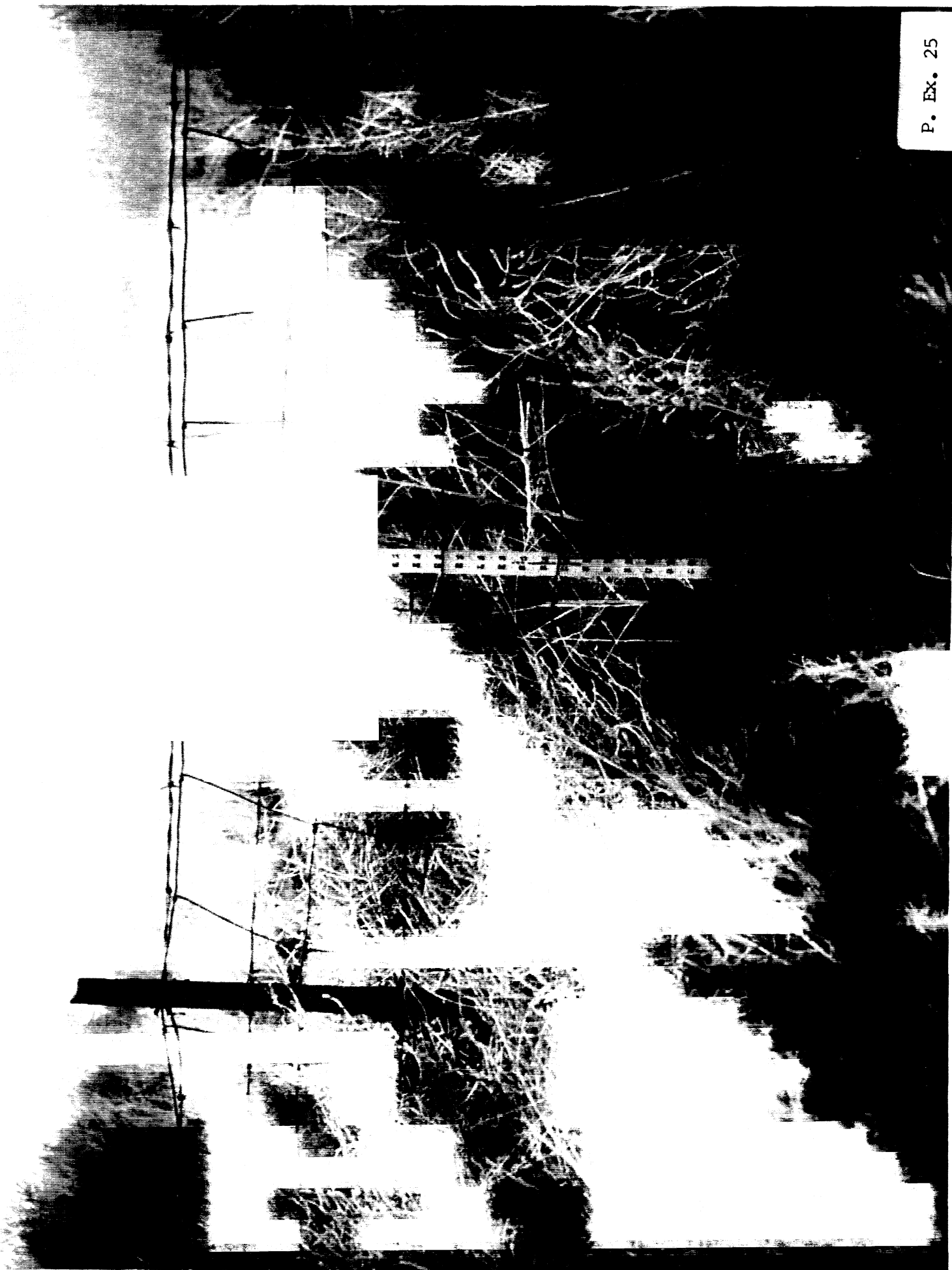




P. Ex. #23







INSTRUCTION NO. 20

If you believe any witness has willfully testified falsely as to any material matter, you may disregard the entire testimony of the witness, except as that witness may have been corroborated by other credible evidence.

JURY INSTRUCTION 24

A proximate cause of an injury is that cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred. A proximate cause is one which sets in operation the factors that accomplish the injury.

INSTRUCTION NO. 25

In addition to deciding whether the defendant was negligent, you must decide if that negligence was a "proximate cause" of the plaintiff's injuries.

To find "proximate cause", you must first find a cause and effect relationship between the negligence and plaintiff's injury. But cause and effect alone is not enough. For injuries to be proximately caused by negligence, two other factors must be present:

First, the negligence must have played a substantial role in causing the injuries; and

Second, a reasonable person could foresee that the injury could result from the negligent behavior.

INSTRUCTION NO. 26

In this case the plaintiff claims that the defendant State of Utah was negligent in the following respects:

1. Negligence in maintaining a fence;
2. Improper design of drainage areas.

Defendant State of Utah claims that if anybody was negligent and at fault for the steer getting on the highway, it was the landowner or operator.

To return a verdict for the plaintiff, you must find by a preponderance of the evidence that:

Either the State of Utah is the land owner -
1. ~~One or both of the defendants were negligent in one or~~
was.
more of the particulars alleged; and

2. Such negligence was a proximate cause of the plaintiff's injuries.

If you find in favor of the plaintiff on those two questions, you must then decide the amount of the damages suffered by the plaintiff.

INSTRUCTION NO. 32

The terms "negligence", "contributory negligence", "ordinary care", and "proximate cause", as used in these instructions, are defined as follows:

A. "Negligence" means the failure to do what a reasonable and prudent person would have done under the circumstances involved, or doing what a reasonable and prudent person would not have done under such circumstances. The faulty conduct may lie either in acting or in not acting. The standard of conduct required in any given case is dictated and measured by the immediate requirements of the occasion as determined from the existing facts and circumstances. You will note that the person whose conduct we set up as a standard is not the extraordinary cautious individual, not the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional caution and skill are to be admired and encouraged, the law does not demand them as a general standard of conduct;

B. "Contributory Negligence" is negligence on the part of the person injured which, alone or together with the negligence of the other party, contributes in proximately causing such person's own injury;

C. "Ordinary Care" is that degree of care which a reasonably prudent person would use under the same or similar circumstances. "Ordinary Care" implies that exercise of reasonable diligence and such watchfulness, caution and foresight as under all the circumstances of the particular case would be exercised by a reasonably careful, prudent person;

D. A "proximate cause" of an injury is a cause which in direct unbroken sequence produces the injury. It is one without which the injury would not have occurred.

The law does not necessarily recognize only one proximate cause of an injury, consisting of only one factor, one act, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded by the law as a proximate cause and all may be responsible.

INSTRUCTION NO. 33

In order for the plaintiff to recover in this action he must show, among other things, that the steer got upon the highway through the negligence of the defendant. "The mere fact that the animal escaped from the enclosure is not sufficient evidence, standing alone, to justify" recovery based on negligence: