

1992

Michael H. Suhr v. the Utah Department of Transportation, State of Utah : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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

BRIEF OF APPELLANT

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 GORDON J. LOW, PRESIDING

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**UTAH COURT OF APPEALS
BRIEF**

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920218-CA

Utah Court of Appeals
Clerk of Court
Salt Lake City, Utah

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UTAH,	: Priority No. 16
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BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter under Utah Ann. § 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 Const. Art. VIII, § 3 and Utah Code Ann. § 78-2-2(j) (1992).

STATEMENT OF THE ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether there was sufficient evidence to sustain the jury's finding that the steer entered the highway through either of two alleged defects in the adjacent fence and thus that UDOT's negligence proximately caused Suhr's injuries.

Standard of Review: The denial of a motion for judgment notwithstanding the verdict based on insufficiency of the evidence is reviewed for correctness, applying the same standard as the trial court: whether, viewing the evidence in the light most favorable to the verdict, there is competent evidence to support it. In challenging such a denial, the appellant must

marshall all of the evidence supporting the verdict and show that reasonable people would not conclude that the evidence supports the verdict. Hodges v. Gibson Products Co., 811 P.2d 151, 156 (Utah 1991); Hansen v. Stewart, 761 P.2d 14, 17-18 (Utah 1988); King v. Fereday, 739 P.2d 618, 620 (Utah 1987).

DETERMINATIVE PROVISIONS

None.

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from a final judgment of the First Judicial District Court, the Honorable Frank L. Gunnell presiding, upon a jury verdict, awarding \$118,814.70 in damages to the plaintiff-appellee Suhr against the defendant-appellant UDOT for property damage and personal injuries sustained by Suhr when his semi-truck hit a steer on an interstate highway, allegedly as a result of UDOT's negligent maintenance of the fence bordering the highway.

Course of the Proceedings & Disposition Below

A jury trial was held from December 17 - 20, 1991. At the conclusion of the plaintiff's case, UDOT moved for a directed verdict. The court denied the motion and submitted the case to the jury. By special verdict, the jury found UDOT 85% at fault and Suhr 15% at fault for the accident and resulting injuries. The jury awarded special damages of \$83,860 and general damages of \$50,000, for a total of \$133,860.

On January 7, 1992, after deducting for the

contributory negligence and adding pre-judgment interest and costs, the court entered a judgment on the verdict for \$118,814.70. UDOT had moved for a judgment notwithstanding the verdict on December 30, 1992. On January 21, 1992, the court denied the motion. UDOT filed its notice of appeal on January 30, 1992.

Statement of the Facts

The following facts are recited in the light most favorable to the jury verdict, marshalling all of the evidence in support of the verdict.

On November 8, 1988, plaintiff-appellee Michael H. Suhr was driving a semi-truck northbound on Interstate 84 in Box Elder County near the Utah-Idaho border when his truck hit an 800 pound steer that was standing in the outside lane. Suhr's truck was damaged and he sustained personal injuries in the accident.

At the point of the accident, the highway was bordered on both sides by a pasture, which was separated from the highway by wire fencing. The highway consisted of two lanes in each direction, divided by a wide center median. Just north of the accident site, a box culvert ran underneath and perpendicular to the highway, allowing cattle and other farm traffic to travel from one side of the highway to another. Where it crossed the median strip, the culvert was bordered on both sides by fencing. (For a general layout of the highway, see Plaintiff's Exhibit Nos. 5, 4 and 13, photocopies of which are attached as Addendum 2.) All of the fencing was maintained by UDOT.

Suhr filed a complaint alleging that UDOT had negligently designed and maintained the fencing and that this negligence was the proximate cause of the steer's entry onto the highway and thus the accident. On UDOT's motion, the "livestock owner or operator" was also included on the special verdict form for purposes of assessing fault. R. 332.

Viewed in the light most favorable to the jury verdict, the evidence adduced at trial showed that there were two defective areas in the fence near the accident site: an area on the east (northbound) side of the highway, where water erosion had created a gap beneath the fence, and an area in the median section of the culvert where a combination of sagging of the fence wires and accretion of the ground level shortened the fence to 36 inches from the standard 52 inch height.

Tom Wilcock testified that he went to the scene of the accident the day after it occurred and identified the steer as one of his own. Tr. 320.¹ Wilcock testified that he had been operating the ranch next to the highway since April 1982 and that he kept cattle in the pasture on the northbound side of the highway 30 to 40 days a year in the fall before snowfall. Tr. 318. He testified that cattle liked to stick their heads in the gap underneath the fence to rub their necks, and that the bottom of the fence was bent outward at the gap. Tr. 335. According to Wilcock, it was "possible" for an animal the size of the steer

¹Because the trial transcript was paginated separately from the remaining trial record, it is referred to as "Tr. ____".

involved in the collision to have gone under the fence at the location of the gap. Tr. 336. Wilcock stated that in his opinion it was also possible for a steer to leap over the shortened fence in the median section of the culvert. Id. He testified that there was a gate on the southbound side of the culvert that was closed at the time of the accident. Tr. 331.

Suhr called Clinton Burt, a rancher of over 40 years of experience, as an expert witness. Burt had never seen the accident site, but testified hypothetically that it was "possible" for an 800 pound steer to work its way under a 20 inch clearance between the ground and a field fence. Tr. 359. Burt also testified that he "imagined" that an 800 pound steer could jump over a 36 inch high fence "if there was no other place to go. It would have to be kind of boxed in." Tr. 360. According to Burt, cattle get nervous when boxed in and can also be "spooked" by noises. Tr. 362-363.

Utah Highway Patrol Trooper Paul Stephens investigated the accident on the night it occurred and the following day. He testified that "[i]t is possible, if that fence was up like knee high, a steer of that size . . . might be able to push their way underneath and traverse through it." Tr. 86.

There was no direct evidence, however, that the steer actually did enter the highway through either of the two defective areas in the fence. To the contrary, Trooper Stephens, who had 30 years of experience with livestock, testified that he checked the fence on both sides of the highway and saw no place

where a steer could have entered the highway. Tr. 79-82. He testified that he did not measure the gap, that it "did not appear to be a problem area, and that "[i]f I would have had any indication at all that a steer had gone under the particular portion of the fence I would have been alerted to it." Tr. 85-86. He testified that he saw no displacement of the vegetation near the gap, no dig marks, no cow droppings, no hair on the fence, no scratches on the steer's hide, or any other sign that the steer entered the highway through the gap. Tr. 94-96.

Similarly, Rodney Arbon, a UDOT employee responsible for maintaining the fence, inspected the fence on both sides of the highway for at least a mile in either direction from the accident site, and saw no place where the steer could have entered the highway. Tr. 172-73. Arbon testified that the gap between the bottom of the fence and the ground was actually only 2 to 3 inches, although the deepest point of the eroded area, which was on the far side of the fence from the highway, was 16 inches. Tr. 141-145, 197.

The only other evidence of the actual dimensions of the gap was photographs taken in the spring following the accident. (See Plaintiff's Exhibit Nos. 18, 19 & 20, photocopies of which are attached as Addendum 3.) Tr. 302-303. Although the photographs were admitted into evidence on Suhr's motion, Suhr argued in closing that because the view of the gap in the photographs was partially obstructed by vegetation and the angle from which they were taken, their probative value was limited.

Tr. 651.

At the same time, un rebutted evidence showed that the steer could have entered the highway by some other means. Arbon testified that, at the time of the collision, Wilcock had cattle in two other pastures in the vicinity of the accident. Tr. 170-75. Arbon, who was a rancher himself, further testified that cattle have a tendency to roam, and that therefore the steer did not necessarily escape from the pasture closest to the accident site. Id. This testimony was un rebutted by Wilcock or any other witness or evidence.

Wilcock testified that he drove cattle directly through the culvert every year and that the fence had "always been saggy through there." Tr. 323-24. Similarly, Arbon testified that UDOT had dumped fill into the gap several times a year for many years. Tr. 137-39. There was no evidence, however, that any cattle had ever previously jumped the culvert fence or escaped through the gap underneath the fence. To the contrary, Arbon testified that only one steer had previously escaped in the vicinity of the accident. That escape occurred when a portion of the fence had been taken down by power company employees working in the area. Tr. 206.

In addition, Burt, Suhr's cattle expert, repeatedly stated that when cattle are boxed in and spooked, they not only will jump a 36 inch fence but will sometimes go over even the top of a person. Tr. 362, 365. This testimony supported that of Arbon that he had seen cattle jump a fence as high as five feet.

Tr. 162-63. Burt also declined to opine that the steer jumped the fence in the area of the culvert, stating, "I don't know how I could say it jumped out at that spot. I've watched cattle all my life. They don't particularly pick any spot. They can get out at the most unlikely places." Tr. 364. Pressed further, Burt asked candidly, "Who knows where it got out?" Tr. 366.

At the conclusion of the plaintiff's case, UDOT moved for a directed verdict under Rule 50(a), U. R. Civ. P., based on the insufficiency of the evidence to show that the steer had escaped through, and thus the accident was caused by, either of the two alleged defects. Tr. 544. The court denied the motion. Tr. 563.

By special verdict, the jury found that UDOT was negligent as alleged by Suhr and that the negligence proximately caused Suhr to sustain injuries. The jury also found that Suhr was 15% contributorily negligent. The jury found special damages of \$83,860 and general damages of \$50,000, for a total of \$133,860. After deducting for the contributory negligence and adding pre-judgment interest and costs, the court entered a judgment on the verdict for \$118,814.70.

UDOT moved for a judgment notwithstanding the verdict under Rule 50(b), U. R. Civ. P., again based on the insufficiency of the evidence to support the jury's finding that UDOT's claimed negligence proximately caused Suhr's injuries. R. 338. The court denied the motion. R. 402.

SUMMARY OF ARGUMENT

Viewed in the light most favorable to Suhr, the evidence adduced at trial failed to support Suhr's theory that the steer had been in the pasture on the northbound side of the highway and that it escaped through either one of the two alleged defects in the fence bordering that side of the highway. Thus, Suhr failed to prove an essential element of his claim, i.e., that the alleged negligence of UDOT in maintaining the fence actually caused the accident.

There was no direct evidence adduced at trial as to how or where the steer actually entered the highway. The circumstantial evidence was, at most, equally consistent with the view that the steer entered the highway from some other pasture or through some other means as that it escaped through either of the allegedly defective areas in the fence. Thus, the evidence established mere possibilities as to how the steer escaped and Suhr's theory of causation was based on complete speculation and conjecture. The judgment and jury verdict should be reversed.

ARGUMENT

POINT I

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT SUHR'S THEORY THAT THERE WAS A CAUSAL CONNECTION BETWEEN THE ALLEGED NEGLIGENCE AND THE ACCIDENT

An essential element of a cause of action in negligence is causation. Reeves v. Gentile, 813 P.2d 111, 115 (Utah 1991); Williams v. Melby, 699 P.2d 723, 726 (Utah 1985); Gregory v. Fourthwest Investments Ltd., 754 P.2d 89, 91 (Utah App. 1988).

Thus, a plaintiff must prove by a preponderance of the evidence, not only that the defendant was negligent in a manner that could have injured the plaintiff and that the plaintiff was injured, but that the proven negligence was both the actual and proximate cause of the injury. Here, although reasonable persons might have differed as to whether UDOT was negligent in maintaining the fence that bordered the highway where the accident occurred, there was insufficient evidence to support Suhr's theory that the steer entered the highway as a result of the alleged negligence. Thus, Suhr failed to prove the essential connection between the alleged negligence of UDOT and his injury.

A. At Most, The Evidence Was Equally Consistent With Other Explanations As The Theory That The Alleged Negligence Caused The Accident

The Utah Supreme Court addressed the issue of causation in the context of a vehicle-animal collision in Rhiness v. Dansie, 472 P.2d 428 (Utah 1970). There, the plaintiff's car hit one of several of the defendant's horses that had escaped onto the highway. The horses were normally kept in a pasture next to a railroad track adjoining the highway. The pasture was separated from the track and the highway by a fence which had a gate, which was partially open at the time of the collision. The plaintiff contended that the defendant was negligent in failing to put a lock on the gate to prevent others who used the gate from leaving it open.

Noting that the evidence showed that livestock had

escaped from the pasture four times in the 25 years before the accident, but never before through the gate, the Supreme Court affirmed a directed verdict for the defendant. In so holding, the Court stated, "The mere fact that the animals escaped from the enclosure is not sufficient evidence, standing alone, to justify the submission of defendant's negligence to the jury." Id.

The principle followed in Rhiness also governs this case. Like the plaintiff in Rhiness, Suhr adduced evidence at trial of a defect or defects in the fence bordering the highway through which livestock could have escaped. As in Rhiness, however, there was simply no evidence that the animal actually escaped through the allegedly defective areas. Indeed, the evidence here is even weaker than in Rhiness, where the alleged defect was an unlocked and open gate which the horse would not have had to jump over or wriggle under to traverse. In the face of other possible explanations for the horses' escape, the Supreme Court in Rhiness rejected the plaintiff's theory as to causation. Similarly, Suhr's hypothesis should be rejected here.

Rhiness was followed by the U.S. Court of Appeals for the Tenth Circuit in Vanderwater v. Hatch, 835 F.2d 239 (10th Cir. 1987). Vanderwater involved a collision between a motorcycle and a cow on a "stretch of rural highway in Northern Utah adjacent to a fenced pasture" in which Hatch kept 25 head of yearling cows. Hatch also kept 120 head of cattle, including a few yearlings, on an open range that crossed the highway within a

mile of the accident site. Witnesses to the accident reported seeing as many as 15 yearlings on the highway just before the accident. Unlike Rhiness, however, there was no evidence of any defects in the pasture fence.

The court rejected the plaintiff's contention that the trial court erred in denying a request for a res ipsa loquitur instruction, holding that the requirement that the injury was more probably than not the result of negligence was not met. "The evidence in the instant case is at least as consistent with the view that the cow involved in the accident drifted in from open range as with the view that it escaped from defendant's fenced pasture. In light of the statutory exclusion [exempting open range livestock from the requirement that owners prevent livestock from entering upon a fenced public highway], we do not believe there is a reasonable basis here for concluding the injury is more likely than not the result of negligence." Id. at 242-43.

In so holding, the court relied on Rhiness. While it did not directly address the doctrine of res ipsa loquitur and was factually distinguishable, the court stated, "Rhiness at least implicitly rejects the proposition plaintiff Vanderwater is advancing in the instant case, that common knowledge is a sufficient substitute for evidence identifying the cause of the animals' escape."

Although Vanderwater arose in the context of a request for a res ipsa loquitur instruction, its reasoning is helpful

here. As in Vanderwater, the evidence here is at least as consistent with the view that the steer entered the freeway through some other means as that it entered as a result of the defendant's negligence. The additional evidence of negligence adduced by Suhr adds nothing to his claim in the absence of evidence of causation. Just as the evidence did not warrant a legal presumption of negligence in Vanderwater, it does not support a factual inference of causation here. See also Dailey v. Lawson, 119 A.2d 684, 685 (Vt. 1956) (reversing judgment upon jury verdict for the plaintiff stating, "The mere fact of the poor condition of the fence would not warrant a finding by the jury that the horse escaped over or through that portion of the fence"); Granger v. Tremblay, 28 A.2d 696, 697 (Vt. 1942) (reversing judgment upon a jury verdict for the plaintiff because there was "no evidence tending to show how the horse happened to be upon the highway" although the evidence did show that a gate to a pasture adjacent to the highway containing other horses owned by the defendant was open).

The Utah Supreme Court has applied this reasoning in other contexts as well. In Mitchell v. Pearson Enterprises, 697 P.2d 240 (Utah 1985), for example, the Court upheld a summary judgment for the defendant, in whose hotel the plaintiff's decedent was robbed and murdered. The plaintiffs in Mitchell had adduced extensive evidence of numerous breaches in the hotel's security that could have allowed a potential assailant access to the victim's room where the murder took place. The Court found

that "plaintiffs have elicited sufficient evidence . . . to raise material issues of fact with respect to whether defendants were negligent in providing hotel security." But, the Court continued,

the inquiry does not end there. Demonstrating material issues of fact with respect to defendants' negligence is not sufficient to preclude summary judgment if there is no evidence that establishes a direct causal connection between that alleged negligence and the injury.

The Court noted the total absence of eyewitness or other direct evidence as to how the murderer actually gained access to Mitchell's room. It concluded that the evidence was equally consistent with the view that the murderer entered the room at Mitchell's invitation as that the murderer obtained a passkey as a result of the hotel's lax security. "Any supposition," the Court stated, "as to the manner of entrance to Mitchell's room or the identity of the assailant would be totally speculative. A jury cannot be permitted to engage in such speculation."

Similarly, in Staheli v. Farmers Cooperative of Southern Utah, 655 P.2d 680 (Utah 1982), the Court upheld a judgment for the operator of a storage facility in which a fire broke out, destroying the plaintiff's grain. The plaintiff presented no evidence of the actual origin of the fire, relying on a presumption that a loss of or damages to bailed goods is due to the bailee's negligence. The Court affirmed the trial court's ruling that the defendant did not have exclusive control over the storage facility and that therefore there was no legal

presumption that the fire occurred as a result of the defendant's negligence. Moreover, although there was considerable evidence of conduct by the defendant that could have caused the fire, there was no evidence as to how the fire actually started. The Court stated, "We readily concede that the record contains evidence of carelessness on the Coop's part, but there is also evidence of the Stahelis' negligence and, indeed, the possibility of negligence on the part of third parties." Concluding that the judgment should be affirmed, the Court stated, "When the proximate cause of an injury is left to speculation, the claim fails as a matter of law." See also Sumsion v. Streater-Smith Inc., 103 Utah 44, 52, 132 P.2d 680, ____ (1943) (J. Wolfe) ("While deductions may be based on probabilities, the evidence must do more than merely raise a conjecture or show a probability. Where there are probabilities the other way equally as more potent the deductions are mere guesses and the jury should not be permitted to speculate.").

Just as there was no direct evidence as to how the murderer gained access to the victim's room in Mitchell or how the fire was started in Staheli, there was no direct evidence as to how or where the steer entered the highway in this case. The only witness to the accident was Suhr himself, who testified that when he first saw the steer it was simply standing in the outside lane of the highway. Tr. 380. Just as there was no known eyewitness to the murder in Rhiness or to the fire in Staheli, there was no eyewitness to the steer's entry onto the freeway

here.

Moreover, as in Mitchell and Staheli, the evidence relied upon by Suhr is equally consistent with other possible explanations of the accident. To conclude that the cause of the accident was UDOT's alleged negligence would require utter speculation and conjecture.

In closing argument, Suhr argued that Wilcock's testimony that the fence in the area of the gap was bent out constituted circumstantial evidence from which the jury could infer that the steer escaped through the gap. Tr. 649. Notably absent from Wilcock's testimony, however, was any claim that the fence was unbent before the accident. In light of Wilcock's statement that cattle liked to rub their necks there, Tr. 335, no inference that the fence was previously unbent can reasonably be drawn. Thus, even viewed in the light most favorable to Suhr, the evidence does not fairly or reasonably support the inference that the steer escaped through the gap.

Suhr offered various explanations for the absence of any affirmative evidence of where or how the steer escaped. For example, he contended that the ground surface was too dry for the steer to have left any tracks and that the fence immediately above the gap was too smooth to scratch the steer's hide or catch its hair. Tr. 649. While it may have been within the jury's prerogative to accept these explanations, the evidence nevertheless failed to support Suhr's theory that the steer actually did escape through one of the defective areas.

Focusing on the possibility that the steer jumped the shortened fence in the area of the culvert, Suhr attempted in closing argument to paint a "picture" of the steer trapped in the culvert at near dark with semis "racing back and forth over the tunnel at 60 miles an hour." Tr. 653-56. While it may have provided compelling drama, this explanation of how and where the steer escaped was completely unsupported by any evidence. Indeed, the fact that trucks had been passing over the culvert and that the fence had been in the same condition for years, as Wilcock testified, Tr. 323-24, tended to refute this explanation.

Moreover, even assuming that the conditions necessary to cause a steer to jump the fence, as established by Suhr's cattle expert, were in fact present, there was no evidence tending to show that the shortened height of the fence had any causal connection to the steer's escape. To the contrary, Clinton Burt testified that a steer the age and size of the one involved in the collision was capable not only of jumping a three foot fence, but "sometimes it might even be me" or "anybody else that is there." Tr. 362, 365. In the same vein, Rodney Arbon testified that he had seen cattle jump a fence as high as five feet. Tr. 162-63. Arbon further testified that there was another culvert going underneath the freeway (thus also providing the conditions that Suhr contended caused the steer to jump) only one mile up the road. Tr. 172. Certainly, if the steer could have jumped over a person, there is no basis for concluding that the shortened area of fence was the cause in fact of the steer's

escape, even assuming the existence of conditions sufficient to cause a steer to leap over a fence in the first place.

Realizing this flaw in his theory after the defendant's closing argument, Suhr made a last minute pitch in rebuttal that if steers can jump five foot fences and the state erects 4'4" fences, then "[i]f that isn't negligence I don't know what is." Tr. 681. Since Suhr adduced no evidence of any prior escapes over 4'4" fences or of the likelihood that a steer will jump such a fence, there was no competent evidence on which the jury could have based such a finding of negligence. Moreover, just as the evidence was insufficient to support Suhr's other theories as to how the steer escaped, it was insufficient to show that the steer actually did jump the 4'4" fence.

Not only was there insufficient evidence to support Suhr's theory that the steer escaped through one of the two allegedly defective areas in the fence bordering the pasture on the northbound side of the highway, there was insufficient evidence to support the conclusion that the steer was even in that pasture before its escape. Notably absent from the testimony of Tom Wilcock, the owner of the steer, was any claim that the steer had indeed been enclosed in the pasture on the northbound side of the highway. At the same time, Arbon testified that Wilcock had cattle in two other pastures in the same vicinity at the time of the accident and that cattle have a habit of roaming. Tr. 170-75. While, again, it may have been within the jury's prerogative to disregard Arbon's testimony, the

evidence nevertheless failed to establish the steer's whereabouts before its escape.

In closing, Suhr's counsel argued that both Arbon and Trooper Stephens had checked the fence "up and down the interstate" and found "[e]verything else in great shape," implying that the two allegedly defective areas were the only possibilities. Tr. 683. Of course, this argument ignores the fact that neither Arbon nor Stephens viewed either of the two allegedly defective areas as potential escape routes either. Even so, the testimony of Arbon and Stephens established only that there were no other defects in the fence within about a mile of the accident site. It did not diminish the possibility that the steer escaped through some other means (e.g., by jumping the standard height fence) or that it escaped further up or down the road from one of Wilcock's other pastures.

As shown by Rhiness, Vanderwater, Mitchell and Staheli, the essential causal link between the negligence and the injury cannot be reasonably inferred by the existence of the injury and the defect alone. There must be some additional evidence, either direct or circumstantial, to support the conclusion that the negligence in fact caused the injury. Suhr failed to adduce any such evidence and therefore the judgment and jury verdict must be reversed.

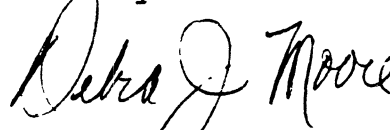
CONCLUSION

Suhr failed to adduce any evidence, direct or circumstantial, that established more than a mere possibility

that the steer escaped from the pasture on the northbound side of the highway adjacent to the accident site or through either one of the two allegedly defective areas in the fence bordering that pasture. At least equally likely was the possibility that the steer escaped from some other pasture or through some other means not attributable to UDOT. Thus, Suhr's theory of causation was based on complete speculation and conjecture, and the judgment and jury verdict should therefore be reversed.

RESPECTFULLY SUBMITTED this 15th day of June, 1992.

R. PAUL VAN DAM
Attorney General



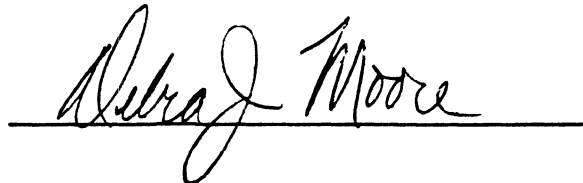
DEBRA J. MOORE
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief of Appellant was mailed, postage prepaid, to the following:

BEN H. HADFIELD
Mann, Hadfield & Thorne
98 No. Main Street
Brigham City, UT 84302

this 15th day of June, 1992.



ADDENDA

ADDENDUM 1

Ben H. Hadfield of Mann, Hadfield & Thorne #1288
Attorneys for Plaintiff
Zions Bank Building - 98 North Main
P. O. Box 876
Brigham City, Utah 84302-0876
Telephone: 723-3404

IN THE FIRST JUDICIAL DISTRICT COURT IN AND FOR BOX
ELDER COUNTY, STATE OF UTAH

MICHAEL H. SUHR,)	
Plaintiff,)	
vs.)	JUDGMENT ON THE VERDICT
UTAH DEPARTMENT OF)	
TRANSPORTATION, STATE OF)	
UTAH,)	Civil No. 900000191PI
Defendant.)	Judge F. L. Gunnell

Trial in the above matter came on regularly before the court on the 17th day of December, 1991. The plaintiff appeared personally and was represented by his attorneys Ben H. Hadfield and Jeff R Thorne; defendant State of Utah by its Department of Transportation appeared and was represented by its attorney, Mark Ward. A jury of eight people was regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined, and all evidence was submitted by the parties. After four days of trial and having considered the evidence, arguments of counsel and instructions of the court,

Case no 90000191-55

RECORDED
Date 1-24-92 Roll No. 09

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**Suhr vs. State of Utah
Judgment on Verdict**

the jury retired to consider the verdict, and after deliberating approximately four and one-half hours, returned its special verdict and answered the interrogatories as follows:

1. Was defendant State of Utah negligent as alleged? Answer: Yes
2. If defendant State of Utah was negligent as alleged, did such negligence proximately cause the plaintiff, Michael H. Suhr to sustain injuries? Answer: Yes
3. Was the livestock owner or operator negligent as alleged? Answer: No
5. Was plaintiff Michael H. Suhr negligent as alleged? Answer: Yes
6. If plaintiff Michael H. Suhr was negligent as alleged, did such negligence proximately cause the plaintiff Michael H. Suhr to sustain injuries? Answer: Yes
7. Assuming the combined negligence of all parties is equal to 100%, what percentage is attributable to:
 - A. State of Utah 85%
 - B. Livestock owner or operator 0%
 - C. Michael H. Suhr 15%100%
8. What amounts, if any, would compensate plaintiff for his damages, if any, which he sustained as a result of the accident?
 - A. Property Damages.
 1. Damage to truck \$ 4,000.00
 2. Towing Charges \$ 1,200.00

**Suhr vs. State of Utah
Judgment on Verdict**

B. Special Damages.

1. Past medical expenses	\$ 5,100.00
2. Past lost earnings	\$ 8,560.00
3. Future medical expenses	\$ 15,000.00
4. Future loss of earnings	\$ 50,000.00
5. Future loss of household services	-0-

TOTAL PROPERTY AND SPECIAL DAMAGES	\$ 83,860.00
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C. General Damages	\$ 50,000.00
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TOTAL VERDICT	<u>\$133,860.00</u>
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Pursuant to Section 78-27-44, Utah Code Annotated, as amended, the plaintiff is entitled to prejudgment interest at the rate of 10% per annum from the date of the accident on \$18,860.00, the amount of all special damages incurred to the date of trial. This interest totals \$5,922.00 as of December 30, 1991, which amount should be added to the judgment, for a total judgment of \$139,782.00. Pursuant to Utah law regarding comparative fault, the total judgment should be reduced by 15%, the amount of plaintiff's comparative fault, which is equal to \$20,967.30.

Based upon the foregoing, it is hereby **ORDERED, ADJUDGED AND DECREED** that plaintiff Michael H. Suhr shall have judgment


**Suhr vs. State of Utah
Judgment on Verdict**

against the State of Utah for the total amount of \$118,814.70.

In addition, plaintiff shall be awarded his costs pursuant to Rule 54(d) of Utah Rules of Civil Procedure. This judgment shall bear interest at the rate of 12% per annum from the date hereof.

DATED this 10 day of ~~December~~^{JANUARY 92}, 1991.

BY THE COURT;


F. L. GUNNELL
DISTRICT JUDGE

CERTIFICATE OF MAILING

In accordance with Rule 4-504 of the Utah Code of Judicial Administration, a copy of the within Judgment on the Verdict was mailed to defendant's attorney, Mark Ward, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114 by depositing in the United States mail, postage prepaid, a copy of said proposed Judgment on the Verdict, on the 24th day of December, 1991.


SECRETARY

tr/1:suhr.jud

BRIGHAM DISTRICT

JAN 9 11 57 AM '92

Ben H. Hadfield of Mann, Hadfield & Thorne, #1288
Attorneys for Plaintiff
Zions Bank Building, 98 North Main
P. O. Box 876
Brigham City, Utah 84302-0876
Telephone 723-3404

IN THE FIRST DISTRICT COURT, BOX ELDER COUNTY, STATE OF UTAH

MICHAEL H. SUHR,)	
)	
Plaintiff,)	ORDER DENYING MOTION FOR
)	JUDGMENT NOTWITHSTANDING
vs.)	THE VERDICT
)	
UTAH DEPARTMENT OF)	
TRANSPORTATION, STATE OF UTAH,)	
)	
Defendants.)	Civil No. 900000191

This matter came before the Court pursuant to the defendant's Motion filed in accordance with 50(b) of the Utah Rules of Civil Procedure. The defendant submitted a supporting Memorandum, a Memorandum in Opposition was filed by the plaintiff, and a Reply Memorandum was filed by the defendant. The Court reviewed these documents prior to the hearing which was held on January 8, 1992, beginning at 10:00 o'clock a.m. At said time, the plaintiff was represented by Ben H. Hadfield of Mann, Hadfield and Thorne and the defendant, State of Utah, was represented by J. Mark Ward, Assistant Attorney General. The Court heard arguments from each counsel concerning the Motion for

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Date 1-25-92 Roll No. 10

Case No. 900000191-6

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Judgment Notwithstanding the Verdict and then issued its decision from the bench.

In its ruling, the Court noted that the issue was whether there was sufficient evidence that was placed before the jury to satisfy it by preponderance of the evidence that there was in fact negligence, that there was in fact causation, and that there were in fact damages. The Court observed that there were sufficient instructions on causation to assist the jury in understanding what the Court expected them to find before they could make a finding of liability. There were specifically three separate jury instructions defining and explaining proximate cause. The Court is satisfied that the jurors reviewed those instructions and applied those against the evidence. The Court is of the opinion that the jury understood that there had to be a relationship of causation and negligence on the part of the State. The Court is further of the opinion that the Court must now consider the evidence in a light most favorable to the verdict.

Under these circumstances, the Court finds that there is sufficient evidence to show to the satisfaction of a jury, by a preponderance of the evidence, that the damages were proximately caused by defendant's negligence. The Court conferred with the jurors after the trial had been concluded. The jurors noted that

while there was testimony that the steer could have walked over the fence in one location and crawled under the fence at another location, the fact that the steer was hit in the immediate vicinity, very close to the defects in the fence, added more weight to the fact that the steer, by a preponderance of the evidence, got over or under the fence at those locations where there was negligence. This then relates to the proximate cause question. This Court is of the opinion that there was sufficient evidence for the jury to find as it did. The defendant's Motion for Judgment Notwithstanding the Verdict is denied.

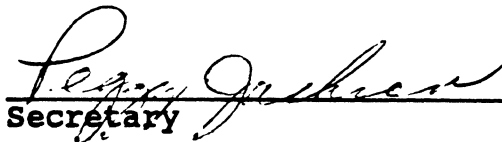
DATED this 21 day of January, 1992.



F. L. GUNNELL
DISTRICT JUDGE

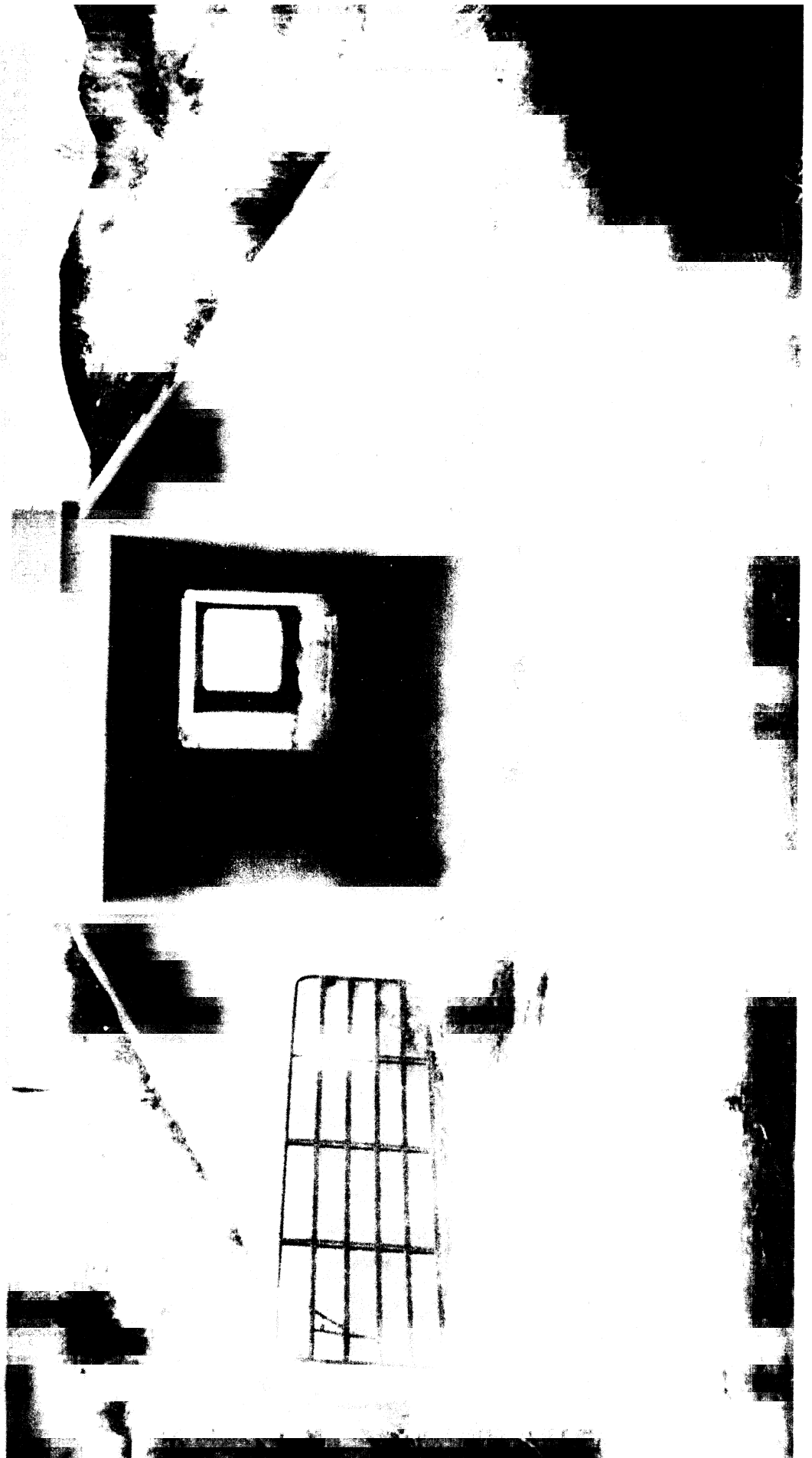
CERTIFICATE OF MAILING

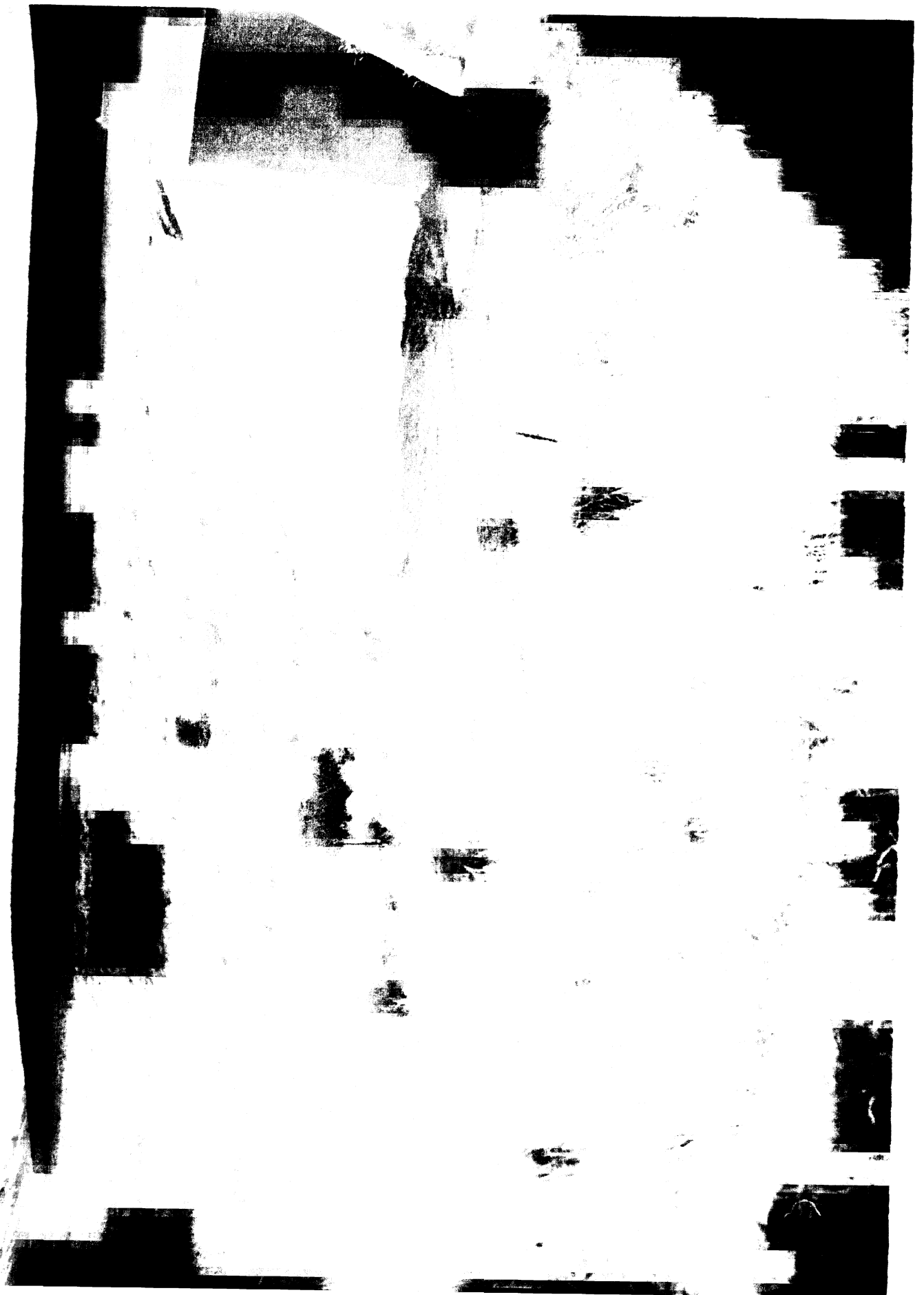
I hereby certify that on the 8 day of January, 1992, I mailed a copy of the foregoing **Order Denying Motion For Judgment Notwithstanding Verdict** to J. Mark Ward, Attorney for Defendant, 236 State Capitol, Salt Lake City, Utah 84114.


Secretary

ADDENDUM 2







ADDENDUM 3

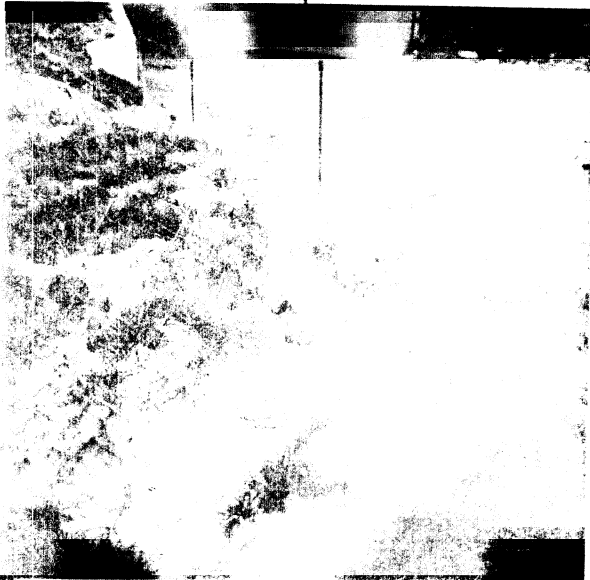


Photo taken 4-25-89 by MGS.
2-miles No. of Snowville
Leonard Wilcock Steer
hit on I-84



Photo taken 4-25-89 by MGS.
2-miles No. of Snowville
Leonard Wilcock Steer hit
on SR-84.



Photo taken 4-25-89 by MGS.
2-miles No. of Snowville
Leonard Wilcock Steer
hit on I-84.