

1993

Julia Lee Askew v. Paul Hardman : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Gary A. Dodge; Mark F. James; Kimball, Parr, Waddoups, Brown & Gee; Attorneys for Appellant.
Stephen G. Morgan; Mitchel T. Rice; Morgan & Hansen; Attorneys for Appellee.

Recommended Citation

Reply Brief, *Askew v. Hardman*, No. 930537 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5466

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

~~STATE~~
DOCUMENT
KFU
50
.A10

DOCKET NO.

930537CA

IN THE UTAH COURT OF APPEALS

JULIA LEE ASKEW,)	
)	Appeal No. 930537-CA
Plaintiff and Appellant,)	
)	
vs.)	
)	Priority No. 15
PAUL HARDMAN,)	
)	
Defendant and Appellee.)	

APPENDIX TO
REPLY BRIEF OF PLAINTIFF/APPELLANT

District Court Civil No. 91-0400665

Honorable George E. Ballif (Retired); Honorable Lynn W. Davis
Fourth Judicial District Court of Utah County District Judges

Stephen G. Morgan
Mitchel T. Rice
MORGAN & HANSEN
Kearns Building, Eighth Floor
136 South Main Street
Salt Lake City, Utah 84101

Attorneys for Appellee
Paul Hardman

Gary A. Dodge
Mark F. James
KIMBALL, PARR, WADDOUPS,
BROWN & GEE
185 South State Street,
Suite 1300
Salt Lake City, Utah 84111

Attorneys for Appellant
Julia Lee Askew

FILED
Utah Court of Appeals

OCT 19 1993


Mary T

IN THE UTAH COURT OF APPEALS

JULIA LEE ASKEW,)	
)	Appeal No. 930537-CA
Plaintiff and Appellant,)	
)	
vs.)	
)	Priority No. 15
PAUL HARDMAN,)	
)	
Defendant and Appellee.)	

APPENDIX TO
REPLY BRIEF OF PLAINTIFF/APPELLANT

District Court Civil No. 91-0400665

Honorable George E. Ballif (Retired); Honorable Lynn W. Davis
Fourth Judicial District Court of Utah County District Judges

Stephen G. Morgan
Mitchel T. Rice
MORGAN & HANSEN
Kearns Building, Eighth Floor
136 South Main Street
Salt Lake City, Utah 84101

Attorneys for Appellee
Paul Hardman

Gary A. Dodge
Mark F. James
KIMBALL, PARR, WADDOUPS,
BROWN & GEE
185 South State Street,
Suite 1300
Salt Lake City, Utah 84111

Attorneys for Appellant
Julia Lee Askew

TABLE OF CONTENTS

EXHIBITS

- A. RULING ON PLAINTIFF'S MOTION TO COMPEL DISCOVERY
- B. DEPOSITION OF: PAUL HARDMAN VOLUME I and VOLUME II
- C. DEPOSITION OF: LORA HARDMAN
- D. UTAH COUNTY OFFENSE REPORT/PLAINTIFF'S TRIAL EXHIBIT 15
- E. DEPOSITION OF: JERRY MONSON
- F. DEPOSITION OF: DAVID C. GUEST
- G. TRIAL TESTIMONY OF: JERRY MONSON dated 01/05/93
- H. DEPOSITION OF: FRANK GRANT
- I. AFFIDAVIT OF GREG JOHNSON
- J. AFFIDAVIT OF STEPHEN G. MORGAN
- K. HEARING ON PLAINTIFF'S MOTION TO COMPEL dated 12/28/92
- L. TRIAL TRANSCRIPT dated 01/13/93
- M. TRANSCRIPT OF HEARING ON PLAINTIFF'S MOTION TO COMPEL dated 03/06/92
- N. TRIAL TRANSCRIPT dated 01/04/93

Tab A

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

3/20/91

JUDGE

JULIA LEE ASKEW

Plaintiff,

Case Number: 910400665

vs.

RULING

PAUL HARDMAN

GEORGE E. BALLIF, JUDGE

Defendant.

This matter came before the Court on plaintiff's motion to compel discovery and for attorney's fees, filed December 11, 1991 and on defendant's motion for protective order, filed December 5, 1991.

The Court, having reviewed the motions and being fully advised, now enters its:

RULING.

The Court denies plaintiff's motion to compel and for attorney's fees in that the request for discovery is overbroad and involves material protected under the attorney work product doctrine pursuant to Rule 26(b)(3), Utah Rules of Civil Procedure. The Court therefore limits discovery to incidents occurring and documents created prior to the accident in issue. Documents prepared subsequent to the accident were prepared by the insurance company, at the instruction of defendant's attorney, in anticipation of litigation.

This ruling is made in accordance with the decision in

1.

EXHIBIT "A"

2.

Fontaine v. Sunflower Beef Carrier, Inc., 87 F.R.D. 89, 92 (1980)
in which the U.S. District Court held that, in the context of an
insurance investigation of an accident,

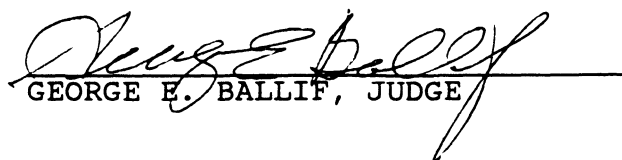
. . .the anticipation of the filing of a claim is undeniable
once an accident has occurred and a person injured or property
damaged. This is especially true in today's litigious
society. Documents prepared at that time, therefore, are
clearly prepared "in anticipation of litigation" and "by or
for another . . . party's representative."

In the present case, the documents were prepared by the insurance
company at the request of and on behalf of defendant's attorney.
They were created in preparation of an approach for defenses
against claims filed in conjunction with the accident.

In addition, plaintiff has failed to demonstrate substantial
need for the documents in accordance with Rule 26(b)(3), which
would overcome the protection of the attorney work product
doctrine. Accordingly, a protective order in favor of defendant
will be broadly phrased to encompass all items placed in the file
and all communications with counsel subsequent to the date of the
accident.

Dated at Provo, Utah this 20TH day of March, 1992.

BY THE COURT


GEORGE E. BALLIF, JUDGE

cc: Scott F. Young
Stephen G. Morgan

Tab B

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

** *** **

JULIA LEE ASKEW,)	
)	
Plaintiff,)	
-vs-)	CIVIL NO. 91-0400665
)	JUDGE BALLIF
PAUL HARDMAN,)	DEPOSITION OF:
)	PAUL HARDMAN
Defendant.)	VOLUME I
)	

** *** **

BE IT REMEMBERED THAT on the 6th of May, 1992, the deposition of PAUL HARDMAN, produced as a witness herein at the instance of the Plaintiff herein, in the above-entitled action now pending in the above-named court, was taken before Deborah F. LaVine, a Certified Shorthand Reporter and Notary Public in and for the State of Utah commencing at the hour of 10:15 a.m. of said day, at the law offices of Kimball, Parr, Waddoups, Brown & Gee, 185 South State Street, Suite 1300, Salt Lake City, Utah;

That said deposition was taken pursuant to Notice.

ORIGINAL



**Rocky Mountain
Reporting Service, Inc.**

322 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Phone (801) 531-0256

Statewide Reporting
National and Merit Certified Reporters
Expedited Delivery
Computerized Transcription
IBM Compatible Disks
Litigation Support Software
Video Depositions

1 a clear memory?

2 A. No.

3 Q. Have you had the opportunity to meet with your
4 counsel prior to coming to the deposition today?

5 A. Yes.

6 Q. Other than meeting with your counsel, have you done
7 anything else to prepare for the deposition?

8 A. No.

9 Q. Have you read or reviewed any documents?

10 A. I read the interrogatories last night.

11 Q. Anything else?

12 A. No.

13 Q. Are you still represented by Mr. Jay Peck in this
14 case?

15 A. Not with this specific part of the case. Involving
16 my father, yes, but that's --

17 Q. But with respect to you, Mr. Peck doesn't represent
18 you personally?

19 A. No, not right now.

20 Q. You met with an insurance agent the day following
21 the accident that is the subject of this lawsuit; correct?

22 A. Yes.

23 Q. Do you recall the name of the agent with whom you
24 meet?

25 A. Bob Harmon.

1 Q. Is he an agent with Utah Farm Bureau?

2 A. Yes. I think he's an adjuster or an agent,
3 whatever.

4 Q. An insurance adjuster. And he recorded a
5 conversation between you and he; is that correct?

6 A. Yes.

7 Q. Do you know whether a transcript of that recording
8 ever was prepared?

9 A. Yes.

10 Q. Did you review that transcript in preparing for
11 your deposition today?

12 A. No.

13 Q. Have you ever reviewed that transcript?

14 A. It's been read to me once, but I've not read it
15 myself.

16 Q. Do you recall who read the transcript to you?

17 A. I believe Steve did.

18 Q. Do you recall when that occurred?

19 A. It was some time ago. I don't remember exactly
20 when it was.

21 Q. Do you have a copy of the transcript?

22 A. No.

23 Q. Do you know whether the transcript has ever been
24 shown to anyone other than yourself and your counsel, of
25 course?

1 A. No.

2 Q. Tell me, if you would, the names of the persons who
3 you consider to be your neighbors.

4 A. All my neighbors?

5 Q. Your neighbors, yes.

6 A. Mike Locke, Phil Falk, Darrell Allred, and Doug
7 Smith, Douglas Smith, Harold Kinsey, and Chris Jensen, I
8 guess.

9 Q. And of those persons you just named, who lives the
10 closest to you?

11 A. Probably Doug Smith. There's two others.

12 Q. Okay.

13 A. Brent Beckstead. He would actually live a little
14 closer.

15 Q. Than Doug Smith?

16 A. Than Doug, yeah. We're talking, you know, within a
17 block.

18 Q. Okay.

19 A. Of course, we're talking within a mile are
20 neighbors also. And Terry Beckstead would be the other one.

21 Q. Terry Beckstead?

22 A. Uh-huh.

23 Q. Do you know, Mr. Hardman, whether the transcript
24 that was made from the recording of the conversation between
25 you and Mr. Harmon the day following the accident is contained

1 on a computer disk?

2 A. No.

3 Q. You don't know?

4 A. I don't know.

5 Q. Now, again, Brent Beckstead then is your closest

6 neighbor as far as geographical location?

7 A. I would think so, yes.

8 Q. How far away does Mr. Beckstead live from you?

9 A. Three-quarters of a mile maybe.

10 Q. What is it you do, Mr. Hardman, for a living?

11 A. I teach school at Utah Valley Community College. I

12 also run a farm.

13 Q. What do you teach?

14 A. Diesel mechanics.

15 Q. You say you also run a farm?

16 A. Yes.

17 Q. What sort of farming operation do you have?

18 A. Raise hay, grain, and horses.

19 Q. Now when you say you raise horses, you actually

20 raise horses for commercial sale?

21 A. Yes.

22 Q. How long have you been involved in agriculture?

23 A. Since I was a youth, a year ago. Wasn't I a youth

24 a year ago? My father's -- I was raised on a farm, and I've

25 continued to farm since I can remember.

1 Q. So you consider yourself to be familiar with farm
2 animals?

3 A. Yes.

4 Q. You've been around farm animals?

5 A. Yes.

6 Q. Dealt with them?

7 A. Yes.

8 Q. And those animals would include horses?

9 A. Yes.

10 Q. Do you feel comfortable around horses?

11 A. Yes.

12 Q. How long have you dealt with horses?

13 A. Well, I've had horses, you know, since I was young,
14 again, since my youth. But I've actually probably dealt with
15 horses 15 years.

16 Q. How long have you commercially raised horses or
17 raised horses for resale to others?

18 A. 12 years, give or take, I guess.

19 Q. Do you buy and sell horses, or do you raise the
20 horses you sell, or what is it you do with respect to --

21 A. Mostly raise horses to sell.

22 Q. So you have mares that are bred, and then you sell
23 the colts; is that --

24 A. Yes.

25 Q. Do you consider yourself to be knowledgeable

1 regarding animal behavior?

2 A. Some animal behavior, I do, yes.

3 Q. How about horses?

4 A. Yes.

5 Q. In the past five years, how many horses have you

6 bought approximately?

7 A. Maybe five.

8 Q. How many have you sold?

9 A. Five, maybe six.

10 Q. And would that five or six include foals that you

11 have raised?

12 A. Yes.

13 Q. And then during that time period, the last five

14 years, have you also raised foals that you have kept?

15 A. Yes.

16 Q. And how many?

17 A. Again maybe six, somewhere in that area.

18 Q. Do you recall as of November 20th of 1989 how many

19 horses you owned?

20 A. Approximately 15.

21 Q. How many do you own presently?

22 A. I believe I've got 12.

23 Q. Are you familiar with the migratory patterns of

24 horses?

25 A. Somewhat, yes.

1 Q. Is there somewhere you would expect a horse to go
2 if it leaves an enclosure or escapes from an enclosure?

3 A. Yes.

4 Q. Where would that be?

5 A. My horse or --

6 Q. Well, in general.

7 A. Any horse?

8 Q. Any horse.

9 A. He would generally go to an area that he's been
10 kept at for a period of time.

11 Q. Estimate for me how many horses you believe you
12 have owned over the period of your life.

13 A. Oh, geez, in my life, maybe 25, 27, somewhere in
14 that area.

15 Q. Explain for me, if you could, how it is that you
16 are familiar with the migratory patterns of horses.

17 A. By observation on what they do.

18 Q. This is personal observation?

19 A. Yes.

20 Q. Is this observations that you have made over a
21 period of time?

22 A. Uh-huh, yes.

23 Q. Over what period of time have you made those
24 observations?

25 A. During the time that I've owned horses.

1 Q. Are there instances of which you are aware where
2 horses have escaped from an enclosure and returned to a place
3 they have been kept before?

4 A. Yes.

5 Q. And would you describe for me those instances.

6 A. If you have maybe two different pastures and they
7 escape out of one pasture, more than likely they may go to
8 another pasture that they've been in prior to then.

9 Q. You've seen that happen before?

10 A. I've seen it happen.

11 Q. Seen that happen with horses that you owned?

12 A. Yes.

13 Q. Have you seen that happen in other instances with
14 horses that you didn't own?

15 A. I've seen it happen, yes, yeah. Well, horses that
16 I didn't own, when I seen them get out, you know, I've seen
17 them leave an area and go to another area. I don't know if
18 that's where they normally would go because, you know, I don't
19 know where they're kept all the time.

20 Q. But you have observed with your own horses that
21 when they got out of an enclosure, they've returned to another
22 area they've been kept?

23 A. The nature of the animal.

24 Q. Now you mention that you have observed that happen,
25 escaping from one field and going to, I take it, a field where

1 the horses have previously been kept; correct?

2 A. Yes.

3 Q. Have you ever seen horses escape from an enclosure
4 and return to a corral or the area of a corral where they've
5 previously been kept?

6 A. They will generally go where they are not confined.
7 In other words, they will go to an area where there's not
8 people or where they've got more freedom rather than going to
9 a corral.

10 Q. Have you ever seen horses return to a corral where
11 they've previously been kept after escaping from an enclosure?

12 A. Yes.

13 Q. How many times have you seen that happen?

14 A. Maybe once.

15 Q. And do you recall the occasion when that happened?

16 A. I don't remember exactly when it was, no, it was a
17 long time ago.

18 Q. Do you remember approximately when it was?

19 A. Oh, geez, four years maybe. You know, it's been
20 quite a while.

21 Q. And were those horses that were owned by you?

22 A. Yes.

23 Q. Do you recall from where those horses escaped?

24 A. No.

25 Q. Do you know where those horses went to after they

1 escaped?

2 A. One occasion, as I say, it was a long -- it was
3 quite a while ago. They got out. And I have some -- I have
4 two pastures basically, a summer pasture and a winter pasture.
5 In the summer pasture, there are some corrals that I use to
6 catch some horses with if I want to catch them. I also feed
7 them grain in the corrals because it's easier to catch them.
8 They'll come in and get the grain.

9 They left my winter pasture. It was in the
10 wintertime when the feed was not -- you know, when there was
11 some snow. And they left the winter pasture and went over to
12 the summer pasture, and I caught them in the corral down at
13 the summer pasture.

14 Q. And can you tell me where the summer pasture that
15 you're talking about is located?

16 A. It's directly east of my house.

17 Q. You say directly east of your house?

18 A. Yes. It's down a half mile away.

19 Q. On the east side of State Road 68?

20 A. Yes.

21 Q. And where is the winter pasture you've discussed
22 located?

23 A. It's north and east of my house below Camp
24 Williams.

25 Q. And can you tell me over what periods of times you

1 have placed horses in the summer pasture and winter pasture?

2 A. In the summer pasture, I usually put them in there
3 in April -- well, excuse me, February. I leave them there
4 until September or October, depending on the weather
5 conditions, and then I move them to the winter pasture.

6 Q. And leave them there until February again?

7 A. Yes.

8 Q. And do you recall how many years you've been doing
9 this?

10 A. Ever since I've owned horses, that's usually what I
11 do.

12 Q. So you've used these two pastures for many years;
13 would that be fair?

14 A. Yes, uh-huh.

15 Q. And do you recall whether you used this same
16 grazing program in 1989?

17 A. Yes.

18 Q. Placed the horses in the summer pasture early in
19 1989?

20 A. (Witness nods head.)

21 Q. Kept the horses in that pasture until the late
22 summer or fall of '89, and then moved the horses to the winter
23 pasture?

24 A. Yes, uh-huh.

25 Q. Is there a particular breed of horse that you own?

1 A. Paint horses and quarter horses.

2 Q. And do you raise registered horses?

3 A. Yes.

4 Q. Do you own any horses that are not registered?

5 A. I don't, no -- well, yes, I own one. Excuse me.

6 One.

7 Q. Do you have horses that your wife owns in which you
8 have no ownership?

9 A. No.

10 Q. How about horses that any of your children own?

11 A. My son has claim on one horse, yes. The actual
12 owner, that's debatable, I guess.

13 Q. Having been raised on a farm, I understand that.

14 A. Technically, yeah, I guess it's his horse.

15 Q. And in 1989, was that also the case that the horses
16 you own for the most part were registered horses?

17 A. Yes.

18 Q. Also a combination, I take it, of paint and quarter
19 horses?

20 A. Yes.

21 Q. How long have you owned registered horses? Would
22 that differ from --

23 A. No. With the exception of the one that I have
24 that's not registered, all my horses have been registered.

25 Q. Now during 1989, you rented a pasture that is just

1 south of Camp Williams and east of State Road 68; is that
2 correct?

3 A. East of Camp Williams.

4 Q. And a little bit --

5 A. Yes, sir.

6 Q. -- south of the actual location on the top of the
7 hill?

8 A. Yes.

9 Q. And that's the pasture you previously referred to
10 as the winter pasture?

11 A. Yes.

12 Q. And you understand the winter pasture, so we're
13 straight, to be the same pasture that Mr. Young and I visited
14 with you and your attorney some months ago?

15 A. Yes.

16 Q. Now were you renting that pasture as of November
17 20th, 1989?

18 A. Yes.

19 Q. How long have you been renting that pasture?

20 A. Five, six years, actually leasing it, you might
21 say.

22 Q. Leasing it. And was that a year-round lease?

23 A. Yes.

24 Q. And during the period, this five- to six-year
25 period prior to 1989, had you continuously leased that pasture

1 on a year-round basis from your father?

2 A. Used it but didn't really lease it. There was no
3 agreement, you know, as far as an actual lease type situation.

4 Q. Nothing in writing?

5 A. No, but I mean nothing changed. When the lease
6 came, you know, when we started the lease, then nothing was
7 different than it was before except for the lease, you might
8 say.

9 Q. Meaning that before you entered into a lease, you
10 still used the pasture?

11 A. Yes, yes.

12 Q. So how did entering into the lease change it?

13 A. The only difference was that prior to that time, my
14 father and I worked the farm together. And then about six
15 years ago, my father quit farming. And when he quit farming,
16 then I took over the farm, which included the pasture. You
17 know, I operate the farm by myself rather than him working
18 with me.

19 Q. Do you recall the year that occurred?

20 A. No. It's approximately -- it might have been '84,
21 '83. I don't know exactly.

22 Q. Since 1983 or '84, has anyone had use of the
23 pasture other than yourself?

24 A. No.

25 Q. Do you understand that the pasture I'm referring to

1 is the winter pasture we've talked about?

2 A. Yes.

3 Q. Did you have any agreement or understanding with
4 your father as to the care of the pasture?

5 A. Just the fact that I would maintain the pasture.

6 Q. And you discussed that with your father?

7 A. Yes.

8 Q. And do you recall when you had that discussion?

9 A. Not exactly, no.

10 Q. How about with respect to maintenance of the fences
11 around the pasture? Did you have any agreement or
12 understanding with your father in that regard?

13 A. We didn't talk specifically about that, but it was
14 just kind of understood that when I assumed responsibility for
15 the farm, I assumed responsibility for everything that took
16 place on the farm.

17 Q. You would just operate under the assumption that --

18 A. Well, as far as specifics of saying, You do this,
19 you do that, no, we didn't write anything like that down.

20 Q. How about any agreements with respect to
21 responsibility for livestock kept in the pasture? Did you
22 have any agreement of that sort with your father?

23 A. Meaning that I was responsible for the livestock,
24 is that what you mean?

25 Q. Correct. Who would have responsibility for the

1 livestock kept in the pasture?

2 A. Well, I had responsibility because they were my
3 livestock.

4 Q. Are you aware of anyone else who you believe had
5 responsibility for maintaining the fences around the pasture
6 or for the livestock kept in the pasture?

7 A. No.

8 Q. And that would be since, again, '83, '84?

9 A. No.

10 Q. So other than yourself, no one?

11 A. No one.

12 Q. Tell me what agreements or understandings you had
13 in 1989 with Camp Williams regarding access to the pasture.

14 A. The same agreement that we've had ever since
15 existence. And that is, that occasionally Camp Williams would
16 use part of our pasture down by the river to do some of their
17 training and they were welcome to do so any time that they
18 wanted as long as it didn't interfere with something that we
19 were doing.

20 Q. Just for clarification, this is the winter pasture?

21 A. Yes.

22 Q. We're not talking about the pasture further to the
23 south?

24 A. Yes, the winter pasture.

25 Q. Okay.

1 A. Other than that, they had nothing to do with it or
2 they had no authority to get in there or do anything with the
3 pasture.

4 Q. Did you have any agreements or understandings with
5 Camp Williams as to who would be allowed over Camp Williams
6 property into your property?

7 A. No.

8 Q. No agreements in that regard?

9 A. No, sir.

10 Q. Did you have any agreement with the guard service
11 at Camp Williams that no one was to enter the winter pasture
12 area without your written permission?

13 A. We discussed that. I guess, actually with Camp
14 Williams, we had no written agreement. But a number of times,
15 we mentioned to Camp Williams that people were not to go onto
16 our property without permission, written permission. And we
17 told the guards at the gate. Of course, the guard gate is a
18 contractual service, and they change guards like people change
19 their hat up there. So they don't know what's going on.

20 Q. And do you recall what the responses were, if any,
21 to your request or your discussions that people not be allowed
22 to enter onto your property without written permission?

23 A. They just agreed that that's the way it should be.

24 Q. So was it your understanding that during the period
25 in, let's say, 1989 that Camp Williams understood that no one

1 was to go onto your property without written permission?

2 A. To my understanding, yes, there was nothing
3 written. But, yes, I believe they understood that.

4 Q. And the basis for that understanding was
5 conversations you had had with Camp Williams and with the
6 guard service?

7 A. Mostly Camp Williams personnel. We would talk to
8 the guard service once in a while.

9 Q. And could you tell me approximately how many
10 conversations you recall having or that you are aware of that
11 were had with Camp Williams and the guard service regarding
12 access or entry to your pasture?

13 A. I don't have any idea how many times, maybe three
14 or four.

15 Q. Do you recall what period of time those
16 conversations occurred?

17 A. Period of time with respect to years or what years?

18 Q. If you recall a particular year when you had such a
19 conversation, that would be helpful.

20 A. I don't recall any specific time other than the
21 fact that if we had found trespassers down on our property,
22 they would say just about all the time, Camp Williams gave us
23 permission to come in, which they could have or could have not
24 done that. And so occasionally I'd go up or call up at Camp
25 Williams and just reemphasize the fact that we didn't want

1 trespassers on our property. And that would happen
2 periodically and may happen once a summer or may happen twice
3 a summer or may not even happen, you know, in one year.
4 Depends on the situation on what happened.

5 Q. And were those conversations on every occasion
6 prompted by an incident of trespassing?

7 A. Yes.

8 Q. Can you tell me since 1984, what years you know you
9 spoke with Camp Williams about what we've been discussing or
10 what years you know you did not?

11 A. I don't know what years. It's just something that
12 happened.

13 Q. So that I'm clear, you know that at least during
14 the period '84 through, I take it, the present, you've had at
15 least three or four conversations?

16 A. Oh, yes.

17 Q. Possibly more than three or four?

18 A. Possibly.

19 Q. Possibly more than ten?

20 A. I won't say that.

21 Q. Do you recall when it was you first had an
22 understanding with Camp Williams or that you first talked with
23 Camp Williams about people entering onto the property, your
24 property?

25 A. No. Again, it had to have been some trespassing

1 incident, why I made contact at all. But I don't recall what
2 year.

3 Q. Do you recall anyone in particular that you spoke
4 with at Camp Williams about this matter?

5 A. I have talked to Major Huff, Colonel Huff now, and
6 I'm trying to think of the post commander prior to Colonel
7 Huff. Can't recall his name. The commander before Colonel
8 Huff, I talked to him also.

9 Q. Do you recall the name of anyone at the guard
10 service with whom you had a conversation regarding access to
11 the winter pasture?

12 A. No.

13 Q. Do you recall the name of the guard service?

14 A. No. I try to block that out of my mind.

15 Q. Why do you try to block that out of your mind?

16 A. Don't like them, I guess. No, I don't know. You
17 know, I just -- they change quite frequently. And so it seems
18 like the personnel, you know, in the service changes quite
19 frequently, and so I don't try to remember their names.

20 Q. On each occasion that you spoke with someone from
21 the Camp Williams or someone from the guard service, did they
22 agree to cooperate with you and agree to your request that
23 people not be allowed to enter your property without written
24 permission?

25 A. Yes.

1 MR. JAMES: Why don't we do that, and then
2 that'll help, I guess, when we're talking about summer
3 pastures and winter pastures.

4 MR. MORGAN: Should we go off the record?

5 MR. JAMES: But let's go off the record for a
6 minute, and you can draw a picture for us.

7 (WHEREUPON, a discussion was held off the record.).

8 MR. JAMES: We're back on the record, and Mr.
9 Hardman has drawn us a diagram of the location of Camp
10 Williams, his home, the summer pasture and the winter pasture
11 and then some other things we've been talking about. And
12 we'll mark that as Deposition Exhibit Number 1.

13 Q. (By Mr. James) Mr. Hardman, do you have any
14 knowledge in referencing the diagram that you have drawn as to
15 the route that the horses that escaped the pasture on November
16 20, 1989, traveled?

17 MR. MORGAN: You're asking --

18 MR. JAMES: If he has any knowledge of the
19 route they traveled, where they went after they escaped the
20 pasture.

21 MR. MORGAN: Other than speculating?

22 Q. (By Mr. James) For example, were you able to tell
23 from footprints or anything where those horses traveled?

24 A. I can give you my speculation as to where they came
25 from.

1 Q. You don't have any actual knowledge as to where
2 they came from?

3 MR. MORGAN: As to where they came from?

4 Q. (By Mr. James) Where they came from and went to?

5 A. Yeah, they came from this pasture and headed up
6 here, (indicating). I mean, no, they could have gone down
7 south and come back possibly.

8 Q. Would you put an X on this picture as to where the
9 horses exited from the pasture.

10 A. (Witness complies.)

11 Q. That's the X that you've circled?

12 A. Uh-huh.

13 Q. And would you also put a Y, and let's circle the Y,
14 as to where the horses were located when you found them.

15 A. (Witness complies.)

16 Q. And refresh my recollection. You found them the
17 evening of the accident or the next morning?

18 A. Evening of, part of them.

19 Q. And where were the part located that remained near
20 the pasture?

21 A. Right here, (indicating).

22 MR. MORGAN: Do you want a Z?

23 MR. JAMES: That would be fine. Let's put a Z
24 there.

25 A. (Witness complies.)

1 Q. (By Mr. James) And so there were four or five
2 horses that remained near the pasture, and the remaining
3 horses went up near your home?

4 A. Uh-huh.

5 MR. MORGAN: You're getting into an
6 uh-huh/huh-uh habit.

7 THE WITNESS: Yes.

8 MR. JAMES: Thank you

9 (WHEREUPON, a discussion was held off the record.)

10 Q. (By Mr. James) And with respect to how the horses
11 arrive from point X to point Y, you have no knowledge --

12 MR. MORGAN: Well, no knowledge --

13 Q. (By Mr. James) -- as to the route they took?

14 A. I have speculation, yes. But, I mean, I can't --
15 nobody can say exactly.

16 Q. Based on your knowledge of the migratory patterns
17 of horses, in particular of your horses, would you put a
18 dotted line for me where you believe the horses traveled.

19 MR. MORGAN: Well, let me just say that even if
20 it's a migratory pattern, you might know that they were at X
21 and they ended up at Y. But even if you know the migratory
22 pattern, I don't know that you can plot out the exact route
23 that they took.

24 (WHEREUPON, a discussion was held off the record.)

25 A. Okay. This field right here, (indicating), there's

1 a large field right here that has sprinklers on the field.

2 Q. (By Mr. James) and so the reporter can designate
3 this for the record, this is a field where you've drawn, well --

4 MR. YOUNG: East of Redwood Road and north of
5 what you have marked as a ditch.

6 A. We'll get to the ditch. Horses would have probably
7 come along here, (indicating), came up this route, ran into
8 the sprinkler pipe so they would not jump over or crawl
9 underneath the sprinkler pipe.

10 Q. These were tall wheel lines?

11 A. Wheel lines. So they came between the wheel lines
12 where they run their main line, okay, which would have put
13 them in this area, (indicating). They came along here, come
14 up on the road and came down the road to go to the house.

15 Now where I say there's a ditch there, there's a
16 large, steep drop-off at the highway. I'm talking real steep.
17 Horses would not come up that when they could come straight
18 onto an area without going down in a hole and coming back up
19 out of it.

20 MR. YOUNG: May the record reflect that the
21 witness has drawn a dotted line demonstrating his best guess
22 as to the path that the horses would have taken; is that
23 correct?

24 THE WITNESS: Yes.

25 MR. YOUNG: Okay.

1 THE WITNESS: There's some real logic here if
2 you want it.

3 MR. YOUNG: I'd like that, please.

4 Q. (By Mr. James) Sure. Any time we can get logic
5 into one of these things --

6 A. Horses aren't dumb. They're smarter than we are,
7 if you believe that or not.

8 Q. I believe they're smarter than cows.

9 A. Not as smart as a pig. But anyway, had the horses
10 entered the road -- this is a dirt road that comes over below
11 my house that joins onto this oil road.

12 Q. This is a road that's pretty much immediately or
13 directly east?

14 A. Yes, and this would go down to my summer pasture
15 also.

16 Q. So this is the road that connects alongside, it
17 looks like along the north side of your summer pasture, that's
18 the road you're --

19 A. Yes.

20 Q. -- referencing?

21 MR. MORGAN: South side of the ditch.

22 THE WITNESS: Yes.

23 Q. (By Mr. James) Along the south side of the ditch?

24 A. Had the horses come over to this road. Now if I
25 have my horses in here, (indicating), and I want to take them

1 walk over to it. No, I never saw her.

2 Q. Do you recall whether there was more than one
3 ambulance on the scene?

4 A. There may have been two. I'm not 100 percent sure
5 on that.

6 Q. What did you do next after you went down to the
7 accident scene the second time? Did you speak with anybody on
8 that occasion?

9 A. I spoke with one of the officers, and I really
10 don't remember what we even talked about. But I did speak to
11 one of the officers.

12 Q. And do you recall with which department or public
13 entity the officer was associated?

14 A. No. It could have been this county sheriff. I
15 don't. I don't remember which one it was.

16 Q. Do you remember anything you said to that officer?

17 A. I don't recall whether it was the first time or the
18 second time that I saw him, I made a statement, something
19 about the poachers, cussing. I cussed the poachers. And this
20 is before I'd ever been down there. But I just made a
21 statement like the damn poachers or hunters have probably left
22 the gates down or the fences down or something.

23 Q. You recall having made some sort of statement?

24 A. I made some statement like that, yeah.

25 Q. To this officer?

1 see a bunch of magpies, you automatically think something's
2 dead. I mean, they're vultures.

3 Q. Like when you see a bunch of lawyers, you think
4 there's been an accident?

5 A. You hope there's a bunch of magpies right there,
6 yes. So the magpies, as I got over there, there had been a
7 deer killed there. There was entrails, deer entrails, and
8 they were almost gone. They had eaten a good share of them.
9 There was some ~~eating a good share of the deer~~. So I came on
10 back and went up to my house after that.

11 Q. Did you observe any magpies in this area on the
12 prior afternoon --

13 A. No.

14 Q. -- when you had driven by the pasture?

15 A. There's always magpies down there, but they don't
16 congregate.

17 Q. And you say most of the entrails were gone?

18 A. About half of them, maybe not that many. Quite a
19 few of the entrails were gone.

20 Q. Did you observe any blood in the area?

21 A. Dried, some dried blood. Well, just right there
22 where the entrails were at.

23 Q. Did you observe any bullet casings anywhere?

24 A. No. Do you hunt deer?

25 Q. Yes.

1 posts along the north side of the fence?

2 A. No.

3 Q. Do you know if anyone has added any steel posts
4 along the north side of the fence since November of 1989?

5 A. Back up. Yes, I have not -- I haven't -- this
6 fence comes along, and then it drops down to the river, right?

7 Q. Right.

8 A. Up here, no. Where it drops down to the river, I
9 added some posts in there, and there's some little --

10 Q. That would be as it goes down over the hill?

11 A. Yeah, right. I did add posts down there, plus I
12 put some -- no, that was before. So I did add some between
13 there and the river. It seems like maybe two, two or three.

14 Q. And when did you do that?

15 A. I don't recall. But it was since '89, I did that.

16 Q. Where you added those posts were in the area
17 further east from where the horses got out; is that correct?

18 A. Yes, yes.

19 Q. And do you know whether any posts since 1989,
20 November, have been removed from that fence? I'm talking,
21 again, the north side, the north fence of the winter pasture.

22 A. I don't think so.

23 Q. After pulling the fence back up and putting the
24 horses back in, you returned to your house; correct?

25 A. Yes.

1 Q. Do you recall what you did next?

2 A. Called the county sheriff.

3 Q. Do you recall with whom you spoke at the county
4 sheriff's office?

5 A. No, I don't. And I called Bob Harmon from the Farm
6 Bureau.

7 Q. Who did you call first of the two?

8 A. I don't remember. But I need to make a correction.
9 I'm older, and my mind is going, and I realize this. I did
10 not put the fence up until after I had the sheriff and Bob
11 Harmon come out and look at it. And I apologize for that. I
12 told you I did, but I didn't. I left the fence down.

13 Q. You left it down?

14 A. Yes. As I recall, I think I kicked the horses in
15 the pasture, but I left the fence down.

16 Q. And was there a reason that you thought the horses
17 would stay in the pasture given the fence was down?

18 A. I didn't really think about that. I wasn't
19 concerned about it at that time. My biggest concern was the
20 fact that the fence was down and that the wires were on the
21 inside of the fence.

22 MR. MORGAN: Inside of the fence?

23 THE WITNESS: Inside of the posts.

24 Q. (By Mr. James) On the inside of the pasture?

25 MR. YOUNG: Pasture?

1 MR. MORGAN: Is that a yes?

2 A. Yes.

3 Q. (By Mr. James) Did you observe any tire tracks in
4 the area of the deer entrails?

5 A. Well, no, that's on a road, a dirt road. So, no, I
6 didn't.

7 Q. This is a road that runs along here?

8 A. Yes. It's a canal road. That's access.

9 Q. There's a canal and a road that runs along --

10 A. There's an access road along the canal, yes.

11 Q. Along the canal where the entrails were located?

12 A. Yes.

13 Q. How far was it from the intersection of the dirt
14 road leading away from the pasture toward Camp Williams and
15 the deer entrails?

16 A. Here?

17 Q. Yes.

18 A. An eighth of a mile maybe.

19 Q. And how far was it from the place where the tracks
20 into the pasture were located and the deer entrails?

21 A. A quarter of a mile maybe.

22 Q. Now I believe you stated that the tracks were fresh
23 tracks; is that accurate?

24 A. These tracks?

25 Q. Yes.

1 A. Well, to my knowledge. I'm not a judge of fresh --
2 I mean, they're tracks that were not there before, that I
3 noticed before, okay? So...

4 Q. So your basis for concluding to the extent they
5 were fresh was that you hadn't noticed them before?

6 A. Yeah. If I said fresh, well, I'm sure that's what
7 I'm alluding to, the fact that I had not noticed them. Of
8 course, when something happens, you maybe pay a little more
9 particular attention on some things than you would normally.
10 I don't know.

11 Q. Then tell me how you knew that the entrails were
12 deer entrails?

13 A. Maybe with all the deer I've killed, they sure
14 looked the same. They could have been -- well, they weren't
15 large enough to be horse. There weren't no sheep in the area.

16 Q. Did you --

17 A. Maybe I assumed that.

18 Q. Did you observe anything other than entrails, for
19 example, feet that had been cut off the animal --

20 A. No, there wasn't.

21 Q. -- or hair? You didn't observe any hair in the
22 area?

23 A. No.

24 Q. And then you returned to your house, and you
25 called -- you returned to the area, and you called the

1 sheriff's office. Was that the Utah County Sheriff's Office?

2 A. Yes.

3 Q. I'm not sure if I misspoke, but you returned after
4 viewing the entrails to the house and then called Bob Harmon
5 and the sheriff's office?

6 A. Yes.

7 MR. MORGAN: I don't believe he said in what
8 order.

9 MR. JAMES: He couldn't recall the order,
10 correct.

11 Q. (By Mr. James) Do you have any knowledge as to
12 whether the tracks that were located near or on the X that
13 you've drawn on the map were not tracks that had been made at
14 some prior date?

15 A. I don't know that for certain.

16 Q. And what did you say to the person at the sheriff's
17 office when you called that office on the morning of the 21st?

18 A. I don't know what I said. I said I've had maybe
19 that I've had some vandalism or some fence let down. I'd like
20 to have an officer come out and do some investigation. I
21 mean, I asked one to come out and do some investigation. I'm
22 sure maybe I told him I had some fence let down or something.
23 I don't know. I don't remember exactly what I told him.

24 Q. Now let me backtrack a little. You stated that you
25 saw that the wires had been undone and dragged to the inside

1 Q. And do you recall the time of day it was when he
2 arrived at your home?

3 A. It was morning time, a.m. I don't recall exactly
4 when.

5 Q. And do you recall what Mr. Harmon said to you when
6 he arrived at your home?

7 A. He didn't say much of anything to me.

8 Q. Do you recall what you said to him?

9 A. He asked me where the pasture was. And he wanted
10 to go look at it, and away we went.

11 Q. Did you go in your vehicle?

12 A. No.

13 Q. You went in his vehicle?

14 A. Yes, I did go in my vehicle. I'm sorry.

15 Q. Did he ride with you?

16 A. Yes.

17 Q. And while you were driving to the pasture, do you
18 recall what was discussed?

19 A. Basically what we've talked about as far as the
20 accident, just in general information, nothing specific at
21 that time.

22 Q. Did you tell Mr. Harmon that you had inspected the
23 pasture earlier that morning?

24 A. Yes.

25 Q. And do you recall telling him anything other than

1 what you've told me you observed?

2 A. We stopped and looked at the entrails. I told him
3 at that time just what I told you about them. And we went
4 down to the pasture and looked at the fence, and I told him
5 again what I told you, what I thought had happened, merely
6 speculation on my part, I guess. And he asked, I don't
7 remember what, a couple of questions, what had been the same
8 material what we've already talked about. And that's about
9 it.

10 Q. What questions in particular did he ask?

11 A. He asked me where the pasture was. And, of course,
12 the fence, he asked me about the fence, which side the horses
13 was in, you know, which was the pasture and which wasn't. And
14 I don't remember too much more of what he said.

15 Q. Did he --

16 A. You know, he asked -- you know, as I recall, it's
17 pretty much the same questions you've been asking me about the
18 pasture and the fences and so on. I don't recall anything
19 being real different.

20 Q. Now you say as you recall, do you have a clear
21 recollection of your conversations with Mr. Harmon?

22 MR. MORGAN: A clear recollection? What do you
23 mean by clear?

24 Q. (By Mr. James) Yes. As compared to or as opposed
25 to a cloudy or not a very good recollection.

1 A. You know, I remember him coming. I remember him
2 asking me questions about the fence, about how I thought what
3 had happened. As I recall, he asked me -- he may have asked
4 me if there were some other horses, if they had all gone to
5 the house. I don't remember that. You know, he asked me if
6 the horses had been out before, the same as what you had. He
7 asked me --

8 Q. Do you remember what you told him?

9 A. The same as I told you, as I recall.

10 Q. And do you have a specific recollection that what
11 you told Mr. Harmon has been the very same as what you have
12 told me?

13 A. I don't remember that there was much of anything
14 different to that. I can't, you know, if there was some point
15 that he asked me a question other than what we've talked
16 about, I don't remember the question, I mean, you know,
17 something that's drastically different. Maybe he stated it a
18 different way. But there's no point that we haven't covered
19 that he covered is what I'm saying. He hadn't covered
20 anything that we haven't already discussed as far as the
21 horses and the fence is concerned. He asked me nothing
22 different.

23 Q. So you have a specific recollection that everything
24 I have discussed with you today you discussed with Mr. Harmon?

25 A. Yeah, I think so. I mean, like I say, you know,

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

** *** **

JULIA LEE ASKEW,)
)
Plaintiff,)
-vs-)
)
PAUL HARDMAN,)
)
Defendant.)

CIVIL NO. 91-0400665
JUDGE BALLIF
DEPOSITION OF:
PAUL HARDMAN
VOLUME II

** *** **

BE IT REMEMBERED THAT on the 20th of July, 1992,
the deposition of PAUL HARDMAN, VOLUME II, produced as a
witness herein at the instance of the Plaintiff herein, in the
above-entitled action now pending in the above-named court,
was taken before Deborah F. LaVine, a Certified Shorthand
Reporter and Notary Public in and for the State of Utah
commencing at the hour of 9:18 a.m. of said day, at the law
offices of Kimball, Parr, Waddoups, Brown & Gee, 185 South
State Street, Suite 1300, Salt Lake City, Utah;

That said deposition was taken pursuant to Notice.

ORIGINAL



**Rocky Mountain
Reporting Service, Inc.**

322 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Phone (801) 531-0256

Statewide Reporting
National and Merit Certified Reporters
Expedited Delivery
Computerized Transcription
IBM Compatible Disks
Litigation Support Software
Video Depositions

1 Q. Any other instances other than the occasion on
2 November 21, 1989, and the one you've just described for me
3 that you've had a horse that has been struck by a vehicle?

4 A. No.

5 Q. Do you recall whether the horse was killed in the
6 accident the eight or nine years before November? And I
7 assume when you said eight or nine years, were you referring
8 to eight or nine years before November of '89?

9 A. Yes.

10 Q. Okay.

11 A. Yes.

12 Q. Was that horse killed in that accident?

13 A. No, it broke its leg, so they shot the horse.

14 Q. And do you know whether anyone riding in the
15 vehicle that struck the horse was injured?

16 A. No.

17 Q. No --

18 A. No, there wasn't.

19 Q. Did a lawsuit result from that incident?

20 A. No.

21 Q. Describe for me depicting on Exhibit 3, if you
22 would, the access to the winter pasture. And let's use, oh,
23 boy, let's use this yellow marker. It seems to show as well
24 as any. The access by vehicle to the winter pasture, how a
25 vehicle can get into the winter pasture.

MR. MORGAN: From the summer pasture or from
2 the road?

3 MR. JAMES: From any location.

4 MR. MORGAN: Why don't you start from Redwood
5 Road.

6 A. I apologize. This is really not right.

7 Q. (By Mr. James) I've mislocated the fence on the
8 winter pasture?

9 A. Yes.

10 Q. I really missed it.

11 A. I wasn't paying attention. Okay. This is the
12 field where this X is should be right here. That's the field.

13 Q. We'll scribble out the X. That was the field with
14 the barley in it that you described earlier and the stubble?

15 A. Yes, this is where the horses got out right there,
16 (indicating).

17 Q. Why don't you put a circle around that X?

18 A. (Witness complies.)

19 Q. Now you have scribbled --

20 A. Now this fence goes right along here, (indicating).

21 Q. So should I scribble this out here too?

22 A. Yes.

23 Q. I'll scribble with black pen through where I
24 previously indicated the fence was located, which seems to be
25 mostly the entire picture.

1 MR. MORGAN: Are you trying to mislead my
2 client?

3 MR. JAMES: No.

4 Q. (By Mr. James) And let's take with the yellow
5 marker, if you would, now and outline the actual fence
6 boundaries on the winter pasture.

7 A. (Witness complies.)

8 Q. Now do the boundaries on the summer pasture look
9 okay?

10 A. They should go like this, (indicating).

11 Q. You or your father owned -- or your father owned
12 the entire area east of State Road 68 that is enclosed with
13 the red. But the summer pasture --

14 MR. MORGAN: Wait. Inclosed by the red, to the
15 south?

16 MR. JAMES: The red line.

17 MR. MORGAN: To the south of the winter
18 pasture?

19 MR. JAMES: Yes.

20 MR. MORGAN: He's got the winter pasture in
21 yellow now.

22 MR. JAMES: Yes, well, let me try that again.

23 Q. (By Mr. James) I'm now referencing the area of the
24 summer pasture, and that area you have marked with a yellow
25 line. And I take it that the summer pasture exists from the

1 yellow line to the east and is enclosed on the south by the
2 red line; is that correct?

3 A. Yes.

4 Q. And then the area the larger area to the north and
5 to the west that is enclosed by red that is east of State Road
6 68 was land owned by your father?

7 A. Yes.

8 Q. And that's farm land?

9 A. Yes.

10 Q. And then your home is immediately to the west on
11 the west side of State Road 68?

12 A. Yes.

13 Q. Now I had asked you before we corrected the
14 boundaries on the exhibit if you would draw the access by
15 vehicle to the winter pasture. And Steve suggested that you
16 start on State Road 68, Redwood Road, any access from that
17 road and then perhaps move around.

18 A. (Witness complies.)

19 Q. So you've marked that one in yellow. And I take it
20 then that there is a gravel road that goes from State Road --

21 A. Oil road --

22 Q. That's an oil road --

23 A. -- that goes east --

24 Q. -- from State Road 68 east --

25 A. A gravel road from this point.

1 Q. -- and gravel road --

2 A. -- to here, (indicating).

3 Q. -- to the northwest corner of the pasture?

4 A. (Witness nods head.)

5 Q. And that road travels along the west side of the
6 pasture, follows the fence along that side?

7 A. Yes.

8 Q. And is there a gate located anywhere to restrict
9 access by that road?

10 A. A gate at the turnoff right there.

11 Q. There's a gate right near the 17.7 number?

12 A. Yes.

13 Q. Let me do this, if I could. I'll put a little
14 arrow and draw gate. Is that accurate?

15 A. Yes.

16 Q. Is there any way to access the pasture by traveling
17 off the oil road to the north across one of the fields to the
18 west of the winter pasture and accessing the pasture that way?

19 A. Someone could drive across the bottom of this
20 stubble field right here, (indicating), come up this fence
21 line, and then go over.

22 Q. They could travel to the east of the gate. And is
23 there a gravel road that goes from --

24 A. No.

25 Q. You could simply travel across the pasture where

1 you've made the small red mark?

2 A. Stubble field.

3 Q. Stubble field and access the pasture that way?

4 A. They could come along the bottom of the stubble
5 field, come up the side of the south fence line, and catch
6 this road, (indicating).

7 Q. That would be then traveling on the field between
8 the 17.7 and the 18.7?

9 A. Yes.

10 Q. And travel across that field to the fence line?

11 A. Yes.

12 Q. On the south side of the winter pasture and then
13 traveling west along the south field to the gravel road;
14 correct?

15 A. Yes.

16 Q. And is there any restriction on that access? Is
17 there a gate between --

18 A. They have a cable gate right here, (indicating),
19 but it's not always up.

20 Q. Do you know whether in November of '89 that cable
21 gate was up?

22 A. No.

23 MR. MORGAN: He said "they" have.

24 THE WITNESS: "They" referring to the
25 landowner.

1 Q. (By Mr. James) Again what was the landowner's name?

2 A. Steve Holbrook.

3 Q. Now does the gate located near the 17.7 number on
4 Deposition Exhibit Number 3 have a padlock?

5 A. Yes.

6 Q. Do you know whether that gate had a padlock in
7 November of '89?

8 A. A combination lock or a padlock, one or the other.

9 Q. Who do you know that had a key or the combination
10 to the padlock on the gate we're talking about in November of
11 '89?

12 A. Landowners who have property north of the gate and
13 Camp Williams personnel.

14 Q. Who are those landowners?

15 A. Myself and Steve Holbrook.

16 Q. Any others that you're aware of?

17 A. Possibly the water master.

18 Q. Do you know the name of the water master?

19 A. Kent Beckstead.

20 Q. Was he the water master in November of '89?

21 A. I'm not certain. There may have been a different
22 one then. It seems like there was.

23 Q. You don't recall his name?

24 A. No.

25 Q. Are there any other accesses to the winter pasture

1 other than the two we've just described that you've just told
2 me about?

3 A. You want me to draw with this, (indicating)?

4 Q. Yes, please, with the magic marker.

5 A. (Witness complies.)

6 Q. You've drawn on the map a road that travels east
7 from State Road 68, crosses, it appears, some fields, and then
8 back down in. It looks like it travels north and then cuts
9 back southeast toward the pasture; is that correct?

10 A. Yes.

11 Q. Now is that access in any way restricted?

12 A. There's a gate off highway 68.

13 Q. Is that a gate that normally is locked?

14 A. Yes.

15 Q. What kind of a lock does it have on it?

16 A. The same lock that's on this lower gate,
17 (indicating).

18 Q. And was that also the case in November of 1989?

19 A. Yes.

20 Q. Who had access through that gate, or who had the
21 key or the combination to that lock?

22 A. The same people who had the one down below.

23 Q. Is there any way to access the winter pasture from
24 State Road 68 other than through the gate that you've just
25 drawn? And let me do this. Let me take my pen and draw

1 another arrow, and I'll put "gate" there; is that accurate?

2 A. Yes. Is there another way?

3 Q. Yes, to access, from State Road 68, the pasture.

4 A. (Indicating).

5 Q. Is that through Camp Williams?

6 A. Yes.

7 Q. You have to pass through the guard gate on the
8 third way that you've drawn?

9 A. You have to come to the guard gate, but you don't
10 go through it.

11 Q. I will draw a 3 with a circle around it to indicate
12 that is the third way to access the property that you've
13 described for me.

14 Now tell me why it is a vehicle simply cannot
15 travel east across the field from State Road 68 other than
16 through the gate along State Road 68 to access the winter
17 pasture.

18 A. Camp Williams has placed large rocks along the
19 highway here so you can't drive off the road, (indicating)?

20 Q. Is there any restriction of access along the oil
21 road that you drew that is south of the winter pasture? Is
22 there any reason you can't access the pasture across those
23 fields from the oil road other than through the gate?

24 A. There's a deep ditch that comes down the side of
25 the road on the north side of the road.

1 Q. And does that ditch end at the gate located near
2 the 17.7 number?

3 A. No, it continues on east.

4 Q. I take it there must be a culvert or something very
5 near the 18.7 number --

6 A. Yes.

7 Q. -- where the exists, I guess, a cable gate?

8 A. Yes.

9 Q. Is the cable gate a gate that also has a padlock?
10 Is there a padlock on the end of the cable?

11 A. Yes.

12 Q. Do you know who has the combination or key to that
13 lock?

14 A. The owner of the property.

15 Q. Doug Holbrook or -- excuse me.

16 A. Steve.

17 Q. Steve Holbrook?

18 A. Yes.

19 Q. Do you know the combination to that lock or have a
20 key to that lock?

21 A. No.

22 Q. Do you know whether anyone from Camp Williams does?

23 A. I would not think so.

24 Q. Is there any reason why a person in a vehicle could
25 not access the winter pasture from the east?

1 A. What do you mean, Is there any reason?

2 Q. From the east side of the pasture.

3 A. Oh, from the east?

4 Q. Yes.

5 A. They could come up the river, float up the river
6 and come in, walk in.

7 Q. But you would have to cross the Jordan River in
8 order to access --

9 A. Yes.

10 Q. -- the property from the east?

11 A. Right on this section right here, (indicating),
12 they could come in, go through the fields and come in. But
13 they'd have to go into the pasture. There's no way they could
14 go anywhere else.

15 Q. So if you continue east on the oil road that runs
16 south of the winter pasture, tell me where that road goes as
17 you continue east on that road.

18 A. It makes a turn right here and goes south, just --

19 MR. MORGAN: Around the end of the exhibit.

20 A. It turns just about at the end of the map that you
21 have here and goes --

22 Q. And goes south?

23 A. Goes, (indicating) --

24 Q. A person could access the pasture by driving across
25 the field with the 3.5 in the corner and then come up to the

1 southeast corner of the pasture?

2 A. It's possible, but it would be difficult.

3 Q. Why would it be difficult?

4 A. Ditches that are in the road.

5 MR. MORGAN: You said ditches in the road or
6 ditches in --

7 A. Ditches in between the fields.

8 Q. (By Mr. James) In the way?

9 A. In the way, yeah. There's a ditch down here,
10 (indicating), but they could come in at this point. They
11 could come in at --

12 Q. So perhaps --

13 A. -- this point.

14 Q. -- on the corners of the fields, they perhaps could
15 cross?

16 A. Perhaps, but then they would have to -- you know,
17 it would be difficult to get up to there from there,
18 (indicating).

19 Q. Now it appears to me that there is a light colored
20 line that runs east and west through the winter pasture. Is
21 that a road?

22 A. Yes.

23 Q. Let me take my blue pen and mark that. Now does
24 the road continue on the east end of the road outside of the
25 pasture?

1 A. No.

2 Q. Are you aware of anyone having access to the
3 pasture on November 20, 1989, through any of the three gates,
4 excuse me, yes, any of the three gates, the gate on the south
5 side of the pasture, the gate from State Road 68, or through
6 Camp Williams?

7 A. No.

8 Q. Other than yourself?

9 A. No.

10 Q. You accessed the pasture on November 20, 1989,
11 through one of those?

12 A. Yes.

13 Q. And which access did you use?

14 A. This gate, the south gate, (indicating).

15 Q. And did you also exit through the south gate?

16 A. Yes.

17 Q. Do you recall whether you locked the gate after you
18 exited through that gate on November 20, 1989?

19 A. I would assume I did.

20 Q. Do you have a specific recollection of whether you
21 did or did not?

22 A. I would say that I locked it.

23 Q. And you say that because that would be your normal
24 practice?

25 A. When I'm not farming over there, we always lock the

1 gate.

2 Q. And on November 20, '89, you were not farming in
3 the vicinity of the winter pasture?

4 A. Well, I was, but I wasn't going to be farming for a
5 week. So I would lock the gate. I'd been plowing over there
6 prior to that, yeah. That was earlier on I answered that.

7 Q. Now are you aware of any occasion in which anyone
8 accessed the winter pasture through Camp Williams? I've
9 marked that as access number 3. Do you see the number 3
10 access?

11 A. Yes.

12 Q. Are you aware of any instance of anyone accessing
13 the winter pasture through that access?

14 MR. MORGAN: At any time?

15 A. At any time or --

16 Q. (By Mr. James) Yes.

17 A. Yes.

18 Q. Now I believe you indicated that to access the
19 pasture through access number 3, through Camp Williams, you
20 traveled by the guard station but not through the guard
21 station; is that correct?

22 A. Yes.

23 Q. And does that mean that the guard station is
24 located further east than where the road turns to go down into
25 the pasture?

1 A. (No oral response.)

2 Q. Why don't you draw for me with a square where the
3 guard station is located.

4 A. (Witness complies.)

5 Q. So I take it then that the road actually cuts off --

6 A. Yes.

7 Q. -- prior to the guard station?

8 A. Yes.

9 Q. Do you have any understanding as to whether the
10 guard station has instructions or orders to stop people
11 attempting to access the vicinity of the winter pasture
12 through access number 3?

13 A. I do not know.

14 Q. Have you ever spoken with Camp Williams about that
15 access, access number 3?

16 A. The Camp Williams let's people go down fishing all
17 the time. And so I have spoken to them about telling the
18 guard gate, the people at the guard gate, to identify Camp
19 Williams property and our property so that they would not
20 trespass on our property.

21 Q. Following the accident on November 20, 1989, did
22 you check -- and when I say following, I'm talking within a
23 day or two after the accident. Did you check the gates and
24 other accesses to the winter pasture?

25 A. The next morning when I came down, I went through

1 this gate here, (indicating). And then there's a gate on --

2 Q. You went through the south gate?

3 A. Yes. There's also a gate right here, (indicating).
4 Or, excuse me. Yes, it would be right here, (indicating).

5 Q. So there is another gate on the south side that you
6 can access the winter pasture from the south?

7 A. Yes, you can.

8 Q. I'll draw an arrow and put "gate" there also.

9 A. That's a service road for the canal.

10 Q. And is that also restricted access?

11 A. Yes.

12 Q. And how is the access restricted?

13 A. The same lock that locks these other gates.

14 Q. So the same key or combination opens any of those
15 locks?

16 A. Yes.

17 MR. MORGAN: Any of those three?

18 Q. (By Mr. James) Any of the three?

19 A. Yes.

20 Q. And when I say three, I'm referring to the two
21 gates that are south of the pasture and the one gate from
22 State Road 68?

23 A. Yes.

24 Q. Now tell me again on November 21st, 1989, which
25 gate you used to access the property.

1 A. I used this gate and this gate, (indicating).

2 Q. Why is it that you used both gates?

3 A. When I was coming down this road, I could see my
4 horses were in this pasture right here or in this field right
5 here, not pasture.

6 Q. In the field where the X is located?

7 A. Yes. So I just come across the top gate to come
8 down west of the horses. It was easier access to them.

9 Q. So you accessed the pasture on that morning through
10 the gate on the -- let's call this gate the canal gate.

11 A. The canal road, yes.

12 Q. I'll mark on this "canal gate." You accessed the
13 pasture on the morning of November 21, 1989, through the canal
14 gate. And then did you exit through the gate on the south
15 side of the pasture further to the west?

16 A. I would have come out the same way so I could have
17 locked the gate.

18 Q. Now --

19 A. But later on, I came down through that gate.

20 Q. Later on the day of the November 20, 1989?

21 A. When I went down --

22 Q. November 21, 1989?

23 A. When I went down to fix the fence, I went through
24 the lower gate.

25 Q. Do you recall whether both gates were locked when

1 you first accessed those gates on November 21?

2 A. As I recall, they were, yes.

3 Q. Did you ever check --

4 MR. MORGAN: Is this a good time to take a
5 break? I don't know if the reporter needs one, but we've been
6 going an hour and 40 minutes.

7 MR. JAMES: That's fine.

8 (WHEREUPON, a recess was taken.)

9 MR. JAMES: Why don't you read back for me, if
10 you would, the last question I'd asked Mr. Hardman.

11 (WHEREUPON, record read.)

12 Q. (By Mr. James) Did you ever, Mr. Hardman, speak
13 with the Camp Williams people and inquire whether they were
14 aware of anyone accessing the winter pasture or the vicinity
15 of the winter pasture on November 20, 1989?

16 A. No.

17 Q. Now I believe there is a yellow gate through which
18 you can gain entrance into the winter pasture; is that
19 correct?

20 A. Yes.

21 Q. And would you show me on Exhibit 3 where that gate
22 is located?

23 A. It would be approximately right here, (indicating).

24 Q. You've placed an X there in blue?

25 A. Yes.

1 Q. And does that gate have a lock on it?

2 A. Yes.

3 Q. Did it in November of '89?

4 A. Yes.

5 Q. What kind of a lock did it have on it in November
6 of '89?

7 A. A padlock.

8 Q. Do you recall whether on November 20, 1989, that
9 padlock was locked?

10 A. It should have been. I didn't check the lock.

11 Q. Is it your practice to keep that gate locked?

12 A. Yes.

13 Q. And would that be your practice with respect to
14 that gate at all times during the year or simply at those
15 times when horses are kept in the pasture?

16 A. Definitely when horses are in the pasture, and
17 other times it may be unlocked at some times.

18 Q. Are you aware of any instance prior to November 20,
19 1989, other than the one specific instance that occurred
20 within the several weeks before that time when the fence was
21 knocked down and the horses got out, are you aware of any
22 other instance in which trespassers allowed horses to escape
23 from the winter pasture?

24 A. (No oral response.)

25 Q. Now let me say first that I know you've testified

1 about the November 20, 1989 incident. I also know you've
2 testified about the incident that occurred within a several
3 week period prior to that time and also possibly one or two
4 other instances occurring within the several week period prior
5 to November 20, 1989. Setting those instances aside, are you
6 aware of any other instance in which trespassers allowed
7 livestock to escape from the winter pasture?

8 A. Yes, there has been.

9 Q. And do you recall specifically any of those
10 instances in November, whether there were any of those
11 instances in November of '89, once again, setting aside --

12 A. I don't recall November of '89. It seems like not
13 every year, but it seems like whenever hunting season comes
14 along, hunters will oftentimes leave a gate down or tear a
15 fence down or something. That doesn't happen all the time but
16 occasionally.

17 Q. It had occurred prior to November of '89?

18 A. Yes.

19 Q. And had it ever occurred on the north fence of the
20 pasture, the winter pasture?

21 A. Not that I recall. Could have done.

22 Q. Do you have a recollection of trespassers allowing
23 livestock to escape from the winter pasture in areas other
24 than on the north side of the pasture?

25 A. Yes.

Tab C

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

-oOo-

JULIA LEE ASKEW,

Plaintiff,

-v-

PAUL HARDMAN,

Defendants.

)
)
) Deposition of:
)
) Lora Hardman
)
) No. 910400665
)
) Judge Ballif

-oOo-

Be it remembered that on the 28th day of October, 1992, the deposition of Lora Hardman was taken pursuant to notice, commencing at 9:50 a.m. of said day at 185 South State Street, #1300 Salt Lake City, Utah, before Diana Kent, a Certified Shorthand Reporter and Notary Public in and for the State of Utah.

CERTIFIED COPY



**Rocky Mountain
Reporting Service, Inc.**

322 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Phone (801) 531-0256

Statewide Reporting
National and Merit Certified Reporters
Expedited Delivery
Computenzed Transcription
IBM Compatible Disks
Litigation Support Software
Video Depositions

Diana Kent, C.S.R., R.P.R.

1 anything he had discussed with people down at the
2 accident scene?

3 A. I don't recall of anything specific,
4 anything he said to me about what he said to them or
5 what was discussed but I'm sure we talked about the
6 situation.

7 Q. Do you recall any discussions on the
8 evening of the accident regarding - and this would
9 be discussions between anyone that you may know
10 about - regarding how the horses may have escaped
11 from the pasture?

12 A. I remember probably right after we got
13 there my husband said something about the
14 tampering. He was probably speculating that the
15 fence had been tampered with where the horses were
16 because we had had an incident about two weeks
17 earlier of that happening.

18 Q. Of someone tampering with the fences?

19 A. Yes.

20 Q. And do you know whether on that
21 occasion, the incident two weeks earlier, and I
22 assume you are referring to two weeks before the
23 accident, correct?

24 A. Yes.

25 Q. Tell me what happened with respect to

1 that incident that you are referring to?

2 A. As I remember, within a month preceding
3 the accident, I would say over four weeks and up to
4 a month, there had been three times when the fence
5 had been tampered with. The first time I don't
6 think our horses were in there yet. My husband was
7 over farming and our son was with him and our son
8 noticed the fence was down and told his dad. So he
9 put it back up. And I would say it was in the
10 general vicinity of the same place that it was
11 tampered with again.

12 Q. And let me interrupt here. Is it your
13 understanding that it was along the north side of
14 the pasture?

15 A. Yes. The northwest corner of the
16 pasture area.

17 Q. And when I refer to the pasture
18 throughout this deposition, I'm referring to, I
19 believe, what your husband called the winter
20 pasture. Do you understand that to be the pasture
21 below the hill near Camp Williams?

22 A. Yes.

23 Q. That is the one I'm referring to.
24 Right.

25 A. Anyway, my husband repaired the fence

1 then and then sometime after that, and I would say
2 about two weeks prior to November 20th, I observed
3 some of our horses being in the adjacent field which
4 was not fenced. In other words, they had escaped
5 from the pasture they were in and gone to the
6 adjacent field.

7 And this was during the daytime and I
8 called my husband at work and told him that there
9 were some of the horses out, that they were grazing
10 in the field which had some new stubble coming up in
11 it. And I said, "It doesn't look like they are
12 going anywhere but I will keep an eye on them until
13 you get home from school," which would have been an
14 hour or two later or something like that, which I
15 did and they stayed there and grazed.

16 So he went over, when he got home from
17 school that day, and it would have probably been
18 home from Geneva, he was doing -- they do a one
19 semester work experience as teachers they do that at
20 Geneva occasionally.

21 Anyway, he went over and the fence, as
22 he told me, looked like someone had hooked onto it
23 with a three or four wheeler and pulled the wires
24 back as taut as they could until they pulled from
25 the posts. So my idea of it is that the fence, the

1 wires had been pulled back off of several of the
2 posts.

3 Q. Again, was this in approximately the
4 same location as the earlier incident you told me?

5 A. Yes, it was.

6 Q. Okay.

7 A. So he repaired that. And then from that
8 time, I mean this was two instances within a month
9 which was rather unusual. And so from that time on,
10 he just always came home that way and went over
11 there and the horses checked every day.

12 And so the night of the accident, I had
13 observed him. We were preparing to go hunting and
14 so I was watching for when he came home and as I was
15 doing my packing and I saw him come right about
16 4:30, come up that road and go over along the fence
17 line and check that before he came home.

18 Q. Now, I believe you mentioned three
19 incidents, and I'm unclear. So did the third
20 accident --

21 A. Was the accident.

22 Q. Was the night of the accident. Okay.

23 A. Yes.

24 Q. Now, with respect to the first incident
25 that you have described for me, is your knowledge

1 say, "Yes, they did."

2 I said, "Did you give them permission to
3 go down there fishing or hunting," or whatever?

4 And they would say, "Well, they said
5 they were going fishing," or whatever the
6 circumstances was.

7 And I almost always say, Did you explain
8 to them that this was permission to only go on Camp
9 Williams property and not on private property? And
10 the answers vary, but for the most part they did not
11 know what was private property and if they did, they
12 did not explain it to the people that they were
13 allowing to go down there.

14 Q. On any of those occasions, did the
15 person at the independent guard service make a
16 commitment that in the future they would do
17 anything?

18 A. On the contrary.

19 Q. What do you mean, "On the contrary"?

20 A. No, they didn't.

21 Q. Did you ask, on any of these occasions,
22 that the guard service inform people not to go on
23 private property?

24 A. Yes. Several times. And I asked for a
25 supervisor one time this summer. I said, "Would you

Tab D

* * * * * UTAH COUNTY * * * * *
OFFENSE REPORT
PRINTED: 01/27/92

REPORT NO: 0020180

CLASSIFICATION: CRIM MISCH
SUB CLASS: WISDEMEANOR

ADDRESS OF OCCUR: 9971 N SR68
DISTRICT: N
BEAT: 11
GRID: 0500

DATE REPORTED: 11/21/89
TIME REPORTED: 0818
DATE OCCURRED:
TIME OCCURRED:

DAMAGED PROP AMT: \$200
STOLEN PROP AMT:

PREMIUM:

COMPL/BUSN: HARDMAN, PAUL
DOB: SEX: M RACE: W
ST: UT ZIP: CITY: 01

REPORTING: MONSON, JERRY
INITIAL INVESTG UNIT: PATROL

COMMENTS: VANDALISM TO FENCE, RP WOULD LIKE EX PATROL FOR TRESPASSING AND SPOT
LIGHTING. 10400 N BETWEEN SR 68 AND 10400 W

INCIDENT NAMES

REPORT NO: 0020180-01
HARDMAN, PAUL
RPTG DOB: SEX: M RACE: W
ADDR: 9971 N SR 68
ID NO: 000000350
MISC ID: CTY: 01
ST: UT ZIP: RES PHONE: 768-3889
BUSN PHONE:

OFFENSE NARRATIVE

REPORT NO: 0020180

SYNOPSIS:

RP REPORTS HUNTERS KNOCKING DOWN HIS FENCE, CAUSING HIS HORSES TO GET
CUT ON THE HIGHWAY. NO SUSPECTS.

INITIAL CONTACT:

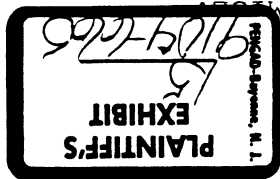
ON 11-21-89 AT 0845 HRS. R/D MET WITH THE RP PAUL HARDMAN AT HIS HOME.
RP ADVISED ONE OF HIS HORSES HAD BEEN HIT ON THE HIGHWAY LAST NIGHT 11-20-89
CAUSING A SERIOUS TRAFFIC ACCIDENT. THE NEXT MORNING 11-21-89 THE RP
CHECKED THE FENCE AROUND HIS PASTURE TO SEE HOW THE HORSE GOT OUT AND
OBSERVED A SECTION OF FENCE THAT HAD BEEN KNOCKED DOWN ON THE NORTH SIDE OF
HIS PASTURE NEAR CAMP WILLIAMS. THE RP SAID HE HAS PUT THAT SECTION OF
FENCE UP THREE TIMES SINCE THE DEER HUNT, BUT THE HUNTERS KEEP KNOCKING IT
DOWN.

OBSERVATION:

R/D RESPONDED TO SCENE WITH THE RP AND OBSERVED WHERE THE FENCE WAS
DOWN. IT APPEARED SOMEONE HAD KNOCKED THE FENCE DOWN WITH A FULL SIZE PICK-
UP TRUCK, AS THERE WAS OLD TIRE TRACKS NEAR THE FENCE. ALSO R/D OBSERVED

EXHIBIT "D"

9104-625



ERE A DEER HAD RECENTLY BEEN POACHED, ON THE RP'S PROPERTY.

CTION TAKEN:

RP WANTED TO SHOW R/D THE FENCE BECAUSE HE IS AFRAID OF BEING SUED
R HAVEING HIS HORSE CAUSE AN ACCIDENT. ALSO RP'S HORSE WAS KILLED IN AUTO
CIDENT. R/D ADVISED RP THAT HE WOULD PUT HIS PROPERTY ON THE EXTRA PATROL
BT SO OTHER DEPUTYS WOULD BE AWARE OF THE PROBLEM AND WATCH FOR TRESPASS-
3 AND VANDALISM IN THE AREA. NO FURTHER ACTION TAKEN.

CASE MANAGEMENT

REPORT NO: 0020180
PORTING : MONSON, JERRY INITIAL REPORTING UNIT: PATROL
LOWUP INVESTIGATOR: FOLLOWUP INVESTG UNIT:

FOLLOWUP ASSIGNED: NEXT REVIEW DATE:

E STATUS/DISPO: CLR EXCEPTN STATUS/DISPO DATE: 112189

LOWUP REPT RCVD: ASSISTING INVESTIGATOR:

LOWUP REPT RCVD: ASSISTING INVESTIGATOR:

VABILITY FACTORS:

VABILITY RATING: 0

END OF REPORT

Tab E

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH

-o0o-

JULIA LEE ASKEW,
Plaintiff,
vs.
PAUL HARDMAN,
Defendant.

Civil No. 91-0400665

Deposition of:

JERRY MONSON

Judge Baliff

CERTIFIED COPY

-o0o-

BE IT REMEMBERED that on the 16th day of September 1992, the deposition of JERRY MONSON, produced as a witness herein at the instance of the Defendant, in the above-entitled action now pending in the above-named court, was taken before Melinda J. Andersen, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, commencing at the hour of 4:20 p.m. of said day, at the offices of Morgan & Hansen, Kearns Building, Eighth Floor, 136 South Main Street, Salt Lake City, State of Utah.

That said deposition was taken pursuant to Notice.

-o0o-

MELINDA J. ANDERSEN
CSR No. 281

INDEPENDENT REPORTING
SERVICE
Certified Shorthand Reporters

1710 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
(801) 538-2333

1 have reference to in terms of a barbed wire fence?

2 A Knocking down. I guess I wasn't very clear on
3 that.

4 Q Can you read what you put down under initial
5 contact?

6 A "On 11-21-89 at 0845 hours R/D, reporting
7 deputy, met with the RP Paul Hardman at his home. RP
8 advised one of his horses had been hit on the highway last
9 night on 11-20-89 causing a serious traffic accident. The
10 next morning 11-21-89 the RP checked the fence around his
11 pasture to see how the horse got out and observed a section
12 of fence that had been knocked down on the north side of
13 his pasture near Camp Williams. The RP said he has put
14 that section of fence up three times since the deer hunt,
15 but the hunters keep knocking it down."

16 Q Do you have any recollection as to anything else
17 Paul Hardman, the reporting party, may have told you on
18 that initial contact other than what you have in your
19 report?

20 A I don't recall anything.

21 Q Having gone to his house and having received
22 this initial contact, did you then go out and make some
23 observations?

24 A Yes.

25 Q Did you record in your report what you observed?

1 A Yes, I did.

2 Q Could you read in the record what you have under
3 observation?

4 A Yes. "Reporting deputy responded to the scene
5 with RP and observed where the fence was down. It appeared
6 someone had knocked the fence down with a full size pickup
7 truck, as there was old tire tracks near the fence. Also
8 reporting deputy observed where a deer had recently been
9 poached on the RP's property." I believe there was a pile
10 of guts, if you will, where the deer had been cleaned.

11 Q When you say it appears someone had knocked the
12 fence down with a full size pickup truck, as there was old
13 tire tracks near the fence. Tell me why it appeared to you
14 that was the case?

15 A There were tire tracks that went through the
16 fence, old tire tracks. They went where the fence was.
17 This fence was -- the barbed wire was laying down. That's
18 why I make that observation.

19 Q Was the barbed wire laying down to the inside of
20 the fence or to the outside of the fence?

21 A I don't know. I don't have that noted here and
22 I don't recall if it was or not.

23 Q When you say there were old tire tracks, what do
24 you mean by old? Older than tire tracks that could have
25 been left there the night prior to the time you were there?

1 A I really don't know what I meant by old. It's a
2 good question. I don't know what I meant by that.

3 Q If I was to say there were fresh tire tracks,
4 what would that mean to you?

5 A That would mean I would say within a day or two.
6 I'm not sure what I meant by old.

7 Q Are you saying the tire tracks you observed
8 could not have been made by a tire the night before?

9 A I'm not sure on that.

10 Q You just don't know one way or the other?

11 A I just don't know.

12 Q When you say someone had knocked the fence down,
13 what observations did you make that led you to conclude
14 that the fence had been knocked down?

15 A The fact that it was laying and there were tire
16 tracks going through it.

17 Q Were the posts laying down or the barbed wire
18 laying down or both?

19 A I don't know. I haven't noted that. It's so
20 long ago I really don't know.

21 Q Do you have any recollection outside what's in
22 your report, any independent recollection?

23 A I have a little bit. Not a lot.

24 Q What little do you have?

25 A I have enough that Paul Hardman was very nervous

1 A I couldn't really tell you exactly. This is Mr.
2 Hardman's house.

3 Q Why don't you write down Mr. Hardman's house on
4 that, otherwise when we look at this later we will not be
5 able to tell.

6 A This right here is SR 68. I think the accident
7 occurred right in here.

8 Q I take it this is north?

9 A This is north. This would be Camp Williams.

10 Q Put an N to designate north on the map.

11 A This is 10400 North. Down along here there is a
12 lane that used to go up along this canal. I really can't
13 recall it specifically. The Jordan River winds down
14 through this area, which made it a popular spot for hunters
15 and whatnot to come down and hunt and whatever.

16 Q I'm going to write along the line that you drew
17 Jordan River.

18 A This is a dirt lane. I think there is a canal
19 here too, but I'm really not sure. In this vicinity he had
20 a fence that I believe came up in this type of vicinity, a
21 barbed wire fence, and the damage -- I don't know how to
22 make this. I'm not even sure that's how the corner went on
23 it. But anyway the damage was basically right here to the
24 fence.

25 Q Where you placed the X?

1 A Yes. As we drove in this dirt lane somewhere
2 along this lane in this vicinity here we observed the
3 entrails.

4 Q Was there actually a deer there?

5 A I don't even remember.

6 Q All you remember --

7 A I remember signs.

8 Q I'll write entrails. Let me draw an arrow, and
9 that would be about where you placed the X in the circle?

10 A Yes.

11 Q Let's mark this Exhibit 2.

12 (Deposition Exhibit No. 2 is marked.)

13 Q (By Mr. James) I take it based on what you said
14 that you actually went from Mr. Hardman's home to the
15 pasture, correct?

16 A Yes.

17 Q Do you recall how you traveled to the pasture?

18 A He got in my patrol vehicle with me and we drove
19 down. This is probably I would guess maybe two miles.

20 Q Drove down 10400 North. Let me draw an arrow
21 indicating I believe where you traveled this way. Is this
22 correct where I've drawn the line?

23 A Yes.

24 Q He traveled in your vehicle?

25 A Yes.

1 Q Do you recall what you were driving at the time?

2 A No.

3 Q Were you in a truck or a car?

4 A It would have been a truck or ram or changer. I
5 don't remember. That was three years ago.

6 Q Do you recall observing along section 10400
7 North whether there were any no trespassing signs or any
8 other indications that people cannot trespass on that
9 property? Again, I'm talking about November of '89.

10 A I couldn't tell you for sure. This has been a
11 posted area for a long time, but whether there was signs up
12 then I couldn't say for sure.

13 Q How was it you could tell the deer had recently
14 been poached?

15 A That I could tell it had recently been poached?

16 Q Yes.

17 A I don't believe -- I don't know. There were
18 just signs that it had been poached. I couldn't even tell
19 you for sure how recent. I'm not an expert on decomposed
20 entrails.

21 Q Did you observe any tracks leading to or away
22 from the entrails?

23 A No.

24 Q Your report indicates that Mr. Hardman said
25 something to you about being afraid about being sued. Do

Tab F

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH

-o0o-

JULIA LEE ASKEW,
Plaintiff,
vs.
PAUL HARDMAN,
Defendant.

)
) Civil No. 91-0400665
)
) Deposition of:
)
) DAVID C. GUEST
)
) Judge Baliff
)

CERTIFIED COPY

-o0o-

BE IT REMEMBERED that on the 16th day of September 1992, the deposition of DAVID C. GUEST, produced as a witness herein at the instance of the Defendant, in the above-entitled action now pending in the above-named court, was taken before Melinda J. Andersen, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, commencing at the hour of 2:15 p.m. of said day, at the offices of Morgan & Hansen, Kearns Building, Eighth Floor, 136 South Main Street, Salt Lake City, State of Utah.

That said deposition was taken pursuant to Notice.

-o0o-

MELINDA J. ANDERSEN
CSR No. 281

**INDEPENDENT REPORTING
SERVICE**
Certified Shorthand Reporters

1710 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
(801) 538-2333

1 Q Dan Ferguson was he there with you the whole
2 time?

3 A Yes, he was.

4 Q While you were at the scene did you talk with
5 anyone other than the officers who were at the scene?

6 A Yes, I talked to Mr. Paul Hardman.

7 Q Do you know who was present when you had the
8 conversation with him other than you and Mr. Hardman?

9 A I don't.

10 Q Can you tell me what you recall Mr. Hardman said
11 to you and what you said to Mr. Hardman?

12 A He claimed he had problems with hunters. They
13 were constantly shooting and tearing down his fences and
14 gates. I talked with him and I also talked with his wife
15 separate from him.

16 Q In other words, separate from each other?

17 A I talked to Mr. Hardman. He went somewhere else
18 and then his wife came. I talked to her and I got
19 basically the same response from her. They were cursing
20 the hunters, that they were always tearing down their
21 fences and leaving gates open. It was a constant problem.

22 Q Tell me what your normal practice is with regard
23 to writing in your Franklin day planner with regard to
24 investigating accidents.

25 A Generally when I'm done and I get time to sit

1 Q When you wrote down estimated travel speed of 60
2 and estimated impact speed of 60, is that Kevin Butts'
3 estimated speeds or is that your estimated speeds?

4 A It would be my estimated speeds.

5 Q Did you believe Mr. Butts over Jim Brierley?

6 A Well, it's not a matter of believing Mr. Butts
7 over Jim Brierley. It's a matter of looking at the
8 accident and saying yeah, he was probably going that fast.

9 Q In other words, that's your estimate he was
10 probably going about that fast?

11 A Right.

12 Q How if at all did you use Jim Brierley's
13 estimated speed of 72 miles an hour?

14 A I wouldn't say that I really used it. As far as
15 any prosecution of Mr. Butts I typed up a report of what
16 our findings were and sent it to Utah County Attorney to
17 see if they wanted to take any action against him. And as
18 far as I know they declined that.

19 Q Have you asked Mr. Brierley to do other drag
20 factor analysis other than this one?

21 A I probably have. He quite shortly after that
22 and went to another section.

23 Q After Mr. Brierley gave you his report did
24 anything else transpire involving yourself as far as this
25 accident was concerned?

1 investigating accidents and your investigation of this
2 accident, the measurements that you took, the observations
3 you made at the scene of the accident, discussing this
4 matter with Kevin Butts and with Paul Hardman and his wife,
5 do you have an opinion as to the cause of this accident?

6 A Are you saying who do I think is at fault?

7 Q Yes.

8 MR. JAMES: I'm going to object to the extent
9 that calls for a legal conclusion.

10 Q (By Mr. Morgan) I believe under the law you're
11 entitled to express your opinion. So I'm going to ask you
12 to tell us your opinion.

13 A The main reason I didn't take any legal action
14 against Mr. Butts because I think the accident was kind of
15 in a gray area. Even if Mr. Butts had been going 72 miles
16 an hour or if he was going 30 miles an hour I think the
17 accident could have still happened. I don't know where the
18 horse was. I don't know if anybody knows where the horse
19 was, whether the horse was standing in the road, standing
20 on side of the road, running cross the road. I don't know.

21 In Mr. Butts' statement he said they were
22 heading down to the crossroads where they could talk.
23 Maybe they were talking and maybe he wasn't paying
24 attention. He said he saw a white flash. The horse wasn't
25 white. I don't know what he saw. I think as far as fault

1 A Yes.

2 Q And you have seen the video?

3 A Yes.

4 Q Do you know whether he is the person narrating
5 the video?

6 A As I recall he was, yes.

7 Q Other than the police reports, video and the
8 photographs we've talked about, are you aware of any other
9 documents or photographs that relate to the accident?

10 A No, I'm not.

11 Q Have you ever performed a drag analysis?

12 A Yes, I have.

13 Q Was there a reason that you did not have a drag
14 boot in your car on the evening of the accident?

15 A A reason? I just didn't have one. Not
16 everybody has one.

17 Q During the period of time when the accident
18 occurred you didn't carry a drag boot in your car?

19 A No, I didn't.

20 Q Did you review the drag analysis that Officer
21 Brierley prepared?

22 A Yes.

23 Q Was there anything unusual to you about that
24 analysis?

25 A Unusual? I thought maybe the 1.8 drag was a

1 A A normal?

2 Q Yes.

3 A I would say .07 to .08 is a normal.

4 Q Was the reason you asked Officer Brierley to

5 conduct the drag analysis because you didn't have the boot

6 or were there other reasons also why you asked him to

7 conduct the drag analysis?

8 A Mainly because I didn't have a boot, and also he

9 had a boot that had been tested at this class, this 80-hour

10 class that he had taken. That's where he got the boot.

11 Q Do you know when he took that class?

12 A It completed April 29, 1988. I guess we could

13 more or less say that the boot he had was a certified boot.

14 It had been tested several times during this class.

15 Q Are some of the boots used by the highway patrol

16 not certified boots, do you know?

17 A Some people have made their own boots, and I

18 would say those probably would not be certified.

19 Q I believe you stated that you understood that

20 Officer Brierley conducted the drag analysis the day

21 following the accident; is that correct?

22 A Yes.

23 Q Do you know if anyone accompanied him when he

24 did that?

25 A I don't think so.

1 Q Is it your practice to draw a set of skid marks
2 if a set actually exist?

3 A I would draw both skid marks, yes.

4 Q Do you have any knowledge regarding the traffic
5 patterns in the vicinity of the accident? I'm referring to
6 the time period of November 1989.

7 A What the traffic would have been like?

8 Q No, specifically the speed the traffic normally
9 travels out through that area.

10 A In the times that I've been out there working --
11 I know they speed quite a bit out there. As far as an
12 average speed I would say probably 65.

13 Q On the occasions that you've traveled the road
14 in the vicinity of the accident have you ever seen
15 livestock on the road?

16 A I never have as I recall.

17 Q Are you aware of any incidents where anyone else
18 may have seen livestock on the road, heard a report or seen
19 a report?

20 A Other than deer I don't recall any. At least on
21 my shift I don't recall any other accidents involving
22 livestock or horses.

23 Q How about sitings of livestock on the road?

24 A That's a little different question because that
25 wouldn't stick in my mind as much as an accident.

Tab G

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

* * *

JULIA LEE ASKEW,)
Plaintiff,) No. 910400665
-vs-) Testimony of:
PAUL HARDMAN,) Jerry Monson
Defendant.)

January 5, 1993

Utah County Judicial Center

Provo, Utah

BEFORE: THE HONORABLE LYNN W. DAVIS, JUDGE

For the Plaintiff: GARY A. DODGE, ESQ. &
MARK F. JAMES, ESQ.
Attorneys At Law
185 South State #1300
Salt Lake City, Utah 84111

For the Defendant: STEPHEN G. MORGAN, ESQ. &
MITCHEL T. RICE, ESQ.
Attorneys At Law
136 South Main #800
Salt Lake City, Utah 84101

1 A They're left there on the ground.

2 Q Do you have any knowledge whether it's
3 typical for birds such as magpies or whatever to
4 come along and get whatever's left?

5 A I think it's typical.

6 Q The entrails or the guts that you saw
7 the morning of November 21, 1989 near where the
8 fence was down, had they already been eaten by
9 other animals or were they still there for you
10 to observe?

11 A They were still there. I don't know
12 whether any animals had been eating on them or
13 not.

14 Q Is that what lead you to conclude that
15 a deer had recently been poached in the area and
16 the entrails were still left there for you to
17 observe?

18 A Yes.

19 (Whereupon, Defendant's Exhibit Nos. 16 &
20 17 were marked for identification.)

21 MR. MORGAN: Your Honor, I think we've
22 stipulated we can substitute a cleaner copy, one
23 that's easier to read.

24 MR. JAMES: That's fine, Your Honor.

25 THE COURT: If you'd just change the

Tab H

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

JULIA LEE ASKEW,	:	Civil No. 91-0400665
	:	
Plaintiff,	:	Deposition of:
	:	
vs.	:	FRANK GRANT
	:	
PAUL HARDMAN and W. RAYMOND	:	
HARDMAN,	:	
	:	
Defendants.	:	

Be it remembered that on the 26th day of October, 1992, the deposition of FRANK GRANT, called as a witness herein at the instance of the Plaintiff herein, in the above-entitled action now pending in the above-named court, was taken before Lisa M. Bernardo, a Certified Court Reporter and Notary Public in and for the State of Utah, commencing at the hour of 2:25 p.m. of said day at the offices of Kimball, Parr, Waddoups, Brown & Gee, Attorneys at Law, 185 South State Street, Suite 1300, Salt Lake City, State of Utah.

CERTIFIED COPY



**Rocky Mountain
Reporting Service, Inc.**

322 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Phone (801) 531-0256

Statewide Reporting
National and Merit Certified Reporters
Expedited Delivery
Computerized Transcription
IBM Compatible Disks
Litigation Support Software
Video Depositions

1 testimony is about how the horse was traveling.

2 A I think that the driver of that car was
3 staring the horse in the rear when he hit it, if you know
4 what I'm talking about.

5 Q Okay.

6 A Directly from the rear. That's my opinion.

7 Q I understand now that that is your opinion,
8 that it hit it in the rear, that at the time --

9 A At impact.

10 Q At impact he hit it in the rear. Do you have
11 an opinion regarding the direction or the location of
12 that horse immediately prior to impact?

13 A No, I don't have any idea.

14 MR. MORGAN: Could you read the question and
15 the answer back? Did you understand the question?

16 THE WITNESS: Yes.

17 (Question and answer read back by the court
18 reporter.)

19 MR. MORGAN: The question was the direction of
20 the horse at the time of impact, is what I understand.

21 Q (BY MR. JAMES) Let me see if I can clear it
22 up. Tell me, do you have an opinion regarding the
23 location of that horse on the road immediately prior to
24 the impact of the car with the horse?

25 A As I described before, I think the driver of

1 regarding that horse one second prior to impact?

2 A If a horse could turn, yes, some --

3 MR. MORGAN: In less than a second?

4 THE WITNESS: In less than a second.

5 Q (BY MR. JAMES) Did you ever speak with anyone

6 who saw that horse at or after the time it was moved from

7 the side of the road?

8 A No.

9 Q Did you ever see any document relating to the

10 horse other than the police reports and the deposition

11 transcripts that you have told me about earlier?

12 A No.

13 Q So you don't know whether anyone ever rolled

14 that horse over, do you?

15 A No.

16 Q Do you know what side the horse was lying on?

17 A No.

18 Q Not what side of the road, but which side of

19 the horse was down and which side was up?

20 A No. I know what side of the road it was, but

21 which side the horse was lying on, no.

22 Q I believe you have now told me about the two

23 major areas you were asked to testify about. You also

24 mentioned that you were asked regarding the visibility

25 for the driver of the car under the circumstances; is

Tab I

Stephen G. Morgan, No. 2315
Attorney for Defendant Paul Hardman
MORGAN & HANSEN
Kearns Building, Eighth Floor
136 South Main Street
Salt Lake City, UT 84101
Telephone: (801) 531-7888

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

JULIA LEE ASKEW,	:	
Plaintiff,	:	AFFIDAVIT OF GREG
	:	JOHNSON
vs.	:	
	:	
PAUL HARDMAN and W. RAYMOND	:	
HARDMAN,	:	
Defendant.	:	Civil No. 91-0400665
	:	Judge Ballif

STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

Greg Johnson, being first duly sworn upon oath, deposes
and says that:

1. I am the Claims Manager for Utah Farm Bureau Insurance
Company. I have worked with Stephen G. Morgan as our defense
counsel for over ten years.

2. On or about September 10, 1986, I received from Mr.
Morgan two letters directing me and our Claims Department that
whenever a person claiming to be a Utah Farm Bureau insured is

involved in an accident, such as Paul Hardman in the subject case, a report of claim should be forwarded to such person to complete and that I or one of our claims representatives should take such statements as I or one of our claims representatives deems necessary from said person and any other persons who have information concerning the accident and to use the information obtained as a basis for an investigation on behalf of Mr. Morgan and his law firm to prepare them for potential legal claims that may arise. (Copies of these letters are attached as Exhibit "A").

3. As Claims Manager, I have established a procedure for handling claims involving livestock on the highway. It has been my experience that once a claim is reported that involves livestock on the highway which is allegedly owned by a Utah Farm Bureau insured, I anticipate from that time forward that a claim may be filed in connection with the accident by the insured, or the driver or occupants of the vehicle that came in contact with the livestock. By reason thereof, I have followed the procedure directed by Mr. Morgan as outlined in the foregoing paragraphs and all documents prepared in connection with the file after the claim is filed with Utah Farm Bureau are prepared in anticipation of possible future litigation.

4. Utah Farm Bureau received a Notice of Claim from our insured Paul Hardman on November 21, 1989. Pursuant to Mr. Morgan's direction, a report of claim form was sent to Mr. Hardman to fill out and arrangements were made to take his statement.

5. On Monday, December 2, 1991, I first received notice that the Subpoena Duces Tecum and Notice of Deposition had been served on our Provo office on Friday, November 29, 1991. I advised our attorney, Stephen G. Morgan, on December 3, 1991, that the Subpoena Duces Tecum and Notice of Deposition had been served and requested Mr. Morgan to file a Motion to Quash the Subpoena.

6. I have reviewed the Privilege Log of Utah Farm Bureau's file, attached as Exhibit "B", which descriptively identifies each of the documents in the file. The documents in the file include my mental impressions, opinions and conclusions and my opinion as to the reserves which should be set up on this claim, and the mental impressions, opinions, conclusions and legal strategy of defense counsel, Stephen G. Morgan, as well as other documents, all of which were prepared either as directed by Mr. Morgan or in anticipation of future litigation.

DATED THIS SIXTEENTH DAY OF DECEMBER, 1991

SIGNED

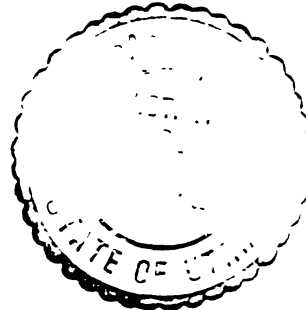
Greg Johnson

ON THIS SIXTEENTH DAY OF DECEMBER, 1991 PERSONALLY APPEARED BEFORE
ME GREG JOHNSON.

JoAnn Asher
NOTARY PUBLIC

RESIDING IN SALT LAKE COUNTY
STATE OF UTAH

MY COMMISSION EXPIRES: 01-10-92



Tab J

Stephen G. Morgan, No. 2315
Attorney for Defendant Paul Hardman
MORGAN & HANSEN
Kearns Building, Eighth Floor
136 South Main Street
Salt Lake City, UT 84101
Telephone: (801) 531-7888

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

JULIA LEE ASKEW,	:	
Plaintiff,	:	AFFIDAVIT OF STEPHEN
	:	G. MORGAN
vs.	:	
PAUL HARDMAN and W. RAYMOND	:	
HARDMAN,	:	
Defendant.	:	Civil No. 91-0400665
	:	Judge Ballif

STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

Stephen G. Morgan, being first duly sworn upon oath,
deposes and says that:

1. I am a member of the Utah State Bar in good standing.
2. I am an attorney for Utah Farm Bureau Insurance
Company. I also represent Paul Hardman in the above-captioned
action.

3. I was notified on Tuesday, December 3, 1991, that the
subpoena duces tecum and notice of deposition had been served in

Provo on Friday, November 29, 1991, and that the claims office in Salt Lake City had been notified on Monday, December 2, 1991. Upon being advised that said subpoena had been served, I prepared a Motion to Quash the Subpoena Duces Tecum and Motion for Protective Order. These were mailed, postage pre-paid, to Plaintiff's counsel. Because the motions were not completed until about 6:00 p.m., they were not hand-delivered.

4. I intended to call Plaintiff's counsel the next day. However, before I had a chance to do so, Plaintiff's counsel called me about the Motions he had received by mail. I advised Plaintiff's counsel to cancel the reporter because a Utah Farm Bureau representative would not appear and/or produce the entire claim file, which included clearly privileged material, (13 letters between myself and insurer, which involved my mental impressions, conclusions, opinions and legal theories), until such time as the court had an opportunity to rule on the motions.

5. I have represented Utah Farm Bureau Insurance Company for over 20 years. On September 10, 1986, I wrote two letters to Greg Johnson of Utah Farm Bureau, copies of which are attached as Exhibit "A", directing that whenever a person claiming to be a Utah Farm Bureau insured is involved in an accident, such as Paul Hardman in this case, a report of claim should be forwarded to such person to complete and to take such statements from said person and

any other persons who have information concerning the accident as Greg Johnson and/or Utah Farm Bureau deems necessary and to use the information obtained as a basis for an investigation on behalf of me and my law firm to prepare us for potential legal claims that may arise. The purpose of this letter was to protect any statements obtained by Utah Farm Bureau or Greg Johnson from the insured or potential witnesses under the law applicable to attorney work product.

DATED this 16 day of December, 1991.

Stephen G. Morgan
Stephen G. Morgan

In the County of Salt Lake, state of Utah, on this ____ day of August, 1991 before me, the undersigned notary, personally appeared Stephen G. Morgan who is personally know to me to be the person whose name is signed on the preceding document in my presence and who swore or affirmed to me that the signature is voluntary and the document truthful.

My Commission Expires:

1-13-92

James McNeill
Notary Public
Residing in Summit County

LAW OFFICES

MORGAN, SCALLEY & READING

A PROFESSIONAL CORPORATION

SECOND FLOOR

261 EAST 300 SOUTH

SALT LAKE CITY, UTAH 84111

TELEPHONE
AREA CODE 801
531-7870

STEPHEN G MORGAN
FORD G SCALLEY
J. BRUCE READING
STEVEN K WALKENHORST
MARK L ANDERSON
BRAD HOLM
JOHN E HANSEN
MICHAEL W SPENCE

September 10, 1986

Mr. Greg Johnson
Utah Farm Bureau Insurance Co.
5300 South 360 West
Salt Lake City, Utah 84123

Dear Greg:

Pursuant to our telephone conference on September 8, 1986, I have prepared the enclosed letter, the purpose of which is to protect any statements you might obtain from your insured or potential witnesses under the law applicable to attorney work-product.

Sincerely yours,

MORGAN, SCALLEY & READING



Stephen G. Morgan

pr
enc.

*our statements in our letter are our
attorney work product.*

LAW OFFICES

MORGAN, SCALLEY & READING

STEPHEN G. MORGAN
FORD G. SCALLEY
J. BRUCE READING
STEVEN K. WALKENHORST
MARK L. ANDERSON
BRAD FOLM
JOHN E. HANSEN
MICHAEL W. SPENCE

A PROFESSIONAL CORPORATION

SECOND FLOOR

261 EAST 300 SOUTH

SALT LAKE CITY, UTAH 84111

TELEPHONE
AREA CODE 801
531-7870

September 10, 1986

Mr. Greg Johnson
Utah Farm Bureau Insurance Co.
5300 South 360 West
Salt Lake City, Utah 84123

Dear Greg:

Pursuant to your request, I have reviewed the materials that are to be filled out by a Utah Farm Bureau insured who is involved in an accident. When a person claiming to be a Utah Farm Bureau insured is involved in an accident, I am hereby directing you to forward this material to said person and through you, I am instructing said person to complete this material and return it to you. I am further instructing you to receive this information from said person who is involved in an accident and to take such statements from said person and any other persons who have information concerning the accident as you deem necessary and to use the information obtained as the basis for an investigation on behalf of me and this law firm to prepare us for potential legal claims that may arise.

If you have any questions regarding the procedure to follow and the use to which this material may be put, please feel free to contact us.

Sincerely yours,

MORGAN, SCALLEY & READING



Stephen G. Morgan

pr

LAW OFFICES

MORGAN, SCALLEY & READING

A PROFESSIONAL CORPORATION

SECOND FLOOR

261 EAST 300 SOUTH

SALT LAKE CITY, UTAH 84111

September 10, 1986

STEPHEN G. MORGAN
FORD G. SCALLEY
J. BRUCE READING
STEVEN K. WALKENHORST
MARK L. ANDERSON
BRAD HOLM
JOHN E. HANSEN
MICHAEL W. SPENCE

TELEPHONE
AREA CODE 801
531-7870

Mr. Greg Johnson
Utah Farm Bureau Insurance Co.
5300 South 360 West
Salt Lake City, Utah 84123

Dear Greg:

Pursuant to your request, I have reviewed the materials that are to be filled out by a Utah Farm Bureau insured who is involved in an accident. When a person claiming to be a Utah Farm Bureau insured is involved in an accident, I am hereby directing you to forward this material to said person and through you, I am instructing said person to complete this material and return it to you. I am further instructing you to receive this information from said person who is involved in an accident and to take such statements from said person and any other persons who have information concerning the accident as you deem necessary and to use the information obtained as the basis for an investigation on behalf of me and this law firm to prepare us for potential legal claims that may arise.

If you have any questions regarding the procedure to follow and the use to which this material may be put, please feel free to contact us.

Sincerely yours,

MORGAN, SCALLEY & READING



Stephen G. Morgan

pr

LAW OFFICES

MORGAN, SCALLEY & READING

A PROFESSIONAL CORPORATION

SECOND FLOOR

261 EAST 300 SOUTH

SALT LAKE CITY UTAH 84111

TELEPHONE

AREA CODE 801

531-7870

STEPHEN G MORGAN
FORD G SCALLEY
J BRUCE READING
STEVEN K WALKENHORST
MARK L ANDERSON
BRAD HOLM
JOHN E HANSEN
MICHAEL W SPENCE

September 10, 1986

Mr. Greg Johnson
Utah Farm Bureau Insurance Co.
5300 South 360 West
Salt Lake City, Utah 84123

Dear Greg:

Pursuant to our telephone conference on September 8, 1986, I have prepared the enclosed letter, the purpose of which is to protect any statements you might obtain from your insured or potential witnesses under the law applicable to attorney work-product.

Sincerely yours,

MORGAN, SCALLEY & READING



Stephen G. Morgan

pr
enc.

per [unclear] on [unclear] [unclear] [unclear] [unclear]
at [unclear] [unclear] [unclear]

Tab K

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH

JULIA LEE ASKEW

Plaintiff,

vs.

PAUL HARDMAN,

Defendant.)

)
)
)
) Case No. 91-0400665
) (Motion to Compel)
)
)
)

December 28, 1992

BEFORE: THE HONORABLE LYNN DAVIS
FOURTH DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:

Mark F. James
Gary A. Dodge
KIMBALL, PARR, WADDOUPS,
BROWN & GEE
185 South State Street
Suite 1300
Salt Lake City, Utah 84147
Telephone: (801)532-7840

For the Defendant:

Stephen G. Morgan
Mitchel T. Rice
MORGAN & HANSEN
Kearns Bldg., 8th Floor
136 South Main Street
Salt Lake City, Utah 84101
Telephone: (801)531-7888

Reported by: Beverly Lowe RPR/CSR

Center Court Reporting
40 South 100 West
Suite 203
Provo, Utah 84601
Telephone: (801)373-4646

P R O C E E D I N G S

1
2 MR. JAMES: Could I now address, Judge, the
3 plaintiff's motion to compel?

4 THE COURT: Well, we've got a motion to
5 continue, and then -- based upon all of these
6 others -- that's next. The plaintiff's motion to
7 compel and then all the spinoffs from that. As to
8 Harmon's tape and also to the deposition of
9 Mr. Harmon.

10 MR. JAMES: Early in the morning after the
11 accident that's at issue in this case Mr. Hardman,
12 the defendant, claims that he went to the pasture
13 where his horses had been located prior to the
14 accident. He claims that on that occasion he made
15 several relevant observations.

16 First he claimed that he observed that the
17 fence was down. Second, he claimed that he
18 observed tire tracks in the location where the
19 fence was down. Third, he has testified that he
20 observed evidence of a fresh deer kill about a
21 quarter of a mile away from where the fence was
22 down.

23 Based on these observations, the defendant
24 has alleged in this case that poachers broke his
25 fence down and allowed his horses to escape. As

1 the Court is aware, defendant has filed a motion
2 seeking to have this Court place these unidentified
3 trespassers on the special verdict form in this
4 case.

5 Three people saw the pasture on the day
6 following the accident, and prior to the time that
7 Mr. Hardman has testified he fixed his fence.
8 Those three people were Mr. Hardman; Jerry Monson,
9 a deputy sheriff from the Utah County Sheriff's
10 Office, and Robert Harmon, who is a claims adjuster
11 for defendant's insurer Utah Farm Bureau.

12 Mr. Harmon took several pictures and
13 recorded a conversation between he and Mr. Hardman
14 that occurred while they were there at the pasture.

15 Defendant has produced the pictures that
16 Mr. Harmon took but refuses to produce the recorded
17 conversation. He also refuses to allow
18 Mr. Harmon's deposition to be taken.

19 First, your Honor, I'd like to address if
20 I could Mr. Harmon's deposition. In opposing the
21 plaintiff's attempt to depose Mr. Harmon, defendant
22 presents essentially few arguments. First that an
23 earlier protective order entered by Judge Ballif of
24 this Court somehow prohibits that deposition. And
25 second, that Mr. Harmon's knowledge and

1 observations constitute work product.

2 In February and March of 1992 we caused a
3 subpoena to be served on Utah Farm Bureau, a
4 subpoena duces tecum. The subpoena did not seek
5 testimony, but only documents. In these the
6 subpoena specifically specified that if documents
7 were produced prior to the taking of a deposition,
8 that a deposition would not occur.

9 Defendant thought Judge Ballif granted a
10 protective order. The ruling did not address
11 Mr. Harmon's deposition. That issue was not before
12 the Court at that time. The plain language of the
13 Court's earlier order makes clear that it pertains
14 only to items contained in Utah Farm Bureau's file
15 in communications with legal counsel that occurred
16 after the date of the accident.

17 Now, Judge, we have addressed in our
18 memorandum the Hornbook principle that protective
19 orders must be narrowly drawn and precise. I won't
20 address that case law further because I believe the
21 plain language of the protective order at issue in
22 this case makes clear that it was not intended to
23 prevent Robert Harmon's deposition from being
24 taken.

25 Defendant also seeks to prevent

1 Mr. Harmon's deposition from being taken, based on
2 an allegation that his knowledge and observations
3 constitute work product. The universally accepted
4 principle of the work product doctrine does not
5 protect underlying facts.

6 Indeed the case upon which defendant
7 placed principle reliance with United Farm Bureau
8 Mutual Insurance Company, a case that was decided
9 by the Indiana Court of Appeals makes this
10 principle very clear.

11 Perhaps more importantly, though,
12 Mr. Harmon's factual knowledge does not even
13 qualify as work product under Utah law. In a case
14 entitled Gold Standard v. American Resources
15 Corporation, a 1990 case decided by the Utah
16 Supreme Court. The Court stated that three
17 essential elements must be established under Utah
18 law for materials to be protected by the work
19 product doctrine. The Court says the material must
20 consist of documents or tangible things.

21 Mr. Harmon's factual knowledge, the
22 observations that he made of the fence, the pasture
23 of the accident scene on the morning following the
24 accident do not constitute documents or tangible
25 things.

1 The party opposing discovery bears the
2 burden of establishing good cause for the entry of
3 a protective order. In this case we would submit,
4 your Honor, that the defendant has not established
5 good cause. Has not established that Mr. Harmon's
6 factual knowledge and first-hand observations of
7 issues that are critical to this case somehow
8 constitute work product.

9 Now, even assuming that Mr. Harmon's
10 knowledge and observation somehow did constitute
11 work product, he still should be ordered to appear
12 for his deposition. The Utah Supreme Court in the
13 Gold Standard Case recognized that materials
14 protected by the work product doctrine must be
15 produced if there exists a substantial need for
16 their production.

17 The Court in Gold Standards stated in that
18 regard, "Satisfying the requirements of the work
19 product doctrine does not automatically guarantee
20 protection. If the party seeking discovery can
21 demonstrate substantial need for the materials and
22 that the materials or their equivalent cannot be
23 obtained without substantial hardship, the party
24 will be entitled to these materials."

25 Robert Harmon was one of only three people

1 to observe the pasture on the day after the
2 accident. Jerry Monson of the Utah County
3 Sheriff's Office, as Mr. Morgan previously noted,
4 has virtually no recollection of what he observed
5 on the day or the morning after the accident.

6 Mr. Paul Hardman has less than a clear
7 recollection regarding what he observed on the
8 morning following the accident.

9 Robert Harmon took the few pictures that
10 we have that are contemporaneous with the
11 occurrence of the accident. His testimony is
12 necessary to authenticate the pictures, and quite
13 frankly, your Honor, it is impossible to tell what
14 supposedly is depicted in several of the pictures.

15 I only have one set of pictures. There
16 were seven pictures provided to us. These are
17 copies of the polaroid print. As we have examined
18 the photographs we are unable to tell what was
19 intended to be depicted --

20 THE COURT: Did you attempt to authenticate
21 the pictures through the testimony of the defendant
22 through deposition or through the officer involved?

23 MR. JAMES: I did not through the officer
24 involved. I showed these pictures to Mr. Hardman.
25 I asked him with respect to several of the pictures

1 what was depicted in the picture. He didn't know.

2 There was a couple of interesting things I
3 would note, your Honor. For example, this picture
4 -- and I'll give these to the Court in a moment --
5 this picture shows a circle with what appears
6 obviously to be an "E" painted on the road in the
7 vicinity of the accident. If you look at the
8 police report there is no "E" painted on the road.
9 We don't understand what that "E" represents.

10 There is a picture taken of a post that we
11 have been able to identify on the fence, but we
12 don't understand why this post has relevance. Why
13 Mr. Harmon when he took these photographs focused
14 on this particular post. He has placed an arrow
15 depicting something in the photograph. If I may
16 approach, your Honor.

17 THE COURT: Sure.

18 MR. JAMES: I asked Mr. Hardman what was
19 depicted in several of these photographs, and
20 again, he didn't know. He said he didn't know what
21 was trying to be demonstrated by some of these
22 photographs.

23 So, your Honor, even assuming that
24 Mr. Harmon's's testimony somehow did constitute
25 work product, we would submit there exists a

1 substantial need for the taking of his deposition.

2 Again he was one of three people who saw
3 the pasture contemporaneous with the occurrence of
4 the accident. The other two have less than a clear
5 recollection, and I'll discuss that a little
6 further in connection with the recorded statement.
7 And if I could, your Honor, I'd like to take a
8 moment and address the recorded statement.

9 THE COURT: Okay, but you have relied upon
10 a recorded statement in your arguments against the
11 motion for summary judgment.

12 MR. JAMES: No, I don't believe that's
13 accurate.

14 THE COURT: I think you have. You have
15 looked at it in terms of the number of times the
16 horses had escaped, three times I think --

17 MR. JAMES: No, let me distinguish. What
18 we have relied on was the police report, the
19 accident report that Jerry Monson, the sheriff's
20 deputy from Utah County prepared.

21 What we're talking about now with respect
22 to the recorded statement is that on the morning
23 following the accident --

24 THE COURT: We're on common ground. I
25 thought that you were making reference to the

1 written statements of Deputy Jerry Monson. Your
2 reference is to the tape recording of the
3 discussion that occurred on the morning between the
4 defendant and Mr. Robert Harmon; is that correct?

5 MR. JAMES: That's correct. I'm switching
6 now from taking Mr. Harmon's deposition to seeking
7 to have this court order production of the tape
8 recorded statement that Mr. Harmon took of his
9 conversation with Mr. Hardman on the morning
10 following the accident.

11 THE COURT: Okay.

12 MR. JAMES: Courts have recognized that
13 contemporaneous statements are unique catalysts in
14 the search for truth, and accordingly many courts
15 have ordered production of such statements.

16 Defendant has attempted to argue that
17 Mr. Hardman's recollection three years after the
18 accident, or approximately three years after the
19 accident somehow is substantially equivalent of the
20 recorded statements taken on the morning following
21 the accident within hours of the accident.

22 Portions of Mr. Hardman's testimony have
23 been set forth in the respective memorandum of the
24 parties. I believe that testimony sets forth the
25 fact that Mr. Hardman suffers from less than a

1 clear recollection of what he observed on the
2 morning following the accident.

3 Mr. Hardman's testimony is replete with "I
4 don't remember." "I don't recall." While he
5 recalled general observations he could not recall
6 specific details.

7 THE COURT: I thought, Counsel, that the
8 inquiry in the deposition was fairly clear
9 regarding details of what he had shared with
10 Mr. Harmon.

11 MR. JAMES: If you read that, your Honor --

12 THE COURT: I mean this is not just a
13 cloudy saying "I don't remember." He talked about
14 specifics on that date. He mentions those and
15 there's some inquiry, either by you or by your
16 co-counsel, whether there were other matters that
17 were discussed with Mr. Harmon and I believe -- he
18 responds, I believe, that this is fairly much of
19 what we talked about on that morning, and it's in
20 detail.

21 MR. JAMES: Let me tell you what he says.
22 I have it here.

23 "Do you have a specific recollection that
24 what you told Mr. Harmon was what you told me
25 today? " "What I can remember, yes." "Now, when you

1 say 'What I can remember,' are there parts you
2 don't remember of the conversation you had with
3 Mr. Harmon?" "Not that I remember there's not."

4 Well, essentially what Mr. Hardman is
5 saying, "I tell you what I remember. " But I don't
6 know, your Honor, if there are things that he
7 doesn't remember. And in fact, at one point during
8 his deposition he struggled to correct some
9 testimony and he said, "I'm older. My mind is
10 going. I realize this."

11 We realize at the time your recollection a
12 couple of years later isn't what it is the morning
13 following the accident where you have a vivid
14 picture of what you've seen.

15 Further, there are various inconsistencies
16 that exist between the testimony of Mr. Hardman and
17 that of his own witnesss.

18 Paul Hardman testified that his horses had
19 only gotten out of the pasture once in the weeks
20 preceding the accident. Mr. Hardman's wife
21 testified that the fences had been down twice.

22 Jerry Monson's report reflected that
23 Mr. Hardman told him that the fence had been taken
24 down three times in the weeks preceding the
25 accident. Paul Hardman --

1 THE COURT: Tell me, Counsel, what does
2 that prove? Let's say you get the tape and it says
3 two time or three times or once?

4 These other statements were made fairly
5 contemporaneous with the event to Deputy Jerry
6 Monson. How would the statements made to the
7 insurance agent or representative of the insurance
8 agent -- seems to me that it cuts the other way.
9 That you are saying -- how is that contemporaneous
10 statement, if it differs from that which was
11 represented to Deputy Jerry Monson, going to help?

12 MR. JAMES: It's not necessarily going to
13 help, but I think I'm entitled to know what he said
14 at the time. Maybe he said they would have escaped
15 four times and that he told Deputy Monson that the
16 fence had only been down three times. I guess it's
17 a little bit related to the medical documents. I
18 just don't know until I can see it.

19 But it was a statement given
20 contemporaneous with the occurrence of a critical
21 event at issue in this lawsuit as opposed to me
22 needing to rely on Mr. Hardman's deposition
23 testimony given approximately three years later.

24 Mr. Hardman testified in his deposition
25 that the wire had been unwound from the fence. His

1 daughter Amanda testified, however, that she
2 specifically recalled Mr. Hardman stating on the
3 day after the accident that the wire had been cut.

4 Defendant has argued in his opposition
5 memorandum that we have Jerry Monson's police
6 report. That constitutes the substantial
7 equivalent of Mr. Hardman's recorded statement
8 given to Robert Harmon.

9 Defendant again ignores, however, that
10 Jerry Monson had a very poor recollection of what
11 some of the things in that police report meant.

12 THE COURT: That's at the time of the
13 deposition. But we do have the report itself.

14 MR. JAMES: I understand. But for example,
15 your Honor, Mr. Monson put in his report that he
16 observes old tire tracks, which is an interesting
17 observation in light of the contention that
18 trespassers had broken down the fence the night
19 before. When he was asked, "What do you mean old
20 tire tracks" he said "I can't remember."

21 THE COURT: How is the tape going to help
22 you out regarding that? I read that portion of the
23 deposition. He said "old"; it might mean old,
24 might mean new, might mean yesterday, might mean
25 tomorrow. It was the most inconclusive statement I

1 have ever heard regarding old tire tracks. He
2 didn't know what old tire tracks meant.

3 MR. JAMES: I think Mr. Hardman's own
4 observations made at the time are relevant as to
5 what he saw; whether the tracks were old or new,
6 whether the fence was cut down or taken down.

7 I think, also, your Honor, it cannot be
8 fairly assumed that Mr. Monson recorded every
9 detail in his report that may have been relevant to
10 the lawsuit.

11 I think it's fair to suggest, your Honor,
12 that there would be much more discussed and much
13 more contained in Mr. Hardman's conversation with
14 Mr. Harmon than in a brief report prepared by a
15 disinterested third party, Jerry Monson.

16 THE COURT: Well, if the Court accepts that
17 reasoning, then in every auto accident, you simply
18 state they're prone to make a more thorough
19 statement to an insurance company than they are to
20 law enforcement, which is very busy on some days
21 because of multiple accidents because of the
22 weather, et cetera, and all of that can come in by
23 virtue of that reasoning? That just doesn't --

24 MR. JAMES: I'm not suggesting that, your
25 Honor. But what I am suggesting is that every case

1 is factually specific, and in this case we have a
2 very brief report prepared by Jerry Monson.

3 If he'd come in for his deposition and
4 say, yeah, I remember my conversation with
5 Mr. Hardman and we talked about this, and he said
6 this and that, and in addition to what's contained
7 in the report we discussed these things, obviously
8 I couldn't put it all in the report. I'm a law
9 enforcement official. I want to get this thing
10 done. That would be a very different issue.

11 But we had Jerry Monson come in, and as
12 you indicated, he didn't remember. He had
13 virtually no recollection. Mr. Harmon, the
14 third-party, who witnessed that, who saw the fence,
15 who went down and made observations of what was
16 there, today we have been prevented from taking his
17 deposition.

18 I think perhaps more important, and I
19 mentioned this, Jerry Monson's knowledge of facts
20 potentially relevant to this case, even when his
21 memory was the freshest, certainly was far less
22 than that of defendant Paul Hardman.

23 Mr. Hardman controlled the pasture, he had
24 knowledge regarding trespassing problems, he had
25 knowledge regarding the history of the fence, his

1 horses located in the pasture and other relevant
2 facts.

3 I can't represent to the Court that those
4 things are contained in the report, but I think
5 it's fair to presume that it's much more likely
6 that they are contained in the report than they
7 were in the report prepared by the police officer.

8 Professor Moore summarized the law in this
9 area as follows: To justify disclosure a party
10 must show the importance of the information in the
11 preparation of this case and the difficulty the
12 party will face in obtaining substantial equivalent
13 information from other sources if production is
14 denied. The clearest case for order and production
15 is when crucial information is in the exclusive
16 control of the opposing party. This is true, for
17 example, when one party has photographs of the
18 scene immediately following an accident.

19 Statements contemporaneous with the
20 occurrence are, in a sense, unique, and can not be
21 duplicated by later interviews or deposition.

22 Professors Wright and Miller have noted,
23 "No one doubts that production should be ordered if
24 the witness has a faulty memory and no longer
25 remembers details of the events."

1 There is now substantial body of authority
2 that goes beyond this and suggests that statements
3 taken from a witness at or about the time of the
4 occurrence described in them are unique in that
5 they provide an immediate impression of the facts.

6 On this view, mere lapse of time is in
7 itself enough to justify production of the
8 materials otherwise protected work product.

9 Goes on to say that the notion of memory
10 fades with the passage of time and is amply
11 supported by psychological studies as well as
12 common sense. Thus the advisory committee in
13 drafting Rule 26(b)3 have wisely accepted the
14 notion that lapse of time in itself may make it
15 impossible to obtain the substantial equivalent of
16 the materials sought.

17 There's only one published case in Utah
18 that I'm aware of in which a Utah case is
19 addressed, production of a witness' statement under
20 facts at all similar, and that was the Mower v.
21 McCarthy's case, and I believe, indeed, your Honor,
22 that the facts in that case were less compelling
23 than those in this case.

24 In Mower the representative of an estate
25 brought a claim arising out of a train accident.

1 Short time after the accident the railroad
2 investigated the accident and the investigation
3 included tape recorded interviews, or recorded
4 interviews with the crew members who survived the
5 train accident.

6 Plaintiff's initial counsel interviewed
7 the crew members one week after the railroad
8 interviewed the crew members. Some four years
9 later plaintiff's successor counsel interviewed the
10 surviving crew members.

11 Plaintiff then sought production of the
12 record, the statements taken, the recorded
13 statements taken by the railroad. The trial court
14 ordered production on appeal. The Utah Supreme
15 Court agreed that the statements should be
16 produced.

17 The Court said, "There would be some
18 reluctance on the part of loyal employees to tell
19 all they knew to plaintiff's investigators and
20 unless the investigators knew enough to ask the
21 right questions they would not be inclined to
22 volunteer evidence which would be damaging to
23 defendant's case."

24 "With their memories dimmed with time and
25 the toll which death had taken and the lack of

1 knowledge of many vital factors it would now be
2 futile to try to get to the bottom of the case
3 without refreshing the memory of the witnesses from
4 the transcript."

5 The Court further reasoned, "Statements
6 should be produced to accomplish the well accepted,
7 well recognized purposes of discovery which is to
8 develop the truth and prevent surprise."

9 "The Court concluded plaintiff will be
10 greatly aided in these respects by such discovery
11 where she can never be adequately prepared for
12 trial without knowing what this transcript
13 contains."

14 Mr. Hardman's knowledge of the fence, his
15 observation of trespassers, incidents of prior
16 escapes and related knowledge go to the heart of
17 this lawsuit.

18 Defendant has sought to place blame for
19 the accident on someone other than himself and he
20 statistically alleged an unidentified trespasser.
21 At the same time he seeks to prevent plaintiff from
22 discovering information that goes to those very
23 issues.

24 Defendant has acknowledged a substantial
25 need that exists to produce the photographs. I

1 guess I'm a little bit at a loss to understand why
2 Mr. Hardman's statement to Mr. Harmon on the
3 morning of the accident, why Mr. Hardman's
4 observations the day of the accident aren't any
5 less substantial than the photographs, which we
6 can't tell what some of them depict anyway.

7 I believe the facts of this case weigh
8 quite heavily in light of the contemporaneous
9 nature of the observations that were made and
10 statements given. I think the facts weigh quite
11 heavily in favor of establishing the substantial
12 need for production.

13 Again, though, even if this court
14 considers to call a close one I think the balance
15 should be struck in favor of allowing discovery.
16 (Whereupon discussion concerning other matters
17 were held)

18 THE COURT: Remain there for a moment,
19 Counsel. In the inadequate showing or the
20 substantial need cases that you have referred to,
21 do they have other sources of information under
22 those circumstances, or is that the sole basis?

23 MR. JAMES: Often it's the sole basis, but
24 in every case it hasn't been, and in part, it
25 depends upon the specific facts of the case, and I

1 can't tell you any specific case name at this point
2 other than to say there are cases where there have
3 been other sources. But where the memories have
4 been dimmed, where essentially a party is precluded
5 from being able to obtain the equivalent of a
6 contemporaneous statement or someone that has a
7 fresh recollection the courts have ordered
8 production of the substantial need of the problem.

9 THE COURT: Any other cases that define
10 substantial equivalent?

11 MR. JAMES: Not that I can recall.

12 THE COURT: Nor do I.

13 Do you believe that where there's a sound
14 public policy that would dictate what the defendant
15 told an insurance adjuster or representative of an
16 insurance company on that particular morning, is in
17 fact, confidential?

18 MR. JAMES: I guess there are public policy
19 arguments that could be made both ways, but in
20 light of the liberal discovery rules and in light
21 of what trial and justice is all about getting at
22 the bottom of things, getting at the truth, I think
23 the balance weighs in favor of production.

24 THE COURT: Thank you.

25 Mr. Morgan, let me ask you a question

1 before you proceed. I've read your brief and
2 thoroughly I understand the arguments involved.
3 You have provided the plaintiff with a number of
4 photographs, I suspect, voluntarily. I don't know
5 that there was any court order in terms of any
6 motion to compel. What would be prejudicial to
7 have the Court order that a deposition could be
8 taken simply to identify what constitutes these
9 arrows on some of the photographs involved and some
10 inquiry regarding the photographs that have been
11 supplied and not broader than that but at least
12 that broad?

13 MR. MORGAN: I see no problem with that
14 just to educate the plaintiffs with regard to what
15 they reflect. I think Mr. Hardman's deposition
16 testimony, I think there are about six or seven
17 photographs and he authenticated about half of them
18 by saying this is what it represents and it's a
19 fair representation. On about three of them he
20 said "I don't know." And so in that regard, I
21 don't have a problem with that.

22 I jump forward to, now, how could that be
23 used at trial then. Let's say you identify what
24 three of those photos actually reflect, that
25 refreshes Mr. Hardman's recollection as to what

1 they reflect, and if he then was to say in my own
2 mind my recollection has been refreshed and I now
3 know what it is they represent could he so testify
4 at trial. Or do you bring in Mr. Harmon to testify
5 at trial and the danger then becomes the injection
6 of insurance in the litigation, which we would
7 strongly abhor and seek to avoid.

8 But in terms of what you have suggested in
9 that regard I see no problem if that's what the
10 deposition is limited to. They seek to have the
11 recorded statement when this court previously ruled
12 that the transcript of the recorded statement is
13 not admissible.

14 THE COURT: What has changed since that
15 date? Has there been any change that would show
16 some new evidence regarding some substantial need?

17 MR. JAMES: Yes. At the time this argument
18 was originally made I don't believe any deposition
19 had been taken in this case, and in fact, it
20 addresses substantially that Mr. Morgan made the
21 arguments, "Gees, they haven't even deposed
22 Mr. Harmon. How can they say there's a substantial
23 need when they haven't went out and talked to the
24 people who now have knowledge." We have now done
25 that.

1 THE COURT: I recall that. I overlooked
2 that.

3 MR. MORGAN: Mr. Hardman certainly
4 remembered a few items with regard to the
5 circumstances surrounding this particular matter.
6 290 pages of deposition testimony was taken of him
7 by the plaintiff. And so to say he doesn't
8 remember anything about the accident is perhaps
9 stretching it a little bit.

10 With regards to substantial need, which
11 you have just raised, I would point out that the
12 Mower case which was before Rule 26(b)3 which we
13 deal with here considered that and apparantly was
14 the only source. We don't have "the only source"
15 in this case. There's Mr. Hardman and there's also
16 the business record entry of the officer who was
17 there the morning following the accident.

18 I would say this with regards to Gold
19 Standard, for example, which was cited as
20 authority. There it dealt with they knew that
21 litigation had been threatened. It hadn't been
22 filed as yet, and they were after a letter that had
23 been written to counsel in which it set forth their
24 proposed fee agreement. And the Court in Gold
25 Standard, Justice Durham said, "Yeah, I think that

1 ought to be discoverable."

2 Now in Gold Standard it said under head
3 note 3, referring to this letter its primary
4 purpose was not to assist in pending or impending
5 litigation.

6 And then in the balance of the case it
7 again refers to that if it is to assist in pending
8 or impending litigation, this means that the
9 document must have either been created for use in
10 pending or impending litigation or intended to
11 generate ideas for the use of such litigation.

12 Well, certainly the recorded statement
13 that an insurance agent is taking would fit. I
14 think something that will assist in pending or
15 impending litigation, unlike the letter that
16 Justice Durham and the Court deemed was
17 discoverable in Gold Standard.

18 Now you raised that question with regards
19 to whether or not there was a confidentiality
20 between an insurance agent and the insured, and I
21 have a case that's directly on point there. It was
22 cited in the brief, Hendrick Heidabrink versus
23 Mauri Wakki, which is a 1985 Washington case.

24 The Supreme Court held that the statement
25 made by the insured to insurer following an

1 automobile accident was protected from discovery
2 under a rule which governs discovery of documents
3 and tangible things prepared in anticipation of
4 litigation. Passage of time alone did not
5 constitute substantial need justifying discovery of
6 statement, and substantial need for statement had
7 not been shown where primary reason for acquiring
8 statement was impeachment.

9 And needless to say, I think perhaps maybe
10 that's what plaintiffs hope to find here is that
11 there's something here that might impeach some
12 prior testimony.

13 The one part I wanted to read to you that
14 dealt with what you said was under headnote No. 5
15 on page 216.

16 It said, "An insured is contractually
17 obligated to cooperate with the insurance company.
18 Such an obligation clearly creates a reasonable
19 expectation that the contents of statements made by
20 the insured will not be revealed to the opposing
21 party."

22 "The insurer, on the other hand, has a
23 contractual obligation to act as the insured's
24 agent and secure an attorney. The insured cannot
25 choose the attorney, but can expect the agent to

1 transmit the statement to the attorney so
2 selected."

3 "Without an expectation of confidentiality
4 an insured may be hesitant to disclose everything
5 known. Such nondisclosure could hinder
6 representation by the selected attorney."

7 There must have been some reason for Rule
8 26(b)3. In this Court's prior ruling, and I have
9 to read this in light of, well, what's happened
10 since, as the Court has pointed out. But it says,
11 "The Court denies plaintiff's motion to compel and
12 for attorney's fees and that the request for
13 discovery is overbroad and involves material
14 protected under attorney work product doctrine
15 pursuant to Rule 26(b)3, Utah Rules of Civil
16 Procedure. The Court therefore limits discovery to
17 incidents occurring and documents created prior to
18 the accident in issue."

19 Incidents occurring. Now, that's talking
20 about something more than just documents.
21 Incidents occurring prior to the accident in
22 issue.

23 Then he goes on and says, "Documents
24 prepared subsequent to the accident were prepared
25 by the insurance company with the instruction of

1 defendant's attorney in anticipation of
2 litigation."

3 By the way, in that case there were a
4 couple of letters that I had sent to the insurance
5 company directing them to do that in all cases.
6 Maybe that's what the Court was referring to.

7 Then it says, "This ruling is made in
8 accordance with the decision in Fontaine v.
9 Sunflower Beef Carrier, a 1980 case in which the
10 U.S. District Court held that in the context of an
11 insurance investigation of an accident, quote, 'The
12 anticipation of the filing of a claim is undeniable
13 once an accident has occurred and a person injured
14 or property damaged.' This is especially true
15 today in this litigious society."

16 "Documents prepared at that time,
17 therefore, are clearly prepared in anticipation of
18 litigation and buyer for another party's
19 representative."

20 And then in the last paragraph, it says,

21 "In addition, plaintiff has failed to
22 demonstrate a substantial need for the documents in
23 accordance with Rule 26(b)3 which will overcome the
24 protection of the attorney work product doctrine.
25 Accordingly a protective order in favor of

1 defendant will be broadly phrased to encompass all
2 items placed in the file and all communication with
3 counsel subsequent to the date of the accident."

4 And again, therefore, it's kind of
5 "subsequent to the date of the accident," that was
6 the only communication really in issue at that time
7 because he was after the documents.

8 Now if the Court would have known that he
9 was also after the recorded statement, which is a
10 document, or the tape itself, which is a document,
11 certainly I believe the Court would have ruled that
12 that would have been encompassed in his broadly
13 phrased ruling.

14 We believe that Mr. Harmon ought not to be
15 deposed other than for the purposes that you have
16 indicated and within that limited scope and we
17 don't have a problem with deposition taking place
18 within that limited scope, and I think that any
19 ruling other than that would have to contemplate
20 how Mr. Harmon would be dealt with at trial if he
21 was going to be a witness at trial with respect to
22 the injection of insurance into the case which
23 would be unduly prejudicial and is irrelevant
24 according to Utah law.

25 THE COURT: Thank you, Counsel.

1 MR. JAMES: I believe, your Honor, if
2 you'll look back at the Mower case, and we
3 acknowledge in our brief that that was decided
4 prior to Rule 26(b)3, but I think the same analysis
5 applies, and if you look back at that and look at
6 what happened, that the statements that the
7 plaintiff was after in that case, that there was
8 not a single source of those statements as
9 Mr. Morgan has suggested.

10 What happened, your Honor, is the railroad
11 went out and interviewed four crew members. One
12 week later plaintiff's counsel went out and
13 interviewed those same crew members. Four years
14 later plaintiff had new counsel. It was at that
15 point plaintiff's new counsel went to the trial
16 court and said we want the statements that the
17 defendant, the railroad, obtained in investigating
18 this accident. The Court said, "Got to have the
19 statements. They were made contemporaneous. You
20 can't fairly prepare for trial without having
21 access to those statements."

22 With respect to the Gold Standard case
23 that is a case that I think I'm all too familiar
24 with, having worked on the losing end of that
25 thing, was a joint defense agreement that was at

1 issue in that case.

2 We have suggestions that perhaps it was a
3 letter not prepared in anticipation of litigation.
4 It was a joint defense agreement, your Honor.

5 With respect to the substantial need prong
6 and admittedly the Court previously ruled that the
7 recorded statement, that it was something that
8 constituted work product. I would like a lot to go
9 back and revisit that decision but that's not
10 appropriate. I think, though, your Honor, that in
11 the time that has expired since that time that a
12 substantial need clearly can be demonstrated.

13 That statement that Mr. Hardman gave to
14 his insurance representative was contemporaneous
15 with the accident at issue. It was given within
16 hours after the accident. It undoubtedly goes to
17 issues that are highly relevant in this case.

18 Mr. Hardman's observations of deer
19 enterals, why aren't any pictures taken of deer
20 enterals. I would like to know what he said
21 regarding this deer that was purportedly was
22 poached in the vicinity of the pasture, of the
23 tracks, of the fense.

24 All of these things are highly relevant to
25 our lawsuit and are statements made contemporaneous

1 with the occurrence of the lawsuit in this case.

2 Is there some sort of substantial
3 equivalent out there? Well, we can only look at
4 two other people other than Mr. Harmon for those
5 statements, and that's Mr. Hardman and Jerry
6 Monson.

7 Well, I think we can fairly set Jerry
8 Monson aside. He remembers virtually nothing. We
9 now have the recorded statement and we have Robert
10 Harmon. Robert Harmon made firsthand factual
11 observations regarding the pasture, regarding the
12 fence. He recorded Mr. Hardman's firsthand
13 observations as they stood there and looked and
14 observed the fence. Observed where the fence was
15 down. Observed, apparently, some enterals some
16 quarter of a mile away. Observed apparently some
17 tire tracks; all of those things relevant to the
18 issue of trespassing. Relevant to defendant's
19 claim that trespassers broke the fence down.

20 Again, your Honor, Utah law governs this
21 case. We have cited case law from lots of
22 jurisdictions and admittedly the case law's all
23 over the place. I can find a case on work product
24 to support anything.

25 The law is Utah. We have Mower that

1 guides us. Mower would suggest that Robert Harmon,
2 perhaps not addressed specifically, but the
3 recorded statement, Mower would suggest it ought to
4 be produced.

5 With respect to Mr. Morgan's
6 representations that he instructed Utah Farm Bureau
7 to take certain actions I think in fairness of full
8 disclosure to the Court, those instructions were
9 given to Utah Farm Bureau four, five or six years
10 before the accident at issue.

11 Mr. Morgan in this case did not call Utah
12 Farm Bureau and say, "With respect to this accident
13 you ought to do this."

14 The fact of the matter is, I met with
15 Mr. Robert Harmon before Counsel was ever involved
16 in this case, and before doing so I specifically
17 inquired of him whether that was okay. Whether
18 there was an attorney involved. No. Yes, it was
19 okay and, no, there's not an attorney involved.
20 Mr. Morgan came into play much later in this
21 lawsuit.

22 Again, your Honor, Utah law governs and I
23 haven't hit the waiver argument. I think there's
24 some very valid arguments that exist there and the
25 Utah Supreme Court addressed waiver in the Gold

1 Standard case, and I think waiver has occurred in
2 two instances. One, if what Mr. Hardman new or if
3 what he told Mr. Harmon constitutes work product
4 Counsel should have objected when I inquired into
5 that in the deposition. He didn't.

6 When we asked on interrogatories with
7 respect to statements that had been made regarding
8 the accident there was a reference made to the
9 recording. No objection.

10 I think the case law is pretty clear that
11 under those cases, even assuming this is all work
12 product and a substantial need doesn't exist, I
13 think it's pretty clear under the case law that
14 waiver has occurred.

15 But I don't even think the Court needs to
16 get to waiver. That's a rather painful issue to
17 address, I acknowledge. I think that a substantial
18 need exists here. These statements were made
19 contemporaneous with the accident at issue.

20 I can ask Mr. Robert Harmon what was
21 depicted in these photographs, but I ought to be
22 able to ask him what he saw. What did he see?
23 What did the fence look like? What did you see
24 with respect to these deer enteral. I think full
25 discovery and fairness would require that. I think

1 there's a substantial need for that, your Honor,
2 for that information. We would request the Court
3 allow us to depose Mr. Harmon.

4 With respect to injecting the issue of
5 insurance at trial obviously that can be dealt with
6 at the time.

7 THE COURT: How?

8 MR. JAMES: At that point in time, I guess
9 we can tell the Court what Mr. Harmon has to tell
10 us and the Court can say whether we can ask him or
11 not. Whether we can call him or whether we can use
12 that information in any way at trial or not.

13 I think the fact, though, that he's
14 somehow connected with an insurance company, to
15 suggest that because of that we shouldn't be able
16 to depose him I think is not only unfair, but
17 contrary to Rule 26 where it says irrespective of
18 whether its admissible at trial, it's relevant,
19 which in this case it clearly is. You ought to be
20 able to discover it.

21 I think in this case, your Honor, again,
22 it is relevant and I think there's no question
23 about that and we would ask the Court to let us
24 discover it. Thanks judge.

25 THE COURT: I believe that addresses all

1 of the pending motions, I hope. The others are sub
2 motions. Let's see which ones we can go to.
3 Let's take these in some order.

4 (Whereupon other issues were ruled on)

5 Plaintiff's motion to compel, I believe
6 frankly, that there is some expectation of
7 confidentiality. I believe there's a public policy
8 argument that's a persuasive one. I also believe
9 that while it may not have been anticipated by
10 Judge Ballif of a broad protective order that would
11 go to the issue of the tape or transcript of the
12 tape, certainly it appears that since that time
13 there has been no additional -- well, I'll state it
14 as an inadequate showing of substantial need.

15 There is a work product involved that
16 ought to be protected. Courts are granted broad
17 discretion on these issues, weighing the facts
18 involved and sort of a civil counterpart of a
19 totality of the circumstances involved, and
20 granted broad discretion under Rule 26(b)3 of the
21 Utah Rules of Civil Procedure to weigh those facts
22 and make a determination.

23 There must be a showing of substantial
24 need and that the plaintiff is unable to obtain a
25 substantial equivalent of the evidence contained

1 within that particular recording.

2 This court is aware of the standard
3 announced both in Mower and also the Gold Standard
4 cases, and believes that there is a substantial
5 equivalent. One, in the written record of deputy
6 Jerry Monson, albeit somewhat abbreviated, and
7 while he has no independent recollection of this
8 date of some of the facts involved, there is a
9 written record.

10 Secondly, there has been a long
11 deposition of the defendant involved that's been
12 demonstrated somewhat in excess of 200 pages. The
13 inquiry regarding, quote un, quote, "contemporary
14 statements" made the following morning to a
15 representative of the insurance adjuster are fairly
16 detailed in the estimation of this court.

17 Despite that ruling, defendants have
18 supplied plaintiffs with seven photographs that
19 were taken on that particular morning.

20 The Court will grant plaintiff's motion to
21 compel a deposition of Mr. Robert Harmon on the
22 narrow issue of the photographs, not only the
23 contested ones but all of the photographs involved
24 and they were supplied -- they were taken evidently
25 by him on that morning and that is a legitimate

1 inquiry regardless of the balance of the order.

2 (Conclusion of argument and ruling)

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 STATE OF UTAH)

2) ss.

3 COUNTY OF UTAH)

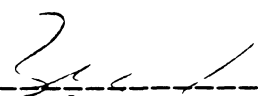
4
5 I, Beverly Lowe, Certified Shorthand
6 Reporter and Notary Public for the State of Utah,
7 certify:

8 That I am an official court reporter in
9 the Fourth Judicial District Court of the State of
10 Utah.

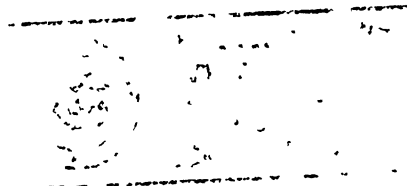
11 That I was present during the entire
12 proceedings in the before entitled cause; that the
13 proceedings were reported stenographically by me,
14 and were thereafter transcribed.

15 That said transcript constitutes to the
16 best of my ability, a true and complete record of
17 the proceedings had.

18 IN WITNESS THEREOF, I have subscribed my
19 name and affixed my seal this 16th day of July
20 of 1993.

21 
22 -----
23 Beverly Lowe, CSR/RPR
24 NOTARY PUBLIC IN AND FOR THE
25 COUNTY OF UTAH, STATE OF UTAH

My commission expires: 2/24/96



Tab L

000000

Defendant.)

) Case No. 91-0400665
) (Rebuttal Testimony
) of Paul Hardman)

EXHIBIT "L"

1 escaped at one time. Some were out. The time I
2 can remember there were three or four that were out
3 and the rest were still in the pasture and they
4 stayed right there in the pasture. They didn't go
5 anywhere." Did I read that accurately?

6 A. That's right and I think that clarifies
7 the question previous, that the time that they had
8 escaped, I said there, and refers to the one time,
9 and it also refers on one of those other questions
10 that I couldn't recall exactly how many times. And
11 again, Counselor, this is three years after the
12 fact and it's difficult to remember specific times
13 and days.

14 Q. The report you gave to Mr. Monson is that
15 the fence had been torn down by hunters two or
16 three times since the deer hunt, was what, the day
17 after the accident?

18 A. Day after the accident.

19 Q. Is your memory better three years later or
20 the day of after the accident?

21 A. Probably the day after the accident.

22 Q. Your memory was better that day than it is
23 today too, wasn't it?

24 A. Probably. I was pretty upset that day
25 also.

Tab M

4TH DISTRICT COURT
STATE OF UTAH
IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH

JUL 22 10 52 AM '93

JULIA LEE ASKEW,)
)
 Plaintiff,) No. 910400665
)
 -vs-) Motions
)
 PAUL HARDMAN,)
)
 Defendant.)

March 6, 1992

Utah County Judicial Center

Provo, Utah

BEFORE: THE HONORABLE GEORGE E. BALLIF, JUDGE

APPEARANCES:

For the Plaintiff: GARY A. DODGE, ESQ. &
MARK F. JAMES, ESQ.
Attorneys At Law
185 South State #1300
Salt Lake City, Utah 84111

For the Defendant: STEPHEN G. MORGAN, ESQ. &
MITCHEL T. RICE, ESQ.
Attorneys At Law
136 South Main #800
Salt Lake City, Utah 84101

PROCEEDINGS

THE COURT: The matter that is before the Court at this time is oral argument on some motions that have been generated by discovery. Let's see what we're--

I think, first of all, we had a Motion to Compel, then a motion for a protective order. Essentially it revolves around a discovery matter that came about when the claims agent or somebody for the Farm Bureau was subpoenaed to give a deposition, I guess, and also directed to bring the file of the case with him.

How do you want to proceed with the argument? Should we start with the Motion to Compel?

MR. JAMES: That would be fine, Your Honor.

THE COURT: All right.

MR. JAMES: Good morning, Your Honor.

My name is Mark James. I'm an attorney with the law firm of Kimball, Parr, Waddoups, Brown & Gee, and my law firm represents the plaintiff in this matter.

The plaintiff called this subpoena to be served on Utah Farm Bureau Insurance Company,

1 defendant Paul Hardman's insurer. Utah Farm
2 Bureau has refused to produce any of the
3 documents subpoenaed claiming that all of the
4 documents subpoenaed were prepared in
5 anticipation of litigation, or, in other words,
6 are protected by the Work Product Doctrine.

7 I think, Your Honor, that there are two
8 important overriding principles that the Court
9 should consider in resolving the issue before
10 it.

11 First, the burden of proving that a
12 document is protected by the Work Product
13 Doctrine rests on the party asserting work
14 product. Second, because the Work Product
15 Doctrine inhibits the true finding process, it
16 is narrowly construed.

17 Now, defendant has cited several cases that
18 stand for the proposition that insurance files
19 may be protected by the Work Product Doctrine.
20 In turn, we have cited cases that state that
21 insurance files are not protected by the Work
22 Product Doctrine and are not immune from
23 discovery. Indeed, we have cited case law for
24 the benefit of the Court that specifically
25 states that the law upon which plaintiff relies

1 is the majority rule.

2 Now, defendant takes issue with this,
3 although defendant has cited no case law to
4 contradict the various judicial holdings that
5 state that the majority rule is that insurance
6 files do not fall within the scope of the Work
7 Product Doctrine.

8 Now, whatever the majority or minority rule
9 may be, proper resolution of this issue depends
10 on Utah law. And while defendant candidly admits
11 that this issue never has been addressed by the
12 Utah Supreme Court, I believe that a couple of
13 recent decisions from that court make clear that
14 the documents that plaintiff seek by subpoena
15 must be produced.

16 In Gold Standard V American Barrick
17 Resources Corporation, a 1990 decision from the
18 Utah Supreme Court, the Utah Supreme Court
19 stated as follows: " The fact that no attorney
20 was involved may suggest that a document was
21 prepared in the ordinarily course of business
22 and not in anticipation of litigation."

23 Now, in an effort to demonstrate attorney
24 involvement with respect to the documents at
25 issue in this case defendant presents an

1 argument that I believe independently is fatal
2 to defendant's claim and dispositive of this
3 issue.

4 Defendant claims that in September of 1986
5 his counsel, Mr. Morgan, who also is Farm
6 Bureau's legal counsel, sent two letters
7 instructing Farm Bureau to prepare certain
8 documents after a claim is made. And I'd like to
9 read to the Court parts of those letters, if I
10 could. And these letters are attached as
11 Exhibit F to the reply memorandum filed by the
12 defendant.

13 The first letter is dated September 10th,
14 1986 and is addressed to Greg Johnson, a claims
15 agent with Utah Farm Bureau. Mr. Morgan states:

16 " Dear Greg, pursuant to your request, I
17 have reviewed the materials that are to
18 be filed"-- or excuse me--" that are to
19 be filled out by a Utah Farm Bureau
20 insured who was involved in an accident.
21 When a person claiming to be a Utah Farm
22 Bureau insured is involved in an
23 accident, I am hereby directing you to
24 forward this material to said person and
25 through you, I am instructing said

1 person to complete this material and
2 return it to you. I am further
3 instructing you to receive this
4 information from said person who was
5 involved in an accident and to take such
6 statements from said person and any
7 other persons who have information
8 concerning the accident as you deem
9 necessary and to use the information
10 obtained as the basis for an
11 investigation on behalf of me and this
12 law firm to prepare us for potential
13 legal claims that may arise. "

14 Mr. Morgan also sent another letter the
15 same day to Mr. Johnson, and this letter stated:

16 " Pursuant to our telephone
17 conversation"-- excuse me--" pursuant to
18 our telephone conference on September
19 8th, 1986, I have prepared the enclosed
20 letter, the purpose of which is to
21 protect any statements you might obtain
22 from your insured or potential witnesses
23 under the law applicable to attorney
24 work product."

25 Defendant has submitted also with his reply

1 memorandum an affidavit of Mr. Greg Johnson, the
2 claims agent for Farm Bureau, wherein Mr.
3 Johnson states that since 1986 Farm Bureau has
4 followed the procedure directed by Mr. Morgan.

5 Now, defendant contends that the broad
6 general instructions given by an attorney for
7 Farm Bureau some five years ago and some three
8 years prior to the occurrence of the accident at
9 issue in this case cloaks all of Farm Bureau's
10 documents with work product protection. This
11 simply is not the case. Indeed, the Utah Supreme
12 Court in the Gold Standard case stated as
13 follows:

14 " If, in connection with an accident or
15 an event, a business entity in the
16 ordinary course of business conducts an
17 investigation for its own purposes, the
18 resulting investigative report is
19 producible in civil pretrial discovery."

20 Subsequently, in Madsen V United
21 Television Inc., the Utah Supreme Court
22 observed, the Work Product Doctrine does not
23 apply to information collected or communications
24 made in the normal course of business. It
25 applies only to material generated primarily for

1 use in litigation, material that would not have
2 been generated but for the pendency or imminence
3 of litigation.

4 Now, Mr. Hardman and Farm Bureau have
5 acknowledged that in Farm Bureau's ordinary
6 course of business Farm Bureau routinely
7 prepares certain documents and memorializes
8 certain information. These documents and that
9 information are the subject of the plaintiff's
10 subpoena in this case.

11 As I stated earlier, Your Honor, the fact
12 that Farm Bureau's practice was commenced some
13 five years ago at the instruction of its legal
14 counsel does not and cannot cloak all documents
15 prepared thereafter with protection of work
16 product. To the contrary, this obviously has
17 become the ordinary business practice of Farm
18 Bureau.

19 Now, the fact that litigation with respect
20 to the accident at issue in this case eventually
21 was initiated similarly does not mean that the
22 documents sought are protected by work product.
23 Again, the Utah Supreme Court stated in the Gold
24 Standard case that the mere possibility that
25 litigation may eventually occur or the fact that

1 litigation eventually does occur is insufficient
2 to cloak materials with the mantle of work
3 product protection.

4 The Utah Supreme Court made it very clear
5 in Gold Standard and again in Madson that
6 documents such as those at issue in this case
7 are not protected by the Work Product Doctrine
8 and are subject to discovery. On that basis,
9 these documents should be produced.

10 Now, even if the documents at issue, Your
11 Honor, were protected by the Work Product
12 Doctrine-- which obviously I believe they are
13 not-- Farm Bureau still should be ordered to
14 produce those documents, because the plaintiff
15 in this case has a need for the information
16 contained in those documents and that
17 information cannot be obtained without
18 substantial hardship.

19 The plaintiff in this case was in a coma
20 for several weeks following the accident. She
21 has suffered permanent brain damage. The young
22 man who was driving the car at the time of the
23 accident since has joined the Marines and now is
24 stationed overseas. The plaintiff did not have
25 a mechanism in place, as does Farm Bureau, to

1 investigate the accident, to take pictures, to
2 interview relevant witnesses. Indeed, through
3 discovery, plaintiff has learned that the day
4 after the accident a Farm Bureau representative
5 interviewed certain persons with knowledge
6 regarding the accident and took pictures
7 regarding the accident at the accident site.

8 Given the time that has passed since the
9 accident, given plaintiff's position, her
10 health, I think it is proper and easy to
11 conclude that Farm Bureau's files-- that
12 plaintiff needs the information requested by the
13 subpoena, and she cannot obtain that information
14 without substantial hardship.

15 As the Utah Supreme Court again observed in
16 the the Gold Standard case, even if the work
17 product requirements of Rule 26B3 are satisfied,
18 the privilege does not apply if the party
19 seeking discovery can show a need for the
20 information and that it cannot be obtained
21 without substantial hardship.

22 Your Honor, this Court should order Farm
23 Bureau to produce the documents that are the
24 subject of plaintiff's subpoena. Unless the
25 Court has any questions as of this time, I'll

1 sit down.

2 THE COURT: Review for me exactly how
3 the subpoena ducus tecum read with regard to
4 what you want to discover in State Farm's files.

5 MR. JAMES: Okay. If you'll permit me--

6 Your Honor, would you like me to read the
7 whole subpoena for the Court or just the
8 document that lists--

9 THE COURT: It was supposed to have
10 been attached to one of the documents you
11 submitted, and it just wasn't there.

12 MR. MORGAN: Would it be okay if I just
13 handed to the Court the subpoena?

14 THE COURT: Is that all right with
15 you, Mr. James?

16 MR. JAMES: Sure. You bet.

17 And, Your Honor, I would state that with
18 respect to request No. 2 on Exhibit A, that
19 document has been produced pursuant to a
20 document request served on Mr. Hardman.

21 THE COURT: Okay. The only comment I
22 want to make relative to that is that appears
23 that this request is broad to the point where
24 you're going to have to rely upon the
25 discretionary facts of whoever is going through

1 their files to pull a particular or not pull a
2 particular file.

3 MR. JAMES: Well--

4 THE COURT: It seems a little broad.

5 MR. JAMES: I guess I understand that,
6 Your Honor, although it seems whenever you serve
7 a subpoena on someone, you have that problem.
8 And quite frankly, the first request in the
9 subpoena refers specifically to the accident on
10 November 20 involving the plaintiff in this
11 case.

12 Again, No. 3 relates-- two has been
13 produced and is no longer an issue. Three again
14 relates to the specific accident at issue. Five
15 relates to particular plaintiff at issue in this
16 case. I can't imagine that Farm Bureau would
17 have any other claim involving Julia Lee Askew.
18 There certainly is no other claim that we are
19 aware of.

20 And four, perhaps the Court may view as
21 broad. But I'm not sure, Your Honor, how you
22 could narrow that request and still feel at all
23 secure that the documents that are being
24 requested, that you'll be able to obtain those
25 documents.

1 Thank you, Your Honor.

2 THE COURT: Thank you. Mr. Morgan?

3 MR. JAMES: Did you want to read this
4 before you proceed?

5 MR. MORGAN: I'll leave it with you in
6 case you need to refer to it.

7 MR. JAMES: It wasn't attached to the--

8 MR. MORGAN: May it, please the Court
9 and counsel, the subpoena, Your Honor, as far as
10 Utah Farm Bureau and Mr. Hardman are concerned
11 is extremely broad and basically asks for
12 everything that is in the file. Anything that
13 relates to the accident or to Julia Askew-- I
14 mean, that is the entire file. The entire file
15 is quite thick.

16 And that file-- I prepared a privileged log
17 and attached that to our objection.

18 With the permission of the Court, I'll just
19 hand to the Court the privilege log. It is an
20 exhibit, so Mr. James would have a copy of it.

21 And you'll note, maybe when you get to the
22 second page or at the bottom of the first page,
23 it starts with letters from Mr. James' law firm
24 and all my letters to Utah Farm Bureau, 13
25 separate letters I wrote to Utah Farm Bureau

1 that all relate to Julia Askew and this
2 accident.

3 So first of all, our position is that it's
4 too broad. But I'd like to explore what the law
5 is in this regard. Specifically we're dealing
6 with rule 26B1 and B3.

7 Now, rule 26B1 states:

8 " Discovery scope and limits. Number
9 one: In general, parties may obtain
10 discovery regarding any matter not
11 privileged which is relevant to the
12 subject matter involved in the pending
13 action. That burden to show that it's
14 not that-- it's relevant and not
15 privileged rests with the plaintiff."

16 And I believe the Gold Standard case and other
17 cases so provide.

18 Now, rule 26B3 provides:

19 " Subject to the provisions of
20 subdivision B4 of this rule, a party may
21 obtain discovery of documents tangible
22 things otherwise discoverable under
23 subsection B1"-- the one I just read--
24 "of this rule and prepared in
25 anticipation of litigation for trial by

1 or for another party or by or for the
2 other party's representative, including
3 his attorney consultant, surety
4 indemnitor, insurer or agent only"-- so
5 this is how you get it--" only upon a
6 showing that a party seeking discovery
7 has substantial need of the materials
8 in the preparation of this case and
9 that he is unable without undue
10 hardship to obtain the substantial
11 equivalent of the materials by other
12 means. In ordering discovery of such
13 materials"-- that is, if the Court
14 should find that they're entitled to
15 it, they've met this burden of need--"
16 in ordering discovery of such materials
17 when the required showing has been
18 made, the Court shall protect
19 against disclosure of the mental
20 impressions, conclusions, opinions or
21 legal theories of an attorney or other
22 representative of a party concerning
23 the litigation."

24 " Other representative" we would take to
25 include the insurer and the agent. Now, that's

1 the rule.

2 What does the case law say? First of all,
3 I'd just like to call the attention of the Court
4 to Gold Standard, which is a case both parties
5 are relying on. And it is the Utah case that--
6 Utah Supreme Court 1991.

7 I'd ask the Court to turn to page 167. And
8 I'm just going to read the areas I've
9 highlighted. Should counsel feel the need to
10 bring to the Court's attention other areas, he
11 certainly can do so.

12 " The underlying theme of Hickman is the
13 preservation of the adversarial system
14 by the protection of the privacy of an
15 attorney's files prepared in
16 anticipation of litigation an
17 encroachment to opposing counsel."

18 Of course, that just deals with attorneys.
19 Then on the next page, 168, under heading 1-2:

20 " For written materials to fall under
21 the protection of Rule 26B3"--which is
22 what I just read--" three criteria must
23 be met and the material must be
24 documents and tangible things otherwise
25 discoverable prepared in anticipation of

1 litigation or for trial by or for
2 another party or by or for the party's
3 representative. However, even if these
4 requirements are met, the privilege does
5 not apply if the party seeking the
6 discovery can show a need for the
7 information and that it cannot be
8 obtained without substantial hardship.
9 But if the documents convey the mental
10 impression, conclusions, opinions or
11 legal theories of an attorney or party,
12 the documents will be afforded
13 heightened protection as opinion work
14 product."

15 And that simply basically restates the rule
16 that I read.

17 " We agree that attorney involvement is
18 only a factor to be weighed in reaching
19 the ultimate conclusion."

20 That's down at the bottom of the page. So
21 that's just a factor.

22 Then over on page 169 it says:

23 "Other courts have rejected the strict
24 application of Thomas Organ."

25 Now, by the way, that is the case that is

1 the strict application that plaintiff referred
2 to as he thinks the majority rule-- at least
3 that's what he so stated in his brief.

4 " Other courts have rejected the strict
5 application of Thomas Organ and have
6 used attorney involvement as only one
7 factor in the more fact specific
8 determination of whether material was
9 prepared in anticipation of litigation.
10 The rule that better affectuates the
11 language of Rule 26B and its underlying
12 rational is that attorney involvement is
13 only one factor to be weighed in
14 determining the applicability of the
15 work product privilege. Moreover, the
16 leading treatises have rejected the
17 Thomas Organ approach."

18 Now, the last thing I'm going to read is on
19 page 170. It says:

20 " An inquiry to determine whether a
21 document was prepared in anticipation of
22 litigation should focus on the primary
23 motivating purpose behind the creation
24 of the document. Under this standard,
25 if the primary purpose behind the

1 creation of the document is not to
2 assist in pending or impending
3 litigation, then work product
4 justification is not justified."

5 The corollary would be if it is prepared in
6 anticipation of litigation, the work product
7 just-- protection would be justified.

8 " The mere possibility that litigation
9 may occur or even the mere fact that
10 litigation does eventually ensue is
11 insufficient to cloak materials with the
12 mantle of work product protection."

13 Now, that's the Gold Standard case.

14 Now, there's one other case that I wanted
15 to refer the Court to because I think it's
16 persuasive. And that is the case of Fontaine V
17 Sunflower Beef Carrier, 87 RFD 89 (1980.) Ask
18 the Court to turn to page 91.

19 " The instant dispute arises due to
20 plaintiff's efforts to obtain statements
21 made by defendant's driver to
22 defendant's safety director, insurer and
23 investigator."

24 Similar type matter to what we have before
25 the Court.

1 " In an alternative attempt to obtain
2 the statements, plaintiff gave notice of
3 his desire to depose the record
4 custodian of the insurer and
5 investigator." Similar again.

6 " Defendant claims that the statements
7 are non-discoverable pursuant to the
8 Work Product Rule 26B3." Our position.

9 Then I'd ask the Court to turn to page 92.

10 And it states:

11 " The fact that litigation may still be
12 a contingency at the time the document
13 is prepared has not been held to render
14 the privilege inapplicable if the
15 prospect of litigation is identifiable
16 because of specific claims that have
17 already arisen. It is apparent that no
18 cohesive theory can be distilled from
19 these dispirit rules. The Court must
20 conclude that the last quoted statement
21 from Hercules represents the sound
22 dispute. That principle best accomodates
23 the competing considerations involved
24 and most closely follows the language of
25 the rule. As stated in Almaguer, the

1 anticipation of filing of a claim is
2 undeniable once an accident has
3 occurred, and a person injured or
4 property damaged. This is especially
5 true in todays litigious society.

6 " Documents prepared at that time
7 therefore are clearly prepared in
8 anticipation of litigation and by or for
9 another party's representative. It must
10 be conceded that in the context of an
11 insurance investigation of an accident,
12 the analysis hereby adopted will almost
13 always result in a finding that the
14 documents were prepared in anticipation
15 of litigation. It is difficult to
16 perceive which factors might lead one to
17 conclude that a particular insurance
18 investigation of an accident is an
19 anticipation of litigation while another
20 such investigation is not. The rule
21 specifically states that the protection
22 is afforded to documents prepared by or
23 for a party's attorney, consultant,
24 surety, indemnitor, insurer or agent.
25 The principle announced in Thomas Organ

1 unnecessarily limits that protection to
2 documents prepared by or for a
3 party's attorney."

4 Then on to page 93.

5 " Under the facts of this case, the
6 documents in question clearly appear to
7 have been prepared in anticipation of
8 litigation. Though no suit had been
9 filed at the the time the statements
10 were taken, litigation was clearly
11 identifiable due to the specific claims
12 which had arisen in connection with the
13 accident. Though no suit had been filed,
14 it was apparent who the plaintiff would
15 likely be and what the claims would
16 likely concern. That does not end the
17 inquire, however, since plaintiff is
18 still entitled to production upon a
19 showing of substantial need and undue
20 hardship in obtaining the equivalent of
21 the materials sought."

22 Now, the plaintiffs contend that they have
23 a need for this material.

24 Now, they did mention the driver of the
25 vehicle is now in the armed forces. I will

1 represent to the Court that we have no statement
2 and there is no reference in the file to this
3 gentleman in terms of having obtained a
4 statement. So we're in the same position as the
5 plaintiff with regard to getting a statement
6 from that particular individual.

7 We did, however, obtain a statement from
8 Paul Hardman, who is the defendant in this case.
9 I think that's where this inquiry should center.

10 And number-- and the argument that they
11 make is, " Well, that is unique, this statement
12 that was obtained by Paul Hardman, because it
13 was taken the day after the accident."

14 The morning after, Hardman called his
15 insurance agent and said, " I want you to come
16 out here because I want to show you what
17 happened. My horse was hit. Somebody was
18 seriously injured. And I want you to come out
19 here and look what the poachers and the
20 trespassers have done to my fence and how the
21 horses got out." He was looking for protection,
22 because he was afraid he was going to get sued.
23 And it was taken that day.

24 There is some uniqueness to the fact that,
25 wow, it's on the very day. And they'd like it,

1 because if it happens to be different from the
2 deposition he will ultimately give, obviously
3 they would like to use that to impeach him. This
4 addresses that issue, under No. 5.

5 " The unique value of contemporaneous
6 statements has repeatedly been
7 recognized. Such statements have been
8 referred to as unique catalysts in the
9 search of truth. It is equally settled,
10 however, that mere speculation or hope
11 that the requested statement may prove
12 to be contradictory for impeaching is
13 not sufficient to overcome the limited
14 privilege applicable to trial
15 preparation materials.

16 " In balancing these conflicting
17 considerations, this Court concludes
18 that it is necessary for plaintiff to
19 show more than the mere
20 contemporaneousness of the requested
21 statements. The rule specifically states
22 that work product materials are
23 discoverable only upon a showing that
24 the party requesting production is
25 unable, without undue hardship, to

1 obtain the substantial equivalent of the
2 requested materials. A mere allegation
3 that the statements are contemporaneous
4 does not satisfy this requirement. This
5 Court also believes that the requesting
6 party must make some showing that
7 efforts to obtain similar materials have
8 proved futile. To rule otherwise would
9 allow that the party"--" would allow
10 that party to rely unfairly on his
11 opponent's preparation and investigation
12 and would run counter to the principle
13 announced in the advisory committee's
14 note. The requirement of a special
15 showing for discovery of trial
16 preparation materials reflects the view
17 that each side's informal evaluation of
18 its case should be protected, that each
19 side should be encouraged to prepare
20 independently and that one side should
21 not automatically have the benefit of
22 the detailed preparation work of the
23 other side."

24 Now, with those cases and that philosophy
25 in mind, I would direct the Court's attention,

1 then, back to the privilege log that has been
2 provided.

3 Now, on December the 6th I've already
4 indicated there that there is a claims coding
5 sheet-reserves.

6 What happened on December 6th is the home
7 office received the materials from the agent
8 that basically were prepared initially on
9 November the 26th, put together on the 6th and
10 sent to the insurance company, who received them
11 on the 7th.

12 Now, I think the rules do provide-- or the
13 law does provide you can waive your privilege if
14 you give the other side your documents. And I
15 don't want to waive the privilege, but I don't
16 know how else this Court can determine whether
17 the documents were prepared in anticipation of
18 litigation initially without looking at the
19 initial documents, because it's our position
20 that--

21 And so anyway, I would like to provide the
22 Court so it could view the documents while-- and
23 without waiving the privilege. I wonder if
24 counsel would have any objection to that.

25 THE COURT: Let's see.

1 MR. JAMES: Your Honor, I don't believe
2 that is necessary, but if the Court feels
3 inclined to look at the documents, I'd be glad
4 to have them submitted for en camera inspection.

5 THE COURT: Well, I don't want to be
6 in a position where I have to make a decision as
7 to whether one is discoverable or not, because
8 of-- I really don't think I should. I think
9 I've got to make my decision based on the other
10 principles and what we know about what has been
11 requested for discovery.

12 MR. MORGAN: Okay.

13 I have provided a privilege log. That's
14 something commonly done when a party is taking
15 the position, " Okay the documents are
16 privileged, but we at least want to tell the
17 other side what they are generally so the other
18 side can say, " Well, okay, we would agree.

19 We're not entitled to the letters you sent
20 the Farm Bureau. That doesn't seem fair,
21 because they include my mental impressions, and
22 theories, and conclusions and that sort of
23 thing." And so I think I have to generally
24 state what these documents are.

25 The very first document on 11-21 is the

1 report of the claim. In other words, the agent
2 receives a telephone call from Paul Hardman, and
3 he tells him about what's happened, and then
4 that agent reports the claim to the home office.
5 And he fills out a document called a Loss
6 Notice. So that's document No. 1. That occurs
7 on November the 21st.

8 THE COURT: That's really just
9 information received about a potential claim.

10 MR. MORGAN: Right. Right.

11 And then, because of Paul Hardman's call
12 and request that the agent-- he actually called
13 the police officer who investigated the accident
14 and requested that he come out-- this accident
15 happened late at night. It's dark-- that he
16 come out and look at the fence so he could see
17 what the deal was.

18 The officer came out. And certainly they
19 can depose the officer and ask what the officer
20 observed that morning. That has not been done
21 as yet. We can take the deposition of the
22 officer and find out what he observed that next
23 morning. He was there.

24 Then Paul Hardman also called his agent and
25 asked that he come out and look at the fences.

1 And pictures were taken of the fence.

2 Now, with regard to the pictures, I think
3 from the standpoint of a need where they
4 couldn't really reproduce-- you can't really go
5 out now and take pictures of the fences and
6 say, " This is the way it was the morning after."

7 And based on that, I would think that we--

8 I mean, we plan to use the pictures anyway.
9 But as far as the pictures are concerned, I
10 think they would be entitled to the pictures.
11 You can't really reproduce those a week later, a
12 month later, a year later. What was it like the
13 morning after? So I don't have a problem with
14 the pictures.

15 But the comments of the agent with regards
16 to the pictures, they would be his mental
17 impressions, his opinions and his conclusions.
18 And I don't think that would be discoverable at
19 trial. They wouldn't be admissible for that
20 reason.

21 The pictures would be admitted at trial.
22 Mr. Hardman would be asked, "Is this a fair
23 representation of what you observed the morning
24 following the accident?" The officer could be
25 asked, " Are these photos a fair representation

1 of what you observed?" And it would come in
2 through testimony. It wouldn't be the comments
3 of the agent with regard to what he thinks they
4 show. I mean, not that I have a big objection to
5 what he says, it's just that they wouldn't be
6 admissible at trial, so why should they be
7 entitled to discover them? Although I think the
8 pictures are appropriate.

9 Now, the next thing he does is he takes a
10 statement of Paul Hardman. He asked him some
11 questions, and Paul hardman responds. It's
12 recorded. And then somewhere down the road it's
13 typed up, that statement.

14 We would submit that that statement was
15 prepared in anticipation of litigation. It was
16 part of the investigation.

17 The next document is a resume or a--
18 important points of interview that the agent
19 fills out and sends to the home office.

20 Now, these would be the conclusions,
21 impressions, observations of the agent trying to
22 recollect what Mr. Hardman said.

23 As far as that's concerned, I think the
24 statement speaks for itself. The statement says
25 what it says. And at trial, you wouldn't allow

1 the insurance agent to come in and give you his
2 recollection and impression as to what the
3 important parts of the statement were. In other
4 words, his resume.

5 The reason he gives a resume is he sends
6 that to the home office. The home office has
7 not had the tape transcribed. And, in fact, this
8 transcript wasn't transcribed until March 5 of
9 1991. And the reason they didn't do it until
10 March 5, 1991 is because there was no need to do
11 it up until that point in time. They had
12 enough-- which was the resume of the agent.

13 So as far as the resume of the agent is
14 concerned, I think that's his mental impressions
15 as to what the statement says.

16 The next document is the-- a check for
17 \$25.00, because the agent orders a copy of the
18 police report. And then he sends the police
19 report together with the statement and his
20 summary and the pictures into the home office,
21 where they all arrive on December 7th. Plus he
22 prepares a report to the company on December
23 6th. And in that gives again his observations
24 and conclusions. He gives his observations with
25 regards to liability and what his opinion is

1 with regard to liability. He gives his opinion
2 as to what the police report says. He suggests a
3 reserve for impending litigation. He talks about
4 the claimant's injuries and gives his opinion
5 with regard to settlement value. He gives his
6 ideas with regards to whether or not the
7 claimant-- the injured person-- ought to be
8 contacted or wait for them to come to Farm
9 Bureau. I mean, absolutely anticipates
10 litigation. And that's why he's sending this
11 record. That's why he went out and obtained a
12 statement in the first place.

13 Now, going on from that point, as I said,
14 there is, then, the-- if you just look at the
15 privilege log, then it goes to December the 11th
16 when the reserve is placed by the insurance
17 company, and then documents with regards to the
18 horse and what Paul Hardman is entitled to.

19 Then there's inter-office correspondence
20 with regard to the claim. There's another
21 reserve sheet as to what the case should be
22 reserved at on the 24th. Then there's four
23 status reports.

24 Then in November there's some inter-office
25 correspondence on the 12th-- or December 18,

1 1990 there's inter-office correspondence that
2 says we've been contacted by Mark James, counsel
3 for the plaintiff. Certainly once you've been
4 contacted by counsel, if you didn't know a claim
5 was coming, it's a pretty good bet that it's
6 coming now.

7 The inter-office correspondence on 11-1-90
8 talks about a call that was received by an
9 individual who identified himself as a brother
10 to Julia Askew and represented their opinions
11 with regards to liability with-- both with
12 regard to the driver and with regard to the
13 owner of the horse, and also offered the fact
14 that they'd hired a private investigator. And
15 that's why on information and belief in our
16 memorandum we indicated that maybe they had
17 hired an investigator. They deny that they
18 have. And we don't know if this was just a
19 bogus call or what. It just happens to appear
20 in the documents.

21 After that you have one status report, and
22 then the letter from Mark James on 1-17-91.

23 And then in March I'm contacted to go out
24 and visit with the attorneys so that they can
25 come to the property of Paul Hardman and view

1 the fences, and the land and the layout, which I
2 do.

3 Then going on from there, it's
4 correspondence between counsel, between the
5 insurance company, settlement demands.

6 And what was subpoenaed, Your Honor, is
7 anything that relates to Julia Askew, the
8 accident, so forth.

9 So as far as we're concerned, I think the
10 issue is whether or not-- anything that this
11 agent did. Certainly the statement that he sends
12 into Farm Bureau that gives all his impressions
13 and opinions.

14 Back to the rule, it says that even if--
15 the initial burden is on the plaintiff to prove
16 that the documents are relevant and not
17 privileged.

18 Now, assuming they can get over that
19 hurdle-- we contend they are privileged because
20 of attorney work product and the prior letters
21 that were sent-- but assuming they get over that
22 hurdle, it says only upon a showing that the
23 party seeking discovery has a substantial need
24 of the materials and is unable, without undue
25 hardship, to obtain the substantial equivalent

1 of the material by other means.

2 They've served two sets of interrogatories
3 on Paul Hardman. He's already answered the
4 first, and the second will probably be filed the
5 first of next week. They've certainly had the
6 opportunity to take his deposition. They
7 haven't, at this point, taken his deposition.
8 They could have taken the investigating
9 officer's deposition. They haven't taken that.

10 So what is the great need for Paul
11 Hardman's statement that was prepared in
12 anticipation of litigation? Because it's
13 contemporaneous and they want to use it so that
14 if he should testify differently, they could use
15 it to impeach him.

16 I read you the material on contemporaneous
17 statements. And basically is that fair when one
18 party has gone out and done their job, the other
19 party has not? It isn't like the photographs
20 that that was the way it looked the day after.
21 So as far as the statement is concerned of Paul
22 Hardman, our position would be that you can take
23 his deposition.

24 Now, as far as the comments of the
25 insurance agent with regard to what the

1 statement says, those are his impressions. And
2 it goes on and says:

3 " In ordering discovery of such
4 materials when required showing has
5 been made, the Court shall protect
6 against disclosure of the mental
7 impressions, conclusions, opinions or
8 legal theories of an attorney or other
9 representative of the party concerning
10 the litigation."

11 So the statement stands alone by itself.
12 Anybody's comment on it I don't think is
13 appropriate. The comments of the insurance
14 agent when he sends it into the company and what
15 he thinks about liability and Paul Hardman's not
16 at fault, and reserve this for such and such,
17 that kind of thing, those are his mental
18 impressions.

19 There's been an implication that somehow
20 within our files we have something on this guy
21 that's now in the armed forces. We don't. I
22 mean, that's not in our privilege log and it
23 doesn't exist. They haven't done it. And so
24 if, in fact, they had taken a statement, maybe
25 he was in the armed services and they couldn't

1 get it any other way, perhaps. But they could
2 send interrogatories or something to him. We
3 certainly plan on finding him at some point in
4 this particular litigation and taking his
5 deposition.

6 So our position, Your Honor, is that when
7 the subpoena was filed and asked the agent to
8 bring his whole file-- to produce the whole
9 file-- it had privileged materials in it and it
10 would have prejudiced Farm Bureau, it would have
11 prejudiced Paul Hardman. And under the rules, we
12 don't believe they're entitled to require the
13 insurance company to produce their whole file.
14 If, when a plaintiff files a lawsuit, they're
15 entitled to the entire file of the insurance
16 company, then that would be a major step, one
17 I'm not familiar with.

18 And so I would just simply say that our
19 position is that the subpoena was way too broad
20 from the standpoint of a need.

21 We don't have a problem with providing the
22 photographs. The agent's comments with regard
23 to the photographs I don't think are
24 appropriate. The statement was prepared in
25 anticipation of litigation. They can take his

1 deposition. As that one case pointed out, just
2 because it's contemporaneous that would mean--
3 if that was the law, any time there was a claim
4 insurance companies may hesitate to go out and
5 take statements if they knew that they
6 immediately had to turn them over to the other
7 side. They're going out to do it in preparation
8 for their investigation of the case in
9 anticipation that litigation will be filed. So
10 that's our position.

11 THE COURT: Thank you, Mr. Morgan.

12 MR. JAMES: I'll attempt to be brief,
13 Your Honor. I would like to put what I consider
14 to be Mr. Morgan's argument in perspective.

15 Your Honor, on the way to this hearing
16 today I stopped at Geneva Steel because my law
17 firm does a lot of work for Geneva Steel. The
18 argument I'm hearing this morning is essentially
19 if I go to Geneva Steel and say, " Every time
20 you sell steel to someone there may be a
21 lawsuit, so I want you to do this, and this and
22 this each time so that if this thing goes to
23 trial, all of your internal documents we can
24 claim to be work product." Your Honor, that
25 simply is not the law of this state.

1 The fact that Mr. Morgan has prepared a
2 privilege log does not establish privilege. The
3 fact that when documents are subpoenaed or when
4 a document request is made there may be some
5 privileged material in there does not allow an
6 opposing party or any independent third-party
7 simply not to produce anything.

8 And, Your Honor, the fact of the matter is,
9 Farm Bureau hasn't produced a single document to
10 us in this case.

11 Now, some of their documents may be
12 privilege. But I submit, Your Honor, the way to
13 handle that is to produce the documents where no
14 claim of privilege is made and then fight over
15 the documents where privilege is made. That is
16 the procedure that I have seen every time in any
17 this case I've ever worked on.

18 Now, Mr. Morgan addressed the issue about
19 notes on pictures and mental impressions and
20 that they probably wouldn't be admissible at
21 trial. But the fact of the matter is, Your
22 Honor, that is not the standard. The standard is
23 admissible at trial or may lead to admissible
24 evidence.

25 The rule is clear under Rule 26 that the

1 fact that something is not admissible at trial
2 does not mean it is immune from discovery.

3 The subpoena that was served on Farm Bureau
4 asked about a particular accident and a
5 particular person. Mr. Morgan claims it's over
6 broad, but comes with two little groups of
7 documents and says it's the whole claim file.
8 Obviously they knew what documents were being
9 asked for.

10 I believe also, Your Honor, that opposing
11 counsel misstates the standard. I agree. The
12 plaintiff in this case has the burden of
13 demonstrating that the documents are relevant.
14 The burden to demonstrate that the documents are
15 privileged, however, rests on the party
16 asserting the privilege. I think the case law on
17 that is absolutely clear.

18 Now, Mr. Morgan read extensively from the
19 Fontaine case, a 1980 case out of the eastern
20 district of Missouri.

21 Your Honor, we have cited case law to you
22 in our brief that states completely to the
23 contrary. And the fact of the matter is Mr.
24 Morgan could stand up here half the day and read
25 case law that supports his position and I could

1 stand up here the other half of the day and read
2 case law that supports our position. And that's
3 why I believe it is important to go back to what
4 the Utah Supreme Court has said in this regard,
5 because Utah law is the law that applies.

6 And the Utah Supreme Court has made very
7 clear in the Gold Standard opinion-- which, my
8 firm was on the losing end, Your Honor, and I
9 was involved in that case.

10 The fact of the matter is the Gold Standard
11 opinion states:

12 "If, in connection with an accident or
13 an event, a business entity in the
14 ordinary course of business conducts an
15 investigation for its own purposes, the
16 resulting investigative report is
17 producible in pretrial discovery."

18 The Court again said in the Madsen case,
19 subsequent to the Gold Standard case, that if
20 it's ordinary course of business, it's
21 discoverable.

22 Utah Farm Bureau has admitted in this
23 proceeding that every time there is a claim or
24 an accident they follow the same procedure-- and
25 they followed the procedure in this case-- how

1 can that be anything other than the ordinary
2 course of business?

3 Now, Your Honor, I'm not going to contend
4 that every document on that privilege log ought
5 to be produced. Indeed, I think a very good
6 argument can be made that after I sent a letter
7 to the insurance company and said, "You're going
8 to have a claim on this case," documents
9 produced thereafter-- there's a good claim that
10 those documents constitute work product or
11 attorney-client privilege, which by the way,
12 Your Honor, I may be wrong, but my recollection
13 is that there's not been a single objection in
14 any of the papers in this case that any of the
15 documents are protected by the attorney-client
16 privilege. That may have just simply been an
17 oversight by counsel. But I don't believe that
18 objection exists in any of the documents.

19 We talked some about the need and
20 substantial hardship. But I think that
21 completely misses the point of the Gold Standard
22 case.

23 The Gold Standard case is all about what
24 documents satisfy the Work Product Doctrine. And
25 I believe, Your Honor, that the Gold Standard

1 case could hardly make more clear that in
2 circumstances such as those that exist in this
3 case, the documents at issue are not protected
4 by work product. They were prepared in the
5 ordinary course of business, at least until a
6 claim was made against the insurance company,
7 until they were notified that a lawsuit would
8 ensue.

9 Now, Your Honor, we haven't argued that the
10 Thomas Organ line of cases is applicable case
11 law. We pointed that out in our brief.

12 But in that same brief we pointed out that
13 the Supreme Court and Gold Standard said, "Yeah,
14 you're right. Attorney involvement is only one
15 factor. It's not a do all and end all." But
16 then the Supreme Court went on and said,
17 " Attorney involvement is obviously an
18 important factor."

19 Now, with respect to the contemporaneous
20 nature of the statements at issue, that
21 obviously is a factor that weighs in behalf of
22 substantial need.

23 The fact of the matter is, Your Honor, we
24 haven't deposed Paul Hardman in this case
25 because we're hoping to receive some documents

1 that can help us in that deposition. What we
2 anticipate is if we deposed him yesterday and
3 got the documents tomorrow, we'd hear an
4 argument from Mr. Morgan that we've had our
5 shot. So when we take our shot, through
6 economy-- I mean, we want to have all the
7 information we can have before we depose him.
8 And we'll depose him as soon as we're able.

9 The fact of the matter is, as I indicated
10 earlier, Your Honor, Julia Askew has suffered
11 permanent brain damage. It's difficult to go to
12 her and say, " Tell us all about what happened."
13 She is helpful in some regards, but we just do
14 not have in place a mechanism like Farm Bureau
15 had in place to immediately go to that accident
16 scene to take pictures of critical elements in
17 the case-- the fence, which will be a key issue,
18 I'm sure, at trial-- to talk to Mr. Hardman the
19 morning after the accident and say, " What
20 happened?"

21 Your Honor, I would submit that--

22 Let me point out one other thing that may
23 be relevant.

24 Mr. Morgan pointed out that one of the
25 documents at issue in this case was not

1 transcribed until March 5th, 1991. I find that
2 to be revealing. And I asked myself as Mr.
3 Morgan made that statement: Why would they wait
4 until then to transcribe that document?

5 Then looking down through the privilege
6 log, I noticed on No. 23 that my letter to Mr.
7 Harmon of Utah Farm Bureau was sent on January
8 17th, 1991. Then it makes sense. Why transcribe
9 something if you're not sure there's going to be
10 litigation?

11 Your Honor, I submit that it's disingenuous
12 to suggest that every document prepared by Utah
13 Farm Bureau in investigating an accident is
14 subject to the Work Product Doctrine. I think
15 that is inconsistent with what the Utah Supreme
16 Court stated. I think it is inconsistent with
17 the very fundamental reason for the existence of
18 the Work Product Doctrine, and believe that the
19 Motion to Compel in this case should be granted
20 and the defendant's Motion to Quash and for
21 protective order should be denied.

22 Thank you, Your Honor.

23 THE COURT: Thank you, counsel. I'll
24 take the matter under advisement and have a
25 decision to you before long.

1 MR. JAMES: Your Honor, if I could, one
2 other item. And I don't know if you'd prefer
3 that I address it now or how you prefer it be
4 addressed.

5 But Mr. Morgan has filed a Rule 11 Motion
6 in this case. And to the extent the Court feels
7 that argument would be helpful, I'd be glad to
8 address that.

9 MR. MORGAN: Well, it was only because
10 you filed a motion for attorney's fees yourself
11 that--

12 MR. JAMES: I didn't file a Rule 11
13 Motion.

14 THE COURT: Well, that's not before
15 the Court now. If you filed memorandum on it,
16 both of you--

17 MR. JAMES: Essentially he incorporated
18 it-- the argument from his reply memo as support
19 for the motion.

20 MR. MORGAN: They asked for attorney's
21 fees for our refusal to--

22 MR. JAMES: Under Rule 37.

23 MR. MORGAN: In turn, we felt that
24 because of the broadness of the subpoena, that
25 if attorney's fees were to be awarded, then they

1 ought to be awarded to us. Kind of a tit for
2 tat.

3 THE COURT: I want to get the other
4 part--

5 MR. JAMES: I understand. I just want
6 to make it clear from my personal view to this
7 Court that Rule 11 is not tit for tat for a
8 request for attorney fees under Rule 37.

9 Thanks, Your Honor.

10 THE COURT: Okay. We'll be in
11 recess. Thank you.

12 (Whereupon, the hearing was concluded at
13 12:02 p.m.)

14 * * *

15

16

17

18

19

20

21

22

23

24

25

1 STATE OF UTAH

SS.

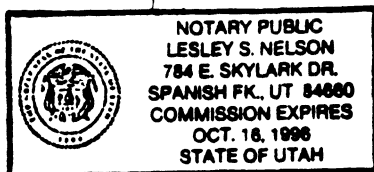
2 COUNTY OF UTAH

3
4 I, Lesley Nelson, do hereby certify that I am
5 an official court reporter in the Fourth Judicial
6 District Court of the State of Utah;

7 That I was present during the entire
8 proceedings in the before-entitled cause;
9 that a transcript of the proceedings at
10 which I was present was thereafter, under my
11 direction, transcribed into computer-assisted
12 transcription, and that the foregoing
13 transcript constitutes a true and correct
14 report of the proceedings which then and there took
15 place;

16 IN WITNESS THEREOF, I have hereto subscribed
17 my hand and affixed my official seal this 20th day
18 of July, 1993.

19
20 
21 Lesley Nelson, C.S.R.
Utah License No. 200



Lesley Nelson, C.S.R.
784 East Skylark Drive

Tab N

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH

JULIA LEE ASKEW,)
)
Plaintiff,) No. 910400665
)
-vs-) Motion to Quash
)
PAUL HARDMAN,)
)
Defendant.)

January 4, 1993

Utah County Judicial Center

Provo, Utah

BEFORE: THE HONORABLE LYNN W, DAVIS, JUDGE

APPEARANCES:

For the Plaintiff: GARY A. DODGE, ESQ. &
MARK F. JAMES, ESQ.
Attorneys At Law
185 South State #1300
Salt Lake City, Utah 84111

For the Defendant: STEPHEN G. MORGAN, ESQ. &
MITCHEL T. RICE, ESQ.
Attorneys At Law
136 South Main #800
Salt Lake City, Utah 84101

Monday, January 4, 1993

PROCEEDINGS

(Whereupon, the following proceedings
occurred in chambers:)

THE COURT: Let's call the case, then,
of Julia Askew V Paul Hardman.

A record ought to reflect now being a time
set for trial in this case. We indicated at the
last meeting to resolve some of a outstanding
issues of the Court that we would meet a few
moments before trial, after the morning
calendar, and address any preliminary matters.
Mr. Morgan is here, and Mr. Rice, in behalf of
the defendant.

Now, are we going to have-- I still have
listed Gary Dodge, Mark James and Scott Young,
three for a plaintiff.

MR. DODGE: Scott will not be involved
in a trial.

THE COURT: Okay. S Gary D dge and
Mark James are present. And what matter. need to
be addressed at this stage, counsel?

MR. MORGAN: Your Honor, we hav filed
a Motion to Quash a Subpoena that was served on

1 Robert Harmon to appear at trial. And I think
2 the Court needs to rule on this prior to opening
3 statement, specially if a plaintiff plans to
4 identify him as a potential witness, and then
5 opening statement to say what they believe he's
6 going to testify to at trial.

7 We faxed to the Court this morning, and to
8 counsel shortly after 8:00, this motion. We also
9 served them with a copy this morning. And Gary
10 indicated he hadn't had a chance to read it.
11 Maybe a Court's in a same position.

12 But it's based primarily on a fact that we
13 believe, by calling Robert Harmon, it is simply
14 an attempt to inject insurance into a trial.

15 Rule 403 of a Rules of Evidence provides,
16 quote:

17 "Although relevant, evidence may be
18 excluded if its probative value is
19 substantially outweighed by the danger
20 of unfair prejudice, confusion of a
21 issues or misleading the jury, or by
22 considerations of undue delay, waste of
23 time or needless presentation of
24 cumulative evidence."

25 This is a discretionary matter with the

1 Court which, absent an abuse, is typically
2 upheld by the Utah Supreme Court.

3 The Court, in Zions-- Terry V Zions, a 1979
4 case, stated, quote:

5 " Evidence is unfairly prejudicial in
6 this context if it has a tendency to
7 influence a outcome of a trial by
8 improper means or if it appeals to jury
9 sympathies or arouses its sense of
10 horror, provokes its instinct to punish
11 or otherwise causes a jury to base its
12 decision on something other than a
13 established propositions of a case."

14 Now, in Rule 411 of a Utah Rules of
15 Evidence, the Court has determined that
16 insurance is irrelevant. And there's
17 substantial case law that says if it's injected
18 into a trial, it is prejudicial to the
19 defendant.

20 A Utah Supreme Court, in Ries V Gentile, a
21 1991 case, 813 P 2d 111, at page 11, stated,
22 quote:

23 " Because of a concern that now ledge
24 of liability insurance will ir rease a
25 frequency of favorable plaintiff

1 verdicts and elevate damage awards, Utah
2 Rule of Evidence 411 was adopted", end
3 quote.

4 So we believe a Utah Supreme Court has
5 already ruled that in adopting this rule of
6 evidence that a interjection of insurance in a
7 trial would unfairly prejudice a defendant.

8 Now, if he is referred to-- Mr. Harmon--
9 When we took his deposition, he was asked,
10 "Well, who do you work for?" I objected. If he
11 is even referred to as an investigator, he's
12 either an investigator for a police or for an
13 insurance company. And once they determine that
14 he's not with a police department, the obvious
15 implication is is that he works for an insurance
16 company.

17 A Utah Court of Appeals held that, quote:

18 " A balancing test of Rule 403 thus
19 excludes matters of scant or cumulative
20 probative force dragged in by the a
21 heels for a sake of its prejudicial
22 effect."

23 We also believe that his testimony would be
24 cumulative with regard to his observations and a
25 pictures, a photographs. Paul Hardman can

1 identify that they fairly represent a fences
2 that existed a morning following a accident.

3 This case will be tried supposedly in one
4 week. With a cumulative witness such as Mr.
5 Hardman, we believe that it would not only be
6 cumulative but waste a Court's time.

7 Now, initially this Court ruled that a
8 files and records of Mr. Harmon were not subject
9 to discovery; then subsequently, at our last
10 hearing, the Court ruled that Mr. Harmon's
11 deposition could be taken.

12 The Court made its ruling on December 28th,
13 but it was limited to what a photographs showed
14 and what his personal observations were. A
15 deposition was then taken on December 30th,
16 limited in that regard.

17 We feel that to subpoena Mr. Harmon now and
18 bring him in as a witness at a trial has the
19 danger of injecting insurance into a trial, and
20 that is why we have filed a Motion to Quash a
21 Subpoena of Robert Harmon and supported that
22 motion with our memorandum.

23 THE COURT: Counsel?

24 MR. DODGE: Your Honor, may I should
25 first inquire of the Court, there is this, there

1 are several other matters that ought to be heard
2 outside the jury room on-- essentially similar
3 issues about unduly prejudicial and
4 non-probative or evidence where a prejudice will
5 outweigh a probative value that we'd like to
6 raise with you.

7 I had not intended to do that right now
8 while the jury is waiting unless you want. I
9 will respond to this one and/or raise our own if
10 you want to go through them all right now.

11 THE COURT: Well, I don't think we'll
12 keep the jury waiting. Do all of these relate
13 to anything that would be involved either in
14 opening statement or identification of
15 witnesses?

16 MR. DODGE: Potentially in opening
17 statement.

18 THE COURT: We'll reserve that for
19 this afternoon.

20 But this would-- might involve--

21 MR. MORGAN: Identifying witnesses--

22 THE COURT: -- the identification of
23 witnesses. A identification of witnesses
24 initially; is that correct?

25 MR. DODGE: Well, it could. It could.

1 Let me respond.

2 THE COURT: Why don't you respond to
3 this Motion to Quash a Subpoena.

4 MR. DODGE: I have not read Mr.
5 Morgan's memo. But my response is essentially
6 two-fold.

7 Your Honor, with your permission, we took a
8 deposition of Mr. Harmon. Part of a reason we
9 requested that permission is that some of a
10 photographs hadn't been and couldn't at the time
11 be identified by Mr. Hardman, a defendant. And
12 secondly, we felt like some of a pictures were
13 inconsistent with Mr. Hardman's testimony of a
14 events and a scene that morning.

15 In a deposition we believe some of that was
16 confirmed. There are some inconsistencies, not
17 only in pictures but in some of his
18 observations.

19 We believe that Mr. Harmon properly can and
20 should be called without identifying him as an
21 insurance adjustor, to identify what is in the
22 pictures, what he saw, what he remembers from a
23 scene.

24 I understand Mr. Morgan's fear of insurance
25 being injected into a trial. It's a matter

1 that's long been part of, I guess, a tradition
2 of a insurance defense bar and even of the
3 courts to try and prevent that.

4 I submit, Your Honor, that a current
5 feeling is that even that is overstated. That
6 fear is overstated.

7 I'd refer Your Honor to Evans V Dottie,
8 which is a 1991 Court of Appeals case, in which
9 they add this footnote-- I won't read it all,
10 but I'll read part of it.

11 " A traditional logic is that a jury
12 may be more likely to find from
13 plaintiff or increase the plaintiff's
14 damage award if the jury knows that
15 defendant has insurance. A per se
16 liability insurance rule developed
17 during a time when liability insurance
18 was uncommon. More recently, however,
19 courts have begun to question this
20 traditional insurance rule."

21 And they cite a Third Circuit Court of
22 Appeals case that says:

23 " The word insurance is not outlawed
24 from the courtrooms-- In fact, it is
25 more realistic for the judge to dissolve

1 a phantom by open talk in a courtroom
2 than to have it run loose in the
3 unconfined speculations of the jury
4 room."

5 A Utah Court of Appeals goes on to say:

6 " There can be little question that even
7 unsophisticated jurors will suspect the
8 existance of insurance. The general
9 prevalence of liability insurance for
10 automobile injuries is known to the
11 jurors; hence, for the law to forbid any
12 disclosure of it in a course of a trial
13 seems to be merely a piece of
14 hypocritical futility."

15 THE COURT: Counsel, isn't that-- but
16 that goes directly to automobile insurance.

17 MR. DODGE: Well, that's true. The
18 existance of liability insurance for people is
19 as prevasively known as any.

20 But the reason I bring it is not because I
21 want to say the word " insurance" ut there,
22 Your Honor. I'm not going to try and--

23 THE COURT: Didn't we plow this ground
24 already last week when you were both before the
25 Court and I inquired as to your motives to--

1 MR. DODGE: Yes.

2 THE COURT: -- depose Mr. Harmon?

3 And I thought we addressed then that he's
4 not going to be a witness; you didn't intend to
5 call him as a witness. This Court would not
6 permit him to be a witness, but you wanted some
7 clarification of the photos on that occasion and
8 you wanted some of his personal observations.
9 That was actually one step broader than defense
10 counsel wanted this Court to allow you to
11 inquire.

12 MR. DODGE: Your Honor, if I could
13 respond to that.

14 THE COURT: But can't you just simply
15 cross-examine the defendant respecting whatever
16 knowledge you may now have?

17 Two points of view. This occurred in
18 November of 1989. You deposed him in December
19 of 1992. Some three years have run. There's
20 going to be naturally some different
21 observations respecting that occasion, I
22 suspect.

23 MR. DODGE: Your Honor, if I may
24 respectfully respond to your memory of the
25 28th.

1 I don't believe there was a determination
2 made at that time whether we could or could not
3 call him. Indeed, Your Honor asked me about
4 that specifically. And I said, " I trust our
5 collective wisdom and talents to be such that we
6 would be able, if necessary, to call Mr. Harmon
7 without injecting insurance, by not referring to
8 his employer."

9 THE COURT: You may have finessed that
10 answer, that's correct.

11 MR. DODGE: And what I had understood
12 was that we would leave that open to see whether
13 there was evidence that came in through Mr.
14 Harmon that would be important for us to get
15 before the jury. We feel that there is.

16 THE COURT: Well, then you're
17 essentially opening up the flood gates so that
18 you can subpoena any insurance agent or
19 insurance adjustor or investigator for an
20 insurance company and--

21 I believe a line of cases still support the
22 fact that ultimately it can be prejudicial or
23 may be, particularly in a case where we're not
24 talking about an auto accident where there's
25 some reasonable reflection upon insurance but

1 liability insurance that attaches to a farmer
2 with some property in a fairly remote area and a
3 variety of things that way. I think the
4 reasoning may be more pervasive if we had two
5 automobiles.

6 MR. DODGE: Well, again, I'm not
7 requesting that the word "insurance" be injected
8 into the case.

9 THE COURT: I understand that.

10 MR. DODGE: Mr. Morgan was arguing that
11 even if it's relevant, he's essentially, I
12 believe, conceding the relevance of the evidence
13 that its probative value is outweighed by its
14 prejudicial value.

15 And I'm saying, in responding to that, I
16 think the prejudicial value or issue of that is
17 overblown and can be mitigated by proper
18 caution, to me, in examining Mr. Harmon, and, if
19 necessary, by proper instructions to the jury.

20 But again, his testimony would be very
21 brief. It would be explaining what he viewed
22 with respect to the fence, with respect to the
23 deer entrails, with respect to a few other
24 things that were simply inconsistent with Mr.
25 Hardman's testimony.

1 THE COURT: Anything further?

2 MR. MORGAN: We incorporated in our
3 argument all the prior arguments that we had
4 made in terms of the work product defense,
5 etcetera.

6 THE COURT: I'll grant your Motion to
7 Quash. It's left with the sound discretion of
8 the Court.

9 I believe that there's-- the probative
10 value is substantially outweighed by the
11 possibility of prejudice or interjection of
12 issues of insurance in the case, which
13 ultimately can either elevate awards or at least
14 may have that possibility.

15 It appears also to the Court that the
16 testimony would be cumulative. Still have an
17 officer or a trooper that was there-- no. Let's
18 see. Excuse me. It's a Deputy County Sheriff
19 that was present on that morning, who made a
20 report, plus a defendant himself who was present
21 on that occasion. So I'll grant your Motion to
22 Quash.

23 What else do we need to address before we
24 go to the jury selection?

25 MR. DODGE: So long as we have the

1 opportunity before opening arguments to address
2 some of our similar Motions to Quash for
3 prejudicial effect.

4 THE COURT: We can do that after
5 selecting the jury.

6
7 (This concludes the proceedings requested
8 by counsel of the defendant's Motion to
9 Quash the Subpoena of Robert Harmon to
10 appear at trial in the above-stated case
11 and the arguments of counsel pertaining
12 thereto.)

13 -oOo-
14
15
16
17
18
19
20
21
22
23
24
25

1 STATE OF UTAH

ss.

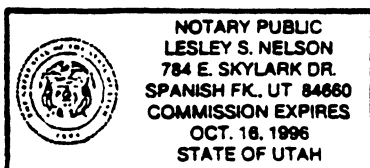
2 COUNTY OF UTAH

3
4 I, Lesley Nelson, do hereby certify that I am
5 an official court reporter in the Fourth Judicial
6 District Court of the State of Utah;

7 That I was present during the entire
8 proceedings in the before-entitled cause;
9 that a partial transcript of the proceedings at
10 which I was present was thereafter, under my
11 direction, transcribed into computer-assisted
12 transcription, and that the foregoing
13 partial transcript constitutes a true and correct
14 report of the proceedings which then and there took
15 place;

16 IN WITNESS THEREOF, I have hereto subscribed
17 my hand and affixed my official seal this 30th day
18 of June, 1993.

19
20 
21 Lesley Nelson, C.S.R.
Utah License o. 200



Lesley Nelson, C.S.R.
784 East Skylark Drive
Spanish Fork, Utah 84660 (801) 798-2868

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing APPENDIX TO
REPLY BRIEF OF PLAINTIFF/APPELLANT was served by hand-delivery this 19th day of
October, 1993, to the following:

Stephen G. Morgan
MORGAN & HANSEN
Kearns Building, Eighth Floor
136 South Main Street
Salt Lake City, Utah 84101

Mark F. James