

IN THE CIRCUIT COURT OF APPEALS
SOUTHERN DISTRICT

No. SD23775

GLEN HANCOCK,

Appellant,

v.

WILLIAM AND RUTH SHOOK, D/B/A BARNES FEED STORE,

Respondents.

APPEAL FROM THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI
THE HONORABLE JUDGE CALVIN HOLDEN

RESPONDENTS' REPLY BRIEF

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JURISDICTIONAL STATEMENT

Glen Hancock appeals from a judgment entered in an action he brought in the Circuit Court of Greene County, Missouri against Bill Shook and Ruth Shook d/b/a Barnes Feed Store. The judgment entered awarded judgment against defendants Bill Shook and Ruth Shook, d/b/a Barnes Feed Store, and in favor of the Plaintiff Glen Hancock.

This action does not involve the validity of any treaty or statute of the United States, nor any statute or provision of the Constitution of the State of Missouri, nor the construction of other new laws of the State of Missouri, nor the title to any state office, nor any case where punishment is imposed by death. This case falls within the general appellate jurisdiction of the Court of Appeals under Article V, Section 3, of the Constitution of 1945 of the State of Missouri.

Jurisdiction lies in the Missouri Court of Appeals for the Southern District pursuant to Mo.Rev.Stat. § 477.060(1994).

STATEMENT OF FACTS

Testimony at trial varied greatly as between plaintiff's witnesses and defendants' witnesses on both issues of causation and damages. For that reason, both positions will be addressed in this Statement of Facts.

I. Plaintiff's Case

Defendants Bill Shook and Ruth Shook owned Barnes Feed Store from 1971 until 1996. (T.2). Plaintiff Glen Hancock was a long time customer of Barnes Feed Store. (T.3). Defendant Bill Shook admitted that, in March, 1992, Barnes Feed Store sold the plaintiff feed for his dairy cattle which contained aflatoxin. It was Mr. Shook's belief that he had possibly purchased two loads of corn from his grain supplier which ultimately tested positive for the presence of aflatoxin. (T.34-38).

Prior to March 12, 1992, Barnes Feed Store did not test its raw corn for the presence of aflatoxin, even though there was a black light test available which could be used to screen corn in an effort to determine the presence of aflatoxin. (T.37-39). There were also chemical tests used to test corn for aflatoxin in March of 1992, but Mr. Shook testified that many mills in Missouri were not testing corn for aflatoxin at that time. (T.39-40). Defendant Bill Shook also testified that it was his understanding that aflatoxin was produced naturally by the presence of moisture in corn during conditions of drought. (T.43-44).

Defendant Bill Shook testified that plaintiff and nine of his other customers fed the corn containing aflatoxin to their dairy cattle, resulting in their milk being taken off the market for a few days and dumped. (T.46-51). The presence of an unacceptable level of aflatoxin in the milk of the ten farmers was discovered by testing at Mid-America Dairymen. Subsequently, a Mid-America representative advised both the farmers and Bill Shook that the milk of the farmers had been taken off the market because of the level of aflatoxin. (T.56-60). After being advised by the Mid-America representative of the existence of unacceptable aflatoxin levels in the milk, Barnes Feed Store retrieved samples of raw corn from the farms of the ten dairy farmers and had the samples tested by an independent laboratory. (T.60-68).

Plaintiff's counsel asked both defendant Bill Shook and plaintiff Glen Hancock about a prior incident in 1990 involving a claim of bad molasses which resulted in an earlier lawsuit being filed by plaintiff against defendants. (T.95-99). In the earlier suit, plaintiff claimed damages from a loss of milk production and damage to his dairy cattle. (T.96-99).

As a result of the aflatoxin incident, plaintiff also claimed damages of a decrease in milk production from March, 1992 until sometime in 1996. (T.105-108). He also claimed that he had to cull 126 dairy cows in 1992 and 1993 which were damaged by their exposure to the aflatoxin in the corn. (T.108-117).

Plaintiff testified that the decrease in the value of his 126 cows culled, based on the difference between their slaughter value and their sale value otherwise, was \$88,200. (T.139-140). He also calculated damages for his loss of milk production from

126 cows, over four separate lactation periods of 305 days each, at “four hundred and sixty-one thousand, one hundred and sixty thousand dollars.” (T.140-141). In arriving at that figure, the plaintiff assigned a \$12 per 100 pounds value to the milk.

The plaintiff also claimed a “loss of reproduction” for calves not produced by the damaged dairy cows. He assumed that he would have produced 50 heifer calves and 50 bull calves per year from the 126 cows culled. He placed a value on the heifers of \$1100 each, for a loss of \$55,000. And he placed a value on the steers at \$300 a head, claiming a loss of \$15,000. He continued these losses over a three-year period of time. (T.144-146).

Plaintiff then testified on his direct examination as to violations of the Missouri Clean Water Law enforced by the Missouri Department of Natural Resources. These problems were present at his Bois D’Arc Missouri farm from 1979 through the present. (T.149-150).

In cross-examination, plaintiff admitted being under an abatement order issued by the Department of Natural Resources which ordered him to stop violating the Missouri Clean Water Law. The order was issued in March, 1993, and offered into evidence as Exhibit J, one year after the aflatoxin incident. (T.192-193). The plaintiff also identified an agreement he entered into with the DNR in September, 1994, which limited the size of his dairy herd on his Bois D’Arc farm to 100 cows. (T.197-199, Exhibit M).

Also, on cross-examination, plaintiff Glen Hancock testified that he did not know the number of cows he was milking on March 11 or March 12, 1992. Neither did

he know the number of non-lactating cows at that time, nor the number of pregnant cows. Nor did he know the number of cows he milked at any time in 1992. And he had no records which would tell him the number of cows he milked at any time. (T.155-156).

The plaintiff testified that all of the cows he culled before the March 12, 1992 aflatoxin incident had some type of health problem. He testified that *all* of the milk cows he sold after March 12, 1992, were sold because they had been exposed to aflatoxin. Of those cows sold after March 12, 1992, Mr. Hancock did not know which, if any, of those cows were giving milk. He could not describe a specific health problem of any one of the cows sold after March 12, 1992, nor did he know the age of any of the cows, nor the number of lactation periods any of them had experienced, nor the number of years he had milked any of them, nor the total production of any of the cows, nor the number of calves produced by any of the cows. (T.164-165). Mr. Hancock was unable to testify as to how long he would have continued to milk any of the cows, in the absence of any aflatoxin problem. (T.166).

Glen Hancock testified that the decrease in milk production he experienced from March 12, 1992, through July of 1996 was strictly because of the aflatoxin incident. (T.184). He then admitted under cross-examination that he was paid a subsidy by the United States government, under the Gramm-Rudman Act, both in 1992 and 1993, for not increasing his milk production. In 1992, he was paid \$4,555.43 by way of federal subsidy, and in 1993, he was paid \$4,388.70. (T.186-188, Exhibits G and H, A-15 to A-19, A-20 to A-26).

The plaintiff was then shown his interrogatory answers from interrogatories in the prior suit he filed against defendants as a result of the molasses incident. (T.207, Exhibit P, A-27 to A-57). In his response to interrogatory number 18, he claimed losses from bad feed because of a decrease of his dairy cattle from \$1200 per head, to a slaughter value of \$572 per head, claiming a loss of \$34,400 per year. (T.207-209). In his deposition testimony from the earlier molasses case, he had testified that these losses in the value of his cows from market value to slaughter value continued until January 1, 1993. He admitted that the time period for which the loss was claimed in the earlier molasses suit was part of the same time period for which the same loss was claimed in the present aflatoxin suit. (T209-210). The dairy cows were the same herd in both suits. (T.210-211).

Further, the plaintiff acknowledged two settlement agreements which resulted in his receiving \$80,200 for the damages claimed for the molasses situation. (T.212-213, Exhibits U and V). The settlement included his claim for losses through January 1, 1993. (T.213).

Further, as it pertains to damages claimed in the present aflatoxin case, plaintiff admitted giving deposition testimony in October, 1993, in the earlier molasses case, wherein he described the overall condition of his dairy herd at that time, October, 1993, as "very good." (T.221). This prior testimony contradicted his trial testimony as to ongoing health problems and decreased milk production experienced by his dairy herd in 1992 until 1996.

The plaintiff also admitted giving testimony in the earlier molasses suit about the aflatoxin incident, prior to his filing the present suit related to aflatoxin. In the earlier case, he was asked how serious the aflatoxin problem had been. His answer was, "Dumped the milk." (T226-227).

The plaintiff's treating veterinarian and designated expert witness, Dr. John Mozier testified and expressed his opinion, to a reasonable degree of medical certainty, that aflatoxin caused the problems in the plaintiff's herd that led to the culling of the 126 dairy cows. (T.287).

On cross-examination, Dr. Mozier admitted that the March, 1992 incident was his first experience with aflatoxin and that, at that time, he knew very little about it. (T.299). At that time, he also had other clients in the same area who experienced problems with aflatoxin in their milk, whose problems resolved. He was not aware of any acute losses occurring to any of his dairy clients and observed no sick cows belonging to any other dairy clients. He did not diagnose any of the other herds in the area with problems associated with aflatoxin. (T299-303).

Further, Dr. Mozier testified that, in 1991, he made approximately 54 farm visits to the plaintiff's farm, during which he treated the plaintiff's dairy cattle for such problems as uterine infections, metritis, diarrhea, enteritis, milk fever, mastitis, foot problems, indigestion, and infertility problems relating to culling. (T.304). In March, 1992, he made two farm visits to the plaintiff's farm. One was recorded on a handwritten ticket identified by the date of 3-13-92. (T.308, Exhibit 31). The second contained only the notation of "3- 92", with the date of the day missing from the

handwritten ticket. (T.308, Exhibit 30). The preprinted number on Exhibit 30, with the missing date, was not in sequence with other tickets from the same time period around March 12, 1992. Dr. Mozier was unable to testify as to whether the farm visit identified on Exhibit 30 occurred before or after March 12, 1992, and he admitted that the ticket would have been numbered out-of-sequence with other tickets for that time period. (T.308-309).

None of Dr. Mozier's records from 1992 and 1993 made any mention of aflatoxin or any aflatoxin-related problems. (T.309-310). And, in fact, his records showed that he treated the same health problems after March, 1992 as he had treated prior to March, 1992, and no new or different problems appeared in the records after March, 1992. (T.311).

Dr. Mozier admitted that the inability of dairy cattle to conceive or to sustain milk production can result from many factors. (T.314-315). He admitted he did no testing of plaintiff's dairy cattle to determine or confirm any diagnosis, and that he saw no signs of acute aflatoxicosis in the plaintiff's dairy herd. (T316-319).

Plaintiff also produced veterinarian Dr. Michael Gardner as an expert witness. (T.346). Dr. Gardner described the regulations of the FDA which prohibit aflatoxin (i.e., M-1) in milk above .5. This relates to 20 parts per billion in feed. (T.360-362). Tests done on the corn from defendants' mill in March, 1992, revealed only the presence of aflatoxin of over 20 parts per billion. (T.353-354). He also testified that aflatoxin is produced by mold growing in the feed. (T.369). Aflatoxin clears the milk within three or four days after withdrawal of the contaminated feed. (T.372). Finally, Dr.

Gardner testified that he held the opinion that, to a reasonable degree of medical certainty, the cause of the problems in the plaintiff's dairy herd was the exposure to aflatoxin. (T.386-387).

On cross-examination, Dr. Gardner admitted that he had never been to the plaintiff's dairy farm, he did not know the feed ration the plaintiff was feeding his dairy cattle in March of 1992, nor did he know the number of cattle the plaintiff was milking, nor the total number in the plaintiff's dairy herd. (T.396-398). Dr. Gardner admitted that, even if the exact amount of aflatoxin in the corn consumed by the plaintiff's cows were known, he would also have to know what else the cows ate and in what proportion to know the level of aflatoxin they consumed, and this information was unknown. (T.407). He also admitted that it was hard to determine whether plaintiff's milk production had increased or decreased without knowing the number of head being milked at any particular time. (T.397). He also admitted, on cross-examination, that the government's concern with aflatoxin in milk is a concern for public safety and an attempt to avoid introducing carcinogens into human food.

Dr. Gardner testified that he was aware of plaintiff's accumulation of animal waste on his dairy farm. He admitted that, as cows are exposed to an environment of animal waste, their health problems could increase, including problems of mastitis, lameness and foot problems. He also admitted that plaintiff's dairy cows had all of these problems and that such problems made animals more susceptible to other illness and disease. (T.412-413). Dr. Gardner admitted that, from his review of the records,

he was aware of no new or additional health problems in plaintiff's dairy herd that had not existed prior to the aflatoxin exposure. (T.417).

II. Defendants' Case

Defendant Bill Shook testified that he had ten dairy farm customers who purchased corn containing aflatoxin. He had talked with all ten customers, including plaintiff, and knew that all of the ten had to dump their milk for a few days after March 12, 1992. He was not aware of any other health problems occurring in the cows of the other nine customers, other than those problems claimed by plaintiff. (T.583-584).

Several of the other nine customers testified at trial that, in March of 1992, they had to dump their milk for a few days because of the levels of aflatoxin in the milk. They all testified that they did not observe any health problems in their dairy cows after the fact, nor did they observe any problems with milk production or conception. (John Miller--T.609-614; Austin Tipton--T.631-636; Ken Abbott--T.644-648; William Crane--T.655-658; James Stanton--T.665-668).

Defendants also offered expert Dr. Gavin Meerdink, diagnostician and head of the Analytical Diagnostic Lab of the College of Veterinary Medicine at the University of Illinois. (T.679-680). Dr. Meerdink had vast experience in the field of aflatoxins and received 4,000 to 5,000 cases per year involving aflatoxins. (T.682-683). He testified that aflatoxin is a chemical produced by mold under certain conditions and that it can occur in almost anything that has a starch base, such as rice, potatoes, bread and peanuts. (T.684). It is also common in dairy feed. (T.685).

Dr. Meerdink testified that aflatoxins can cause a bad effect on cows if the dose is high enough and fed for a long enough period of time. (T.686-687). Aflatoxin is tested in parts per billion, which is a very small unit. (T.689).

Dr. Meerdink testified that aflatoxin in milk disappears rapidly, within 24 to 72 hours. (T.694). A review of the testing records of Mid-America Dairymen for the levels of aflatoxin in the milk of the ten farmers receiving feed from defendants' mill were relatively low, with no indication of any excess exposure in any of the herds. (T.700). The M-1 levels reflected by the testing of the milk were so low that they would not result in any harmful effect on the dairy cows involved. (T.700-701).

Dr. Meerdink had charted the exact M-1 levels of aflatoxin in the milk of the nine dairy farmers who purchased the aflatoxin corn from defendants, based on the Mid-America Dairymen records. Between March 12 and March 16, plaintiff's milk only contained M-1 (aflatoxin) above the .5 level in the testing conducted on March 15, 1992. At that time, the plaintiff had the lowest M-1 level of aflatoxin in his milk of any of the nine dairy farmers. On March 16, the M-1 level of aflatoxin in plaintiff's milk was less than .05 and he was allowed to again market the milk. (T.696-697).

Dr. Meerdink testified that any decrease in milk production following exposure to aflatoxin would appear within a couple of weeks, after a drop in feed intake, which would first occur. And, if no decreased milk production occurred within three to six months after exposure, one can assume that it would not occur from aflatoxin. (T.703-704). Dr. Meerdink compared the plaintiff's milk production records with his records of feed purchases for a period after the March 12, 1992 aflatoxin exposure. The

comparison revealed that in May of 1992, plaintiff experienced the highest milk production he had had in two years. (T.707). The records from the plaintiff's purchase of feed did not indicate any decrease in the level of feed consumed, after March 12, 1992. (T.707-708).

Finally, Dr. Meerdink testified that he saw no evidence from any records on plaintiff's dairy herd that plaintiff's cows suffered any ill effects from ingesting aflatoxin in March of 1992. In fact, the dairy herd's milk production actually improved over the next few months following the incident. (T.713-714).

Defendants also produced expert nutritionist and veterinarian Dr. Don Rollins. (T.786). Dr. Rollins had worked with Mid-America Dairymen in originally establishing the testing process which was used to test the plaintiff's milk for aflatoxin in March, 1992.

Dr. Rollins compared the number of dairy cows claimed by plaintiff on his financial records with the monthly milk sales of plaintiff's dairy cows in 1992. (T.794-795, Exhibit RR, A-58). From the 300 dairy cows reported in early 1992, the productivity per cow appeared to increase in the twelve months immediately after March, 1992. (T.795-797). The records indicated that in the twelve months before March, 1992, the plaintiff sold 3.5 million pounds of milk, and in the twelve months after March, 1992, he sold 3.4 million pounds of milk. (T.796). This milk production increased, even though plaintiff did sell some cows from his herd (T.796-797), which means that the productivity per cow actually increased after March, 1992. (T.797). Such

increase in production per cow belied any claim of damage to the cows from exposure to aflatoxin. (T.797-798).

Dr. Rollins also testified about reviewing the plaintiff's records for veterinarian treatment to his dairy herd from Dr. Mozier's records. (T.800). Of those records reviewed, 50% of the veterinarian expenses related directly to conditions of toxic mastitis, and another 30% pertained to obstetric metritis. (T.801). Dr. Rollins testified that the problems plaintiff was experiencing with manure handling and animal waste directly related to the increased incidences of toxic mastitis and metritis. (T.802). He testified that aflatoxin does not cause mastitis. Mastitis is caused by bacteria in the udder (T.801), which directly related to the environmental conditions on the plaintiff's farm. (T.801-802).

III. Rulings and Verdict

Following the close of the plaintiff's evidence, the defendants filed a Motion for Directed Verdict. (Supp.L.F.1-4). The Court sustained paragraph 5, 6 and 7 of the Motion, directing a verdict for defendants on those issues. The court overruled the motion as to issues set forth in other paragraphs. At the close of all the evidence, the defendants again filed a Motion for Directed Verdict. (Supp.L.F.5-7; T.959). The motion was overruled. (T.959).

In closing argument, defendants' counsel argued to the jury that the plaintiff's only damages consisted of four days of dumped milk, to which different values had been discussed during the evidence. Defendants' counsel suggested to the jury that the

plaintiff's damages should be measured by the value of the four days of dumped milk. (Supp.T.1-5). The jury returned a verdict in favor of plaintiff in the amount of \$12,500. (L.F. 54).

At the close of trial, the parties withdrew from the court's files their exhibits admitted into evidence. Any exhibits relevant to Respondent's Brief and discussed herein have either been deposited with the Clerk or are contained in the Appendix hereof.

POINT RELIED ON

I.

The trial court did not err by refusing to ask plaintiff's treating Veterinarian, Dr. Mozier, in his rebuttal testimony, two juror questions regarding the identification of a missing date on one of Dr. Mozier's invoices from treating plaintiff's cattle, because plaintiff failed to meet his burden of proof on the issue during his direct testimony and because he failed to produce a requested corresponding veterinary record, during discovery, which might have been illustrative of the date in question missing from Dr. Mozier's invoice.

Williams v. McCoy, 854 S.W.2d 545 (Mo.App. S.D. 1993)

Higgins v. Star Electric Inc., 908 S.W.2d 897 (Mo.App. W.D. 1995)

Wilkerson v. Prelutsky, 943 S.W.2d 643 (Mo.banc 1997)

Meyers v. Southern Builders, Inc., 7 S.W.3d 507 (Mo.App. S.D. 1999)

Frank v. Environmental Sanitation Management, 687 S.W.2d 876 (Mo.banc 1985)

City of Springfield, Missouri v. Thompson Sales Company, et al., Case No. SD23595

POINT RELIED ON

II.

The trial court did not err by allowing defendants to present testimony from plaintiffs' deposition pertaining to portions of an unidentified writing prepared by plaintiff because the testimony constituted admissions against interest involving an independent fact pertinent to a material issue and admission of the entire exhibit into evidence would have violated the general rule excluding evidence of settlement negotiations between parties.

In re Mirabile, 975 S.W.2d 636 (Mo.banc 1998, 938-939)

Owen v. Owen, 642 S.W.2d 410 (Mo.App. S.D. 1982)

Stan Cushing Construction v. Cablephone, Inc., 816 S.W.2d 293 (Mo.App. S.D. 1991)

POINT RELIED ON

III.

The trial court did not err in refusing to grant a new trial on the basis of the affidavit of George Parsons, presented by plaintiff in connection with his Motion for New Trial, in that plaintiff preserved no objection to defendants' deposing of the witness by proper objection at the time of the deposition, nor did the affidavit admit any false testimony by the witness or any inaccurate testimony relevant to the issues in the case, and the testimony of the witness was relevant on the issue of the causation of plaintiff's claimed damages.

Hoodco of Poplar Bluff, Inc. v. Bosoluke, 9 S.W.3d 701 (Mo.App. S.D. 1999)

In re Marriage of Beeler, 26 S.W.3d 610 (Mo.App. S.D. 2000)

Rule 57.07(c)(4)

Rule 84.04(d)(1)

POINT RELIED ON

IV.

The trial court did not err in allowing defendants to show videotaped excerpts from plaintiff's deposition, without ruling on plaintiff's objections or allowing plaintiff's counter-designations to the testimony offered by defendants to be read at the same time as defendants' presentation of testimony, because the court did rule on plaintiff's one objection contained in the deposition testimony and did allow plaintiff to read counter-designations of testimony from plaintiff's deposition upon the conclusion of the defendants' presentation of plaintiff's deposition testimony.

Ayers v. Aurora Enterprises, Inc., 899 S.W.2d 913 (Mo.App. S.D. 1995)

Myers v. Ries, 8 S.W.3d 137 (Mo.App. E.D. 1999)

POINT RELIED ON

V.

The error claimed by appellant in Point Relied On V was not preserved for appellate review and appellant's Point V cites no reference to any ruling by the trial court in the trial record and whether the ruling described by Point Relied On V resulted in the omission of relevant evidence prejudicial to the plaintiff was not preserved for appellate review.

Wilkerson v. Prelutsky, 943 S.W.2d 643 (Mo.banc 1997)

O'Bernier v. R.C. & Associates, 47 S.W.3d 422 (Mo.App. S.D. 2001)

McCormick on Evidence, Section 51 (4th ed. 1992)

Smith v. Associated Natural Gas Co., 7 S.W.3d 530 (Mo.App. S.D. 1999)

Rule 81.12

POINT RELIED ON

VI.

The court did not err in its rulings (A) striking Count V of plaintiff's Petition (B) dismissing Count III of plaintiff's Petition, and (C) giving a withdrawal instruction to the jury.

In re Marriage of Beeler, 26 S.W.3d 610 (Mo.App. S.D. 2000)

Gibson v. Slagle, 820 S.W.2d 595 (Mo.App. W.D. 1991)

Curnes v. Equitable Life Assurance Society, 6 S.W.3d 175 (Mo.App. S.D. 1999)

Hoover's Dairy, Inc. vs. Mid-America Dairymen, Inc./Special Products, Inc., 700 S.W.2d 426 (Mo.banc 1985)

Smith v. Associated Natural Gas Company, 7 S.W.3d 530 (Mo.App. S.D. 1999), citing *Bradley vs. Browning Ferris Industries, Inc.*, 779 S.W.2d 760, 765 (Mo.App. 1989)

Rule 84.04(d)(1)

POINT RELIED ON

VII.

The trial court did not err in its pre-trial rulings; plaintiff failed to preserve the court's rulings for the record on appeal by making any objection at trial, and, as to the evidence regarding the plaintiff's molasses suit, the plaintiff's DNR problems, and the plaintiff's suit against Bolivar Redi-Mix, plaintiff directly injected those issues into evidence in his case in chief.

Wilkerson vs. Prelutsky, 943 S.W.2d 643 (Mo.banc 1997)

Lamar Advertising of Missouri v. McDonald, 19 S.W.3d 743 (Mo.App. S.D. 2000)

Budding v. Garland Floor Co., Inc., 939 S.W.2d 419 (Mo.App. E.D. 1996)

Rule 84.04

§490.692, R.S.Mo.

POINT RELIED ON

VIII.

The court did not err in its pre-trial and trial rulings and the court’s ruling on plaintiff’s First Motion in Limine is not preserved in the record on appeal, nor are the other “erroneous and inconsistent rulings” which “prejudiced plaintiff and resulted in an inadequate verdict.”

LaMar Advertising of Missouri v. McDonald, 19 S.W.3d 743 (Mo.App. S.D. 2000)

Wilkerson vs. Prelutsky, 943 S.W.2d 643 (Mo.banc 1997)

§490.692, R.S.Mo.

Rule 84.04

ARGUMENT

I.

The trial court did not err by refusing to ask plaintiff's treating veterinarian, Dr. Mozier, in his rebuttal testimony, two juror questions regarding the identification of a missing date on one of Dr. Mozier's invoices from treating plaintiff's cattle, because plaintiff failed to meet his burden of proof on the issue during his direct testimony and because he failed to produce a requested corresponding veterinary record, during discovery, which might have been illustrative of the date in question missing from Dr. Mozier's invoice.

Dr. John Mozier was both the treating veterinarian for plaintiff's dairy cattle during the time period in issue in the case and one of plaintiff's designated expert witnesses. Dr. Mozier testified that the aflatoxin incident which occurred in March, 1992, was his first experience with aflatoxin and that, at the time, he did not know very much about aflatoxin. (T.299). He further testified that, in 1991 and 1992, he made numerous visits to the plaintiff's dairy farm and that his handwritten tickets from those visits showed treatments he had rendered to plaintiff's dairy cattle for various types of health problems. (T.304). Dr. Mozier identified two handwritten tickets from two farm visits he made to plaintiff's dairy farm in March of 1992. Ticket number 14134 bore the date of "3-13-92" (Exhibit 31) and the second ticket, number 14158, only contained the date of "3- 1992." (Exhibit 30, T.388)(A-1, A-2).

In cross-examination, Dr. Mozier was questioned as to the missing date on ticket no. 14158. He admitted that the ticket number was out of sequence with other tickets

for the time period relating to March 11 and March 12 of 1992, the date plaintiff contended was at or near the time of the discovery of the aflatoxin ingestion by his dairy cattle. (T.327) Dr. Mozier admitted that he was unable to testify as to whether the visit reflected on ticket no. 14158 (Exhibit 30) reflected a veterinarian farm visit before or after March 12, 1992. (T.308, 328).

Plaintiff's Exhibit 30 was a veterinarian record produced by plaintiff during the course of discovery, as reflected by a second exhibit sticker contained on the exhibit identifying the exhibit as "Deposition Exhibit Hancock 17" and bearing the deposition date of 11-12-97. The missing date had not been identified by the time of trial, as reflected by Dr. Mozier's testimony.

As was the court's practice, written questions were submitted by the jury to the court upon the conclusion of the testimony of the witness. The trial judge then reviewed the jury's questions with counsel for the parties and made a decision, based upon input and objections by counsel, as to which questions the court would allow to be asked of a witness. The judge's procedure was to then himself ask the question of the witness as to those questions permitted. This practice was consistently followed throughout the trial, as revealed by the trial transcript.

At the conclusion of Dr. Mozier's testimony, one of the juror questions submitted to the court was, "Is there any other way to figure out the date of the farm visit with the three aborted cows?" (Ct. Ex. 10, L.F.83, T.331). Plaintiff's attorney *agreed* to the court asking the juror's question of the witness. (T.332). Thereafter, in front of the jury, the court did ask the question of the witness, and the witness indicated

that additional records might exist which might help him to identify the particular date relating to invoice no. 14158. (T.334).

No further testimony was presented by Dr. Mozier until rebuttal testimony was offered by the plaintiff. At that time, the plaintiff recalled Dr. Mozier as a rebuttal witness. (T.927-955). At the conclusion of Dr. Mozier's rebuttal testimony, the court again considered questions submitted by the jury. Again, there was a question regarding whether Dr. Mozier had identified the missing date of ticket no. 14158 from reviewing lab test documents. (Ct. Ex. 28, Ct. Ex. 29, L.F.81-82, T.956). Defendants' counsel objected to the juror questions being asked of the witness on the basis that the questions pertained to documents which had not been produced by plaintiff during discovery. The court sustained the objection. (T.956-958).

Defendants interpret plaintiff's Point Relied On I as a claim that (1) the court erred by its refusal to allow the plaintiff's veterinarian to testify, in rebuttal, to jurors' questions regarding the identity of a specific date on the witness's own medical records from his treatment of the plaintiff's dairy herd in March, 1992, (2) because the jury question that the court allowed to be asked of the witness during direct examination as to whether he could locate the missing date created an "unfulfilled expectation" (3) which prejudiced the plaintiff and should have been allowed as relevant.

Defendants' counsel has located no legal authority or precedent on plaintiff's theory of "unfulfilled expectation." Plaintiff then argues that the court's ruling was in error because: (1) the plaintiff did not have possession of the documents which might be some evidence of the missing date on Exhibit 30 and, therefore, the plaintiff had no

duty to produce any such documents, even though plaintiff admits that defendants had requested the production of such documents in Defendants' First Request for Production of Documents and Defendants' Fifth Request for Production of Documents (Appellant's Brief 23-24); (2) the documents constituted records of the plaintiff's treating veterinarian and plaintiff had no access to them, even though the plaintiff authorized the veterinarian to release all of his records maintained by Dr. Mozier to defendants (Appellant's Brief 24); (3) and that if the missing document or documents had been produced to defendants, which they were not, defendants should have then produced such documents to plaintiff, and plaintiff was thereby prejudiced (Appellant's Brief 24-25); and (4) the missing date on ticket no. 14158 was not pointed out to plaintiff prior to trial by defendants' counsel and defendants' counsel did not ask Dr. Mozier "to establish conclusively the date on invoice no. 14158" or otherwise advise plaintiff, in advance, that the missing date would be drawn into question at trial. (Appellant's Brief 25).

Plaintiff then proceeds to argue that records in the possession of Dr. Mozier, not produced in any way or any manner during discovery, even though requested, constituted "newly discovered evidence." (Appellant's Brief 25). This argument is made even though it does not constitute any part of the error cited in Point Relied On I.

The plaintiff's Motion for New Trial (L.F. 55) also cites the court's action in refusing to ask either of the two juror questions of Dr. John Mozier during his rebuttal testimony, without stating any legal reason as to how the ruling constituted error. Plaintiff's motion does raise the question of newly discovered evidence. In *Williams*

v. McCoy, 854 S.W.2d 545, (Mo.App. S.D. 1993), this court pointed out that new trial motions on the ground of newly discovered evidence, not being favored in the law, are viewed with disfavor and granted only as an exception. This court further set forth the elements required to be shown by a party seeking a new trial on the ground of newly discovered evidence: “(1) the evidence came to his knowledge since trial, (2) due diligence would not have uncovered the evidence sooner, (3) the new evidence is so material it would probably produce a different result if a new trial were granted, (4) the new evidence is not cumulative only, (5) an affidavit of the witness must be produced or its absence accounted for, and (6) the object of the evidence may not be to impeach the character or credit of a witness.” *Williams* at 554.

It should be noted that the plaintiff does not cite as error in Point Relied On I that the trial court erred in failing to grant a new trial based on newly discovered evidence. The newly discovered evidence theory is argued by plaintiff, however, in the argument portion of Point Relied On I, along with plaintiff’s other theories as to why the court’s ruling constituted error.

It should also be noted that many of the factual representations set forth by plaintiff in his argument to Point Relied On I are not from the record nor from any evidence presented at trial. Rather, they simply constitute explanation by plaintiff’s counsel as to events which occurred and opinions held by him which are not before this court by means of the official trial record and should not be considered nor accepted as accurate.

The requirements for newly discovered evidence are clearly not met in this case. First, the evidence did not come to the plaintiff's knowledge since trial, in that the evidence existed and was or may have been in the possession of the plaintiff's treating veterinarian and expert witness since 1992. Because no offer of proof was made on the issue and no official evidence or testimony exists as to any missing documents, the exact nature of any such documents is unknown. It is known, however, from Exhibit 30, that the incomplete invoice which sets forth only the month and year had been in existence, produced in discovery, and discussed during depositions in the case, as evidenced by the deposition sticker on Exhibit 30, dated in 1997. (A-2). Therefore, the fact that the important date was missing on a significant piece of evidence from 1992 was evident for a number of years prior to trial. Since it was important to the plaintiff's case that the exact date of ticket no. 14158 be after March 11, 1992, due diligence on the part of the plaintiff or plaintiff's counsel could and should have discovered additional documentation relating to that date long before the trial of this case.

Further, it cannot be argued that the specific date missing from ticket no. 14158 was so material as to have produced a different result if a new trial had been granted. The jury in this case found in favor of the plaintiff, and the question as to the cause of any health condition, created in the plaintiff's cattle by dairy feed sold by defendants, related directly to causation and not to any award of damages. Therefore, since the questions that the plaintiff cites as error were not asked of the witness, it cannot be argued that a different result would have occurred, because the missing questions clearly did not prevent the jury from returning a verdict in favor of the plaintiff. Further,

plaintiff produced no affidavit of Dr. Mozier as to the reason for any missing document nor explaining its absence over the course of time between 1992 and April, 2000. In fact, there is no evidence on the record at all as to any missing documentation, and no offer of any proof as to any such evidence was made by plaintiff.

Clearly, the reason any additional documents were not located sooner by the plaintiff can only be attributed to his own lack of diligence. The absence of a relevant date on a significant piece of evidence was patently obvious for a number of years prior to the date of testimony of Dr. Mozier. Plaintiff went to great lengths at trial to attempt to establish the dates upon which his cattle ingested aflatoxin-contaminated feed. Clearly, the date on the invoice, if applicable to the time period of such ingestion, should have been pursued with due diligence and in an effort to meet the burden of proof imposed upon any plaintiff.

In short, the only reason that any additional and available records were not obtained sooner from plaintiff's treating veterinarian is solely because of the lack of due diligence on the part of plaintiff. A gap in evidence as reflected by the missing date on ticket no. 14158 was obvious since March, 1992. Due diligence has been defined by Missouri courts as "that degree of assiduity, industry or careful attention called for under the circumstances of the case" *Higgins v. Star Electric Inc.*, 908 S.W.2d 897, 903-904 (Mo.App. W.D. 1995). Careful attention to the plaintiff's own documentary exhibits would have revealed the necessity for further pursuing a means by which to identify the missing date on Exhibit 30. Certainly, once the question was raised to the plaintiff's own veterinarian, he readily admitted the possibility existed of

identifying the date by reviewing other documents. These were documents for which plaintiff had neither searched nor which had been produced by plaintiff or by plaintiff's treating veterinarian upon request and authorization. If any prejudice resulted in the case from the failure to produce such documentary evidence prior to trial and properly in the course of discovery, any such prejudice would have resulted to defendants, who were never made aware that any such documentation might exist.

More importantly, the trial record contains no evidence or explanation as to what, if any, document or documents may have been searched out and located by Dr. Mozier between the time of his direct testimony and his rebuttal testimony. In fact, the only explanation anywhere in the record as to what occurred with regard to that time period and any search for any additional documentation is set forth in Appellant's Brief by way of gratuitous explanation on page 21, when plaintiff's counsel describes the occurrences which allegedly happened outside of the trial and which were related to him in an evening telephone call to him from Dr. Mozier. No such evidence exists on the record.

No evidence was submitted at trial of any search for documents or any location of documents might allow plaintiff to more easily meet his burden of proof as to the exact time any of his dairy cows were treated for aborted calves, i.e., miscarriages. Such evidence could have been properly placed on the record by plaintiff making an offer of proof at trial. This was not done. Accordingly, the trial record is devoid of any evidence as to what might have transpired with regard to Dr. Mozier and his records between the time of his direct testimony and his rebuttal testimony. Further, any such testimony

would not be proper rebuttal testimony to any testimony presented by defendants and merely represented the struggles of plaintiff to further attempt to offer some proof as to damage occurring to his cows after March 11, 1992.

Appellant's contention that the court erred by refusing to allow the plaintiff's veterinarian to testify in rebuttal by answering jury questions about documents and the identification of the missing date on a previously produced document was not preserved on the record for appellate review. Plaintiff made no offer of proof as to what the excluded testimony or evidence might have been. (T.956-958). The actual trial record only reveals that two jurors submitted written questions upon the conclusion of Dr. Mozier's testimony in rebuttal. These questions inquired about dates of treatment for three aborted calves as reflected on lab records and blood tests documents. (L.F.81-82). Since those documents were requested but were not produced by plaintiff in discovery, as discussed previously, the court sustained the objection of defense counsel on the basis that such discovery had not been provided. (T.956).

First, a trial court has broad discretion to control discovery and discovery abuses. The court's discretion extends to its choice of remedies in response to the nondisclosure of evidence. *Wilkerson v. Prelutsky*, 943 S.W.2d 643 (Mo.banc 1997). Plaintiff has freely admitted that the defendants requested the production of "all documents in your possession which record or evidence any of the damages described in your Petition" (Appellant's Brief 23), as well as "all veterinary records that have not been produced" and "all records of any testing of any nature whatsoever done on your dairy farm from 1991 to 1996" (Appellant's Brief 24). Further, plaintiff has admitted

that it executed and delivered to defendants an authorization to allow defendants to obtain Dr. Mozier's veterinary records and that the missing records inquired into by the jurors' questions were not produced. (Appellant's Brief 24).

Secondly, at the time the court considered questions submitted by the jury to be asked of Dr. Mozier during his rebuttal testimony, the plaintiff had an opportunity to make a record as to what the evidence or testimony would have been, by way of an offer of proof. Plaintiff failed to do so. There is no indication on the record and no evidence as to what the excluded testimony would have been. At this point, on appeal, one can only guess as to what the excluded testimony would have been, as there is no basis in the evidence to advise the Court of Appeals, or defendants' counsel, as to what the excluded evidence was or would have been.

The primary reason for an offer of proof is to preserve the record for appeal. The secondary reason for an offer of proof is to permit the trial judge to consider the admissibility of the evidence, posed in the form of the anticipated testimony and the expected proof and recorded as such in the official trial record, and so that, in the case of appeal, an appellate court can understand the scope and effect of both the question and proposed answer in determining whether the trial judge's ruling excluding such evidence was proper or error. *Wilkerson* at 646.

Setting aside for a moment the fact that the judge disallowed testimony as to additional documents located by the witness because the documents had not been disclosed in discovery, defendants also contend that no issue on the fact was even preserved for appellate review because of the plaintiff's failure to make an offer of

proof. The general rule is that nothing is preserved for appellate review when a trial court rejects evidence in the absence of an offer of proof. *Meyers v. Southern Builders, Inc.*, 7 S.W.3d 507 (Mo.App. S.D. 1999).

A narrow exception exists to the general rule:

“First, it requires a complete understanding, based on the record, of the excluded testimony. Second, the objection must be to a category of evidence rather than to specific testimony. Third, the record must reveal the evidence would have helped its proponent.” *Frank v. Environmental Sanitation Management*, 687 S.W.2d 876, 883-884 (Mo.banc 1985).

In our present case, we would have to guess what the content of the witness’s testimony would have been. Likewise, we would have to guess what any additional documentary evidence might have been. The record in the present case does not reveal what the excluded testimony would have been, nor how it might have helped plaintiff. The exception does not apply.

Plaintiff’s point of error comes down to his claim that the judge failed to ask witness John Mozier two questions submitted to the court by members of the jury. Plaintiff argues that he failed and was prevented from meeting his burden of proof as a result of the judge’s ruling excluding such questions and answers from his rebuttal evidence. Defendants submit that plaintiff should have met his burden of proof during his initial direct presentation of evidence on his case. If he failed to do that in any regard, it was not because of the court’s ruling excluding jury questions and testimony in rebuttal. The jury had no burden of proof.

The fact is that the plaintiff did not diligently pursue evidence which he now contends was “crucial” to his proof. (Appellant’s Brief 19). Plaintiff should have realized long before the trial of this case that such evidence was “crucial” and should have exercised due diligence to locate and discover any such “crucial” evidence prior to trial. Plaintiff should have realized the problem with his Exhibit 30 by virtue of its missing information and should have foreseen the necessity for identifying the date which was missing from the invoice. It appears that the plaintiff did nothing prior to trial to identify the missing date, and his complaint is that the court failed to allow him to conduct his own discovery during the course of the trial, once the apparent discrepancy in the plaintiff’s own records was highlighted by the defendants.

Counsel for defendants is aware of this court’s recent ruling in *City of Springfield, Missouri v. Thompson Sales Company, et al.*, Case No. SD23595_ pertaining to the court’s submission of jury questions to witnesses. However, defendants contend that the issues presented by the present appellant is quite different from any issue addressed by the court in the *Thompson* case. In our present case, plaintiff’s counsel made no objection whatsoever to the court’s outlined procedure in allowing jurors to submit written questions to be reviewed by the court and, in some instances, asked of witnesses. Secondly, plaintiff’s counsel made no objection to the initial question submitted by a juror and asked by the court to plaintiff’s witness, Dr. Mozier, with regard to whether the missing date could be identified. (Court’s Exhibit 10, L.F.80). And, most importantly, the plaintiff’s claim of error was from the court’s decision to not ask additional questions submitted by jurors to the witness on rebuttal,

and the jurors' questions pertained to evidence plaintiff failed to produce during discovery.

Finally, plaintiff requests this court to grant him a new trial on the issue of damages for the trial court's failure to ask the two jurors' questions. The issue involved in those questions pertained to whether the plaintiff's dairy cows did, in fact, even suffer any ill effects from ingesting aflatoxin. The testimony of Dr. Mozier and the excluded questions would have been relevant only on issues pertaining to causation. The plaintiff attempted to present proof that his dairy herd was damaged by ingesting aflatoxin-contaminated feed and that the physical effects of such ingestion were apparent almost immediately after the cow's exposure to the feed. This position and issue was very much contested by defendants, and any such testimony regarding the physical symptoms of the cows resulting in any diagnosis of aflatoxicosis related only to causation. Therefore, plaintiff's request for a new trial on the issue of damages as a result of the error he argues in Point I is improper.

Moreover, as to the issue of causation, it is again noted that the jury found in favor of the plaintiff. Accordingly, the plaintiff was not prejudiced by the ruling made by the court excluding jurors' questions, since the jury apparently did believe that the plaintiff proved the causation for his damages by their act of returning a verdict for the plaintiff. No prejudice could then result to the plaintiff from the excluded questions and any resulting testimony.

II.

The trial court did not err by allowing defendants to present testimony from plaintiffs' deposition pertaining to portions of an unidentified writing prepared by plaintiff because the testimony constituted admissions against interest involving an independent fact pertinent to a material issue and admission of the entire exhibit into evidence would have violated the general rule excluding evidence of settlement negotiations between parties.

Plaintiff's deposition in this case was originally taken in November, 1997. Videotaped portions of his deposition testimony were offered at trial as admissions against interest. At issue in Point II are those portions of the plaintiff's 1997 deposition testimony designated prior to trial in Defendants' Proposed Deposition Testimony From the Plaintiff's Deposition as page 113, line 16 through page 116, line 23 and page 116, lines 18-25. (Supp. L.F.8-10). A videotape of portions of the plaintiff's deposition was admitted into evidence as Exhibit UU and is filed herewith. Pages 113 through 116 from the transcript of the plaintiff's deposition are attached hereto as A-3 to A-6, for this court's reference.

At trial, plaintiff's counsel objected to the presentation of the aforesaid testimony on the grounds that the plaintiff was testifying from a letter written by him to the defendants' insurer by way of a settlement offer. (T.848-856).

Defendants interpret plaintiff's Point II as citing error of the trial court (1) in allowing defendants to present the aforesaid evidence, as admissions, from the plaintiff's deposition without allowing plaintiff to introduce the entire exhibit, (2)

because evidence of settlement negotiations should have been excluded and (3) if only a portion of the exhibit was admitted, then all of the exhibit should have been admitted under the “doctrine of completeness.”

Quick reference to the deposition testimony presented (Exhibit UU at 11/12/97, 12:07 p.m.-12:09 p.m.; A-3 to A-6) reveals that plaintiff is testifying in his deposition testimony only to a document to which he was referring during questioning. The portions of the plaintiff’s testimony from the document were based upon his initial claim that he had to cull eleven dairy cows because of their exposure to aflatoxin. A great deal of evidence at trial pertained to the number of dairy cows involved in plaintiff’s claim of damage and plaintiff’s inconsistencies and lack of records as to the number of cows involved, the number of cows he owned at the time in question, the number of cows milking at the time in question, the number of cows pregnant at the time in question, the number of cows culled or sold at the time in question, the number of cows exposed to aflatoxin-contaminated feed, etc. Plaintiff’s prior inconsistent statements with regard to these numbers and his lack of records and inability to prove the number of cows owned at any time or effected by aflatoxin was hotly contested by defendants, particularly as those issues related to the plaintiff’s claim for damages.

Plaintiff’s initial claim against defendants pertained only to his claim that he had to cull eleven dairy cows which exhibited signs of damage from ingesting aflatoxin-contaminated corn. Pages 113 through 116 from his deposition testimony pertained only to that claim. Earlier in his trial testimony, plaintiff testified that he had been forced to cull 126 dairy cows because of the aflatoxin problem. (T.108-111, 115-133).

The testimony in question made no reference to the fact that plaintiff was testifying from a letter. The testimony made no reference to the fact that the letter was to the plaintiff's insurance company. The testimony made no reference to the fact that any offer to settle was contained within the unidentified writing. The testimony made no reference to any amount of settlement discussed at any time. The testimony about which plaintiff now complains only introduced portions of the plaintiff's prior statements which constituted contrary testimony to his trial testimony and which were offered as admissions against interest.

An admission against interest is defined as "(1) a conscious or voluntary acknowledgment by a party-opponent of the existence of certain facts; (2) relevant to the cause of the party offering the admissions; and (3) unfavorable to, or inconsistent with, the position now taken by the party opponent." *In re Mirabile*, 975 S.W.2d 636 (Mo.banc 1998, 938-939).

If a statement by a party-opponent meets the above requirements, it is admissible as an admission against interest. In our present case, plaintiff's described deposition testimony clearly meets the above three-part test. First, the testimony described the circumstances surrounding the plaintiff's initial claim of damage, when he limited his claim for culled cows to eleven cows. Since plaintiff repeatedly demonstrated inconsistent statements, testimony and records regarding the number of culled cattle he claimed, his inconsistencies were relevant to the defense offered to his claims. And these important and relevant details of his earlier testimony were clearly inconsistent with his trial testimony.

The general rule is that evidence in settlement negotiations is to be excluded at trial because settlement is encouraged and parties should not be penalized by revealing their prior settlement offers if negotiations fail to materialize. *Owen v. Owen*, 642 S.W.2d 410 (Mo.App. S.D. 1982). However, in our present case, there was no evidence of any settlement negotiations or offers of settlement presented by way of defendants' evidence at all.

Further, an exception to the general rule stated above exists so that if an offer of settlement also constitutes an admission of an independent fact relevant to an issue between the parties, then the offer of settlement is admissible at trial on the independent issue. *Id.*

Even though no evidence of any settlement negotiations or offer to settle was presented to the jury, the fact that the plaintiff's prior inconsistent statements were contained in his letter discussing his damages and offering to settle does not make his prior inconsistent statements contained within that letter inadmissible. Clearly, his prior statements are admissions of an independent fact pertinent to his claim for damages in the case.

Also, where, as here, it was not in evidence that letters consisting of an exhibit were part of an offer to settle, the exception to the general rule was also applied and the admissions of a plaintiff were allowed. *Stan Cushing Construction v. Cablephone, Inc.*, 816 S.W.2d 293 (Mo.App. S.D. 1991).

Plaintiff's Point II also complains that, if portions of evidence in settlement negotiations were admitted, then all of the exhibit containing those admissions should

have been admitted into evidence under “the doctrine of completeness.” First, defendants’ counsel has located no legal authority, definition nor precedent for “the doctrine of completeness.” Moreover, those portions of the document excluded by the court did refer to possible settlement negotiations and communications of plaintiff with defendants’ insurer. Those portions were clearly not admissible and constituted the basis for the plaintiff’s first objection.

The portions of the testimony allowed by the court only referred to plaintiff’s damages and the number of cows he claims to have culled. To have allowed the entire letter into evidence would have violated the general rule which excludes evidence of settlement negotiations. Admission of the entire document into evidence would clearly have constituted error, and thus the court did not admit it.

III.

The trial court did not err in refusing to grant a new trial on the basis of the affidavit of George Parsons, presented by plaintiff in connection with his Motion for New Trial, in that plaintiff preserved no objection to defendants' deposing of the witness by proper objection at the time of the deposition, nor did the affidavit admit any false testimony by the witness or any inaccurate testimony relevant to the issues in the case, and the testimony of the witness was relevant on the issue of the causation of plaintiff's claimed damages.

Defendants' interpretation of plaintiff's claim of error set forth in Point III is that the court erred by not granting plaintiff a new trial on the basis of the affidavit of George Parsons "presented in after-trial motions." George Parsons was an environmental specialist for the Missouri Department of Natural Resources. His deposition testimony was presented at trial, in its entirety, because, according to his affidavit, he became scheduled for open heart surgery during the week of trial and was unable to testify live. (L.F.105). Mr. Parsons's affidavit also states that "[H]aving reviewed all the records", he believes he provided inaccurate testimony to events and dates occurring in 1997 and 1998. Defendants contend that the inaccuracies noted by Mr. Parsons in his affidavit as to events and dates from 1997 and 1998, in response to questions of plaintiff's counsel, had no relevance whatsoever to plaintiff's claim for damages in 1992, 1993, and 1994.

The deposition of George Parsons was taken by agreement of the parties prior to trial and was offered into evidence, in its entirety, by defendants. The videotape of

the deposition, Exhibit TT, was admitted into evidence by the court, and the plaintiff made no objection to the admission of the deposition, which included both direct and cross-examination of the witness. (T.843, 847). In plaintiff's Brief, he admits that he did not oppose the admission of the deposition into evidence. (Appellant's Brief 33).

Rule 57.07(c)(4) provides in part:

“Errors and irregularities in manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties or errors of any kind that might be cured if promptly presented are waived unless seasonable objection thereto is made during the deposition.”

(Exhibit TT is filed herewith)

Defendants' examination of witness George Parsons was brief, and plaintiff's counsel made no objection to any portions of it. Defendants offered testimony from George Parsons because of his involvement in the necessary reduction in the size of the plaintiff's dairy herd during the time at issue in this case. The substance of Mr. Parsons's testimony offered by defendants was that a substantial waste management problem existed at plaintiff's Bois D'Arc farm for a number of years. Mr. Parsons first became involved in 1989, when he received a complaint about plaintiff's dairy farm. (Parsons depo.4). Thereafter, between 1998 and 1994, Mr. Parsons was on the plaintiff's dairy farm at least once a year, and, as a result of these visits, plaintiff was issued several notices of violations because the discharge of animal waste on his farm was entering sub-surface ground waters. (Parsons depo.5).

An abatement order was entered by the DNR to the plaintiff on March 2, 1993. (Exhibit J, A-7 to A-10). Plaintiff's options included relocating his dairy farm by July

15, 1993 or developing a waste management plan for his existing Bois D'Arc farm by July 31, 1993. (Parsons depo.11).

Mr. Parsons testified that the number of cows at the plaintiff's farm had a big effect on the waste management problem occurring there (Parsons depo.12) and that the problem existed because the farm was an old dairy, originally designed for a small number of head of cattle which had expanded over the years and limited the plaintiff's waste management options. (Parsons depo.14). Mr. Parsons's records indicated that, during his initial visits to the farm before the abatement order was issued, the plaintiff had 130 to 150 head of cattle on the farm. (Parsons depo.12). The DNR subsequently issued plaintiff a letter of approval for his Bois D'Arc farm site, limited to 100 cows, to which the plaintiff agreed. One hundred head was the only number for which the plaintiff could manage manure. (Parsons depo.15-17; Exhibit M; A-11 to A-14).

Parsons testified that he was thereafter subsequently on the farm only a few additional times, during which he checked the number of head on the farm for adherence and that the last time he was on the farm could have been in late 1996 or early 1997. After that he was transferred out of the Springfield office. (Parsons depo.18-19).

The described testimony offered by defendants was solely for the purpose of contradicting the plaintiff's testimony as to the large numbers of dairy cattle kept on the farm, for which he claimed loss as a result of aflatoxin. The number of head of dairy cattle claimed by plaintiff in calculating damages was not substantiated by existing written records also presented at trial, nor were they substantiated by the testimony of George Parsons. In fact, at a time when plaintiff was claiming damage to over 200 head

of cows, he had agreed with the DNR to limit the number of head on his farm to 100. (Parsons depo.12). While plaintiff attempted to claim that the incident of aflatoxin caused him to cull 126 cows between 1992 and 1994 (T.223), contradictory evidence indicates that he voluntarily reduced the size of the dairy herd on the farm to 100 cows in order to comply with the requirements of the DNR and the abatement order issued to him.

Moreover, defendants' expert witnesses Don Rollins (T.794) and Gavin Meerdink (T.712, 724-725) also offered opinions that the large volume of animal waste on the farm in 1992 and 1993 could have resulted in increased incidences of disease and illness in plaintiff's dairy herd. These were the same diseases and illnesses which plaintiff attributed to aflatoxin exposure.

Plaintiff argues that George Parsons submitted and admitted false testimony. Mr. Parsons admitted only that he was inaccurate as to certain matters occurring in 1997 and 1998. Those events have no relevance to any issues of causation in this case. Further, the testimony complained of was in response to questions asked by plaintiff's attorney.

Plaintiff argues that Parsons "false" testimony contradicted and impeached plaintiff's testimony. The inaccurate testimony of which plaintiff complains which was admitted by Mr. Parsons in his affidavit has nothing to do with his required reduction of the number of head in his dairy cattle and the filthy conditions to which those cows were exposed at the time in question. Mr. Parsons's testimony offered by defendants did contradict and impeach the plaintiff's testimony that he did not agree to reduce his

herd size to 100 head in order to obtain DNR approval and that the waste problem did not effect the health of his cattle. (T.149-55, 192-99).

Finally, plaintiff complains that Parsons's "false testimony" was "probably the result of defendants' counsel not giving the witness all of the relevant documents." Plaintiff does not define what he means by "relevant documents", nor is there any evidence in the record as to which documents he refers. Other than testifying from his own first-hand knowledge and recollection, George Parsons was testifying from the official file of the DNR, to which plaintiff clearly had access as illustrated throughout Mr. Parsons's deposition testimony. There is no indication or evidence before this court or the trial court that providing any additional documentation to the witness would have in any way materially changed his testimony or prevented the minor inaccuracies described in his affidavit, nor is there any description as to what additional documentation was lacking from the deposition that might have changed the testimony of the witness.

The granting of a new trial on the ground of perjury requires a showing that the witness *willfully and deliberately testified falsely*. *Hoodco of Poplar Bluff, Inc. v. Bosoluke*, 9 S.W.3d 701 (Mo.App. S.D. 1999). In the *Hoodco* case, this court noted that a trial judge enjoys the advantage of seeing and observing witnesses while testifying and, therefore, is in a much better position to judge the credibility of a witness than an appellate court. This court also recognized the trial court's discretion in such matters and said that it would only order a new trial when facts presented illustrated that the trial court was arbitrary and abused its discretion. It was also noted that an appellate court is

warranted in interfering with the judgment on the grounds of perjured testimony when the evidence clearly discloses that the trial court has abused its discretion.

In summary, defendants contend that Point Relied On III violates Rule 84.04(d)(1) in that it does not identify the trial court ruling challenged, nor does it state the legal reasons for the claimed error. *In re Marriage of Beeler*, 26 S.W.3d 610 (Mo.App. S.D. 2000). For this reason, defendants' counsel finds it difficult to respond to Point III and to cite relevant legal authority in opposition to the plaintiff's point.

IV.

The trial court did not err in allowing defendants to show videotaped excerpts from plaintiff's deposition, without ruling on plaintiff's objections or allowing plaintiff's counter-designations to the testimony offered by defendants to be read at the same time as defendants' presentation of testimony, because the court did rule on plaintiff's one objection contained in the deposition testimony and did allow plaintiff to read counter-designations of testimony from plaintiff's deposition upon the conclusion of the defendants' presentation of plaintiff's deposition testimony.

The error complained of in Point IV was in not raised in plaintiff's Motion for a New Trial. It is raised for the first time on appeal.

A claim of error on appeal is limited to claims previously advanced in a motion for new trial and appellate courts do not consider a different ground of the objection.

When an allegation of the error on appeal does not correspond to any point in the motion for new trial, nothing is preserved for appellate review. *Ayers v. Aurora Enterprises, Inc.*, 899 S.W.2d 913 (Mo.App. S.D. 1995). The appellant in this case preserved nothing for appeal on Point IV by preserving his claim of error in his Motion for New Trial.

Further, plaintiff's claim of error asserted in Point IV appears to be that (1) the court allowed defendants to present excerpts from plaintiff's deposition testimony (2) without ruling on plaintiff's objections or (3) allowing plaintiff's designated counter-

testimony to be read at the same time (4) because the “completeness doctrine” required the statements made in deposition to be in context.

First, the court dealt extensively with the only objection to the deposition testimony made by the plaintiff prior to ruling on it. (T.848-856). The subject of this objection in the court’s ruling has been briefed in Point II.

Secondly, the court did allow the plaintiff to read his “counter-designations” to that deposition testimony of the plaintiff offered by defendants. Since the defendants showed portions from the plaintiff’s deposition testimony by videotape, the court required the plaintiff to present his counter-designations of testimony from the same deposition at the conclusion of the defendants’ presentation of deposition testimony. (T.843-847, 848-859). And, plaintiff did present his counter-designated deposition testimony upon the conclusion of the defendants’ presentation. (T.858-859).

In *Myers v. Ries*, 8 S.W.3d 137 (Mo.App. E.D. 1999), the plaintiff argued that, for completeness, defendant should have been required to read from defendant’s own deposition immediately after plaintiff read from the deposition, rather than allowing the reading during the defendant’s case. The court noted that it found no Missouri cases on point and looked to federal cases for guidance, prior to ruling that allowing the defendant to read from his testimony during his own case in chief, as opposed to during plaintiff’s case, did not abuse the court’s discretion and was not “so unreasonable and arbitrary as to shock the sense of justice.” *Id.* at 142. In *Myers*, the court further noted that, both in Missouri and federal cases, the decision as to whether to admit deposition testimony is largely within the discretion of the trial court.

Even if the plaintiff's failure to raise the error cited in Point IV is not dispositive, the fact that the order and presentation of deposition testimony rests within the sound discretion of the trial court should be dispositive.

V.

The error claimed by appellant in Point Relied On V was not preserved for appellate review and appellant's Point V cites no reference to any ruling by the trial court in the trial record and whether the ruling described by Point Relied On V resulted in the omission of relevant evidence prejudicial to the plaintiff was not preserved for appellate review.

Defendants' counsel finds it extremely difficult to respond to the argument set forth in Point V since there is no reference to the transcript or legal file to illustrate the exact nature of the ruling and error of which plaintiff complains. No reference is made to any trial testimony by which plaintiff attempted to offer or introduce the evidence described by the plaintiff as to the plaintiff's own diagnosis for the condition observed in his dairy cattle, and plaintiff offers no such citation or reference. No offer of proof is located in the transcript, nor referred to in plaintiff's argument to Point V, upon which the challenged ruling and error of the court is predicated. Plaintiff's Brief refers to Defendants' Fourth Motion in Limine, but the motion is not included in the legal file and the only reference contained in the plaintiff's Brief is to the court's docket sheet entry showing the date the motion was filed. The recollection of defendants' trial counsel from any unrecorded pre-trial proceedings provides no illumination of the error complained of by plaintiff and would not constitute any basis for argument before this court. Thus, it becomes difficult for defendants' counsel to respond at all to Point V.

Plaintiff apparently complains of the trial court's ruling on the Defendants' Fourth Motion in Limine and then discusses the exclusion of testimony from "plaintiff Hancock and others" regarding observations they made that allowed them to form an opinion of diagnosis. Plaintiff made no attempt to offer any such testimony at trial. The trial transcript is devoid of any such testimony or any offers of proof of such testimony. Nor is there any transcript or order contained in the legal file documenting any ruling of the court, either at trial or in limine.

It is the responsibility of the appellant to prepare the record on appeal. *Rule 81.12*. Matters omitted from the record will not be presumed to be favorable to the appellant. *Wilkerson v. Prelutsky*, 943 S.W.2d 643 (Mo.banc 1997; *O'Bernier v. R.C. & Associates*, 47 S.W.3d 422 (Mo.App. S.D. 2001).

The Supreme Court in *Wilkerson* repeated the Missouri Rule that a ruling on a motion in limine is a "preliminary expression of the court's opinion as to the admissibility of evidence" and is subject to change during the course of the trial. *Id.* at 943. Where an objection has been sustained in a hearing on a motion in limine, an offer of proof must be made at trial. *Id.* The primary reason for the offer of proof is to preserve the record for appeal:

"While a secondary reason for an offer of proof is that it permits the judge to consider the claim of admissibility, the primary reason is to include the proposed answer and expected proof in the official record of the trial, so that in case of appeal upon the judge's ruling, the appellate court may understand the scope and effect of the question and proposed answer in considering whether the judge's ruling sustaining an objection was proper. *Id.* [Citing John W. Strong et al., *McCormick on Evidence*, Section 51 (4th ed. 1992).]"

When the court rules in limine that certain evidence will be excluded, the proponent of such evidence must still make an offer of proof. Then, if the evidence is still excluded by the court upon the offer of proof, the proponent of the evidence may predicate error on that exclusion. *Smith v. Associated Natural Gas Co.*, 7 S.W.3d 530 (Mo.App. S.D. 1999).

In the present case, there is no record as to any motion in limine described or any ruling on that motion. There is no attempt to offer the evidence described by the plaintiff in Point V and no offer of proof of any such evidence. Accordingly, it becomes extremely difficult to respond to appellant's argument or to discuss any action of the court claimed by appellant to be error. This difficulty exists because the plaintiff did not adequately preserve any claimed error for review.

VI.

The court did not err in its rulings (A) striking Count V of plaintiff's Petition (B) dismissing Count III of plaintiff's Petition, and (C) giving a withdrawal instruction to the jury.

A. Plaintiff's Point VI alleges error of the court (1) in striking Count V, a "statutory violation negligence per se", (2) in dismissing Count III in negligence, and (3) by giving defendants' withdrawal instruction (4) because these rulings resulted in the omission of relevant claims and confusion.

Initially, defendants note that plaintiff's Point Relied On VI violates the requirements of Rule 84.04(d)(1) in that it states no legal reasons for any claim of error nor any explanation as to why any such legal reasons constituted error. The "omission of relevant claims and confusion" does not constitute a legal reason for a claim of error nor an explanation as to why a ruling legally constituted error. Accordingly, defendants submit that the Point presents nothing for appellate review. *In re Marriage of Beeler*, 26 S.W.3d 610 (Mo.App. S.D. 2000)

The ruling of which the plaintiff complains was actually the court's ruling on defendants' Motion for a Directed Verdict at the Close of the Plaintiff's Evidence. (T.543-567). Again, plaintiff has failed to include Defendants' Motion for Directed Verdict at the Close of the Plaintiff's Evidence in Appellant's Legal File. Accordingly, defendants have included it in Respondents' Supplemental Legal File. (Supp.L.F.1-4). Count V of Plaintiff's Petition attempts to allege a violation of Section 266.180 R.S.Mo. (L.F.15-20). At the close of the plaintiff's evidence, defendants requested a

directed verdict on Count V, and the court did direct a verdict in favor of defendants on Count V. (T.549-551).

The basis for the Motion for Directed Verdict as to Count V of plaintiff's Petition was that plaintiff's proof did not meet the elements of negligence per se pleaded in Count V and plaintiff did not make a submissible case on that count. This was also the basis for the court's ruling granting a directed verdict as to Count V. (T.549-551). In fact, the statute was never offered into evidence, nor was the court asked to take judicial notice of it. Moreover, plaintiff's counsel admitted on the record, during the hearing held on Defendants' Motion for Directed Verdict at the Close of the Plaintiff's Evidence, that "I didn't put on any independent evidence" (T.550).

Requirements for negligence per se are (1) a violation of a rule or regulation; (2) the injured party must be within the class of persons intended to be protected by the statute or ordinance; (3) the injury claimed of must be of the nature that the statute is designed to prevent; and (4) the violation of the statute or ordinance must be the proximate cause of the injury. *Gibson v. Slagle*, 820 S.W.2d 595 (Mo.App. W.D. 1991).

Plaintiff established none of these elements by his testimony or evidence presented in his case in chief. Nor did he offer the statute into evidence or ask the court to take judicial notice of it. There was no evidence of any "adulterated feed" as defined by the statute. The evidence was that the feed at issue was raw corn. There were no added substances. There was no evidence that the raw corn sold by defendants, even with the presence of aflatoxin in the level which existed, was injurious to human health.

Plaintiff simply failed to meet his burden of proof as to any of the elements required for an action based on negligence per se.

B. Plaintiff contends that the court erred in dismissing Count III of plaintiff's Petition based on negligence *after plaintiff had put on evidence that defendants owed a duty based on industry standards to test, that defendants breached that duty by a failure to test, and that plaintiff was damaged*. Plaintiff's Brief refers to pages 39-44 of the trial transcript. Pages 39-44 deal only with the testimony of defendant Bill Shook as to the fact that, prior to March 12, 1992, he did not use any test to determine the presence of aflatoxin in corn, and that, to his knowledge, many mills in Missouri were not doing any such testing at the time. Such testimony does not rise to any level of proof as to a duty to test based on industry standards at the time, or of a breach of any such duty, or of damage.

Count III of plaintiff's Petition, including its incorporation of other allegations of the Petition, with regard to any failure to test, alleges only that defendants "failed to adequately test the feed products for nutritional balance and/or content and/or the presence of aflatoxins." (L.F.18). As to other allegations of negligence described in subparagraphs a and b of paragraph 2 of Count III, plaintiff presented no evidence.

In response to defendants' Motion to Dismiss Count III, particularly with regard to the remaining claim of a failure to test feed, the court sustained the objection. (T.841). The basis for the dismissal of Count III was that the plaintiff's Petition, on its face, failed to allege that the defendants had any duty to test the feed in question, and thus failed to state a claim for which relief could be granted.

The nature of the cause of action is determined from the allegations contained in the Petition and from the real nature and substance of the facts alleged. *Curnes v. Equitable Life Assurance Society*, 6 S.W.3d 175 (Mo.App. S.D. 1999).

Count III of Plaintiff's Petition incorporated by reference Count I, which set forth a cause of action based upon breach of express warranty. A directed verdict in favor of defendants was granted on Count I of Plaintiff's Petition at the close of the plaintiff's evidence. (T.543-547, Supp.L.F.1-4). The only additional allegation contained in Count III was that defendants were negligent for failing to test the feed. Such bare allegation, in and of itself, is insufficient to state a claim in negligence.

The elements of a negligence action are (1) a duty or obligation recognized by the law requiring the actor to conform to a standard of conduct for the protection of others against unreasonable risks; (2) failure by the actor to conform to the standard of conduct; (3) a reasonably close causal connection between the actor's conduct and the resulting injury; (4) actual loss or damage resulting to the interest of another. *Id.*; *Hoover's Dairy, Inc. vs. Mid-America Dairymen, Inc./Special Products, Inc.*, 700 S.W.2d 426 (Mo.banc 1985). The nature and substance of the facts alleged in plaintiff's Petition were insufficient to constitute a claim of negligence.

C. Plaintiff also claims the court erred in giving Instruction Number 7, a withdrawal instruction, to the jury. (L.F.92). Defendants asked for the withdrawal instruction, patterned after M.A.I. 34.02, because of the fact that plaintiff repeatedly inserted questions and comments regarding the testing of feed throughout the trial. Plaintiff's attorney offered comments in his opening statement pertaining to

defendants' failure to test their feed. Plaintiff has not, however, included such opening statement comments within the legal file submitted.

During the trial, plaintiff's attorney raised the issue of testing feed with various witnesses, including defendant Bill Shook (T.37-40) and witness Monty Dade (T.442, Exhibit 40). Because the issue of testing feed had been discussed in the case in front of the jury, the court did submit Instruction No. 7. (T.926).

“[T]he use of withdrawal instructions is to avoid misleading the jury on a specious issue . . . and the giving or refusal of these instruction is again up to the discretion of the judge.” *Smith v. Associated Natural Gas Company*, 7 S.W.3d 530 (Mo.App. S.D. 1999), citing *Bradley vs. Browning Ferris Industries, Inc.*, 779 S.W.2d 760, 765 (Mo.App. 1989).

This court noted in the *Smith* case that the appellant could not complain about the giving of such instruction when, in both their opening statements and in his case in chief, appellant's counsel expressly made reference to statements made by individuals which were the subject of the withdrawal instruction given. Such is the situation in our instant case, where plaintiff's counsel sprinkled comments and questions regarding testing through the plaintiff's case in chief, without pleading or making any submissible case on that issue. In order to avoid any confusion to the jury because of the references to testing in the evidence, a withdrawal instruction was proper and appropriate under the circumstances.

VII.

The trial court did not err in its pre-trial rulings; plaintiff failed to preserve the court’s rulings for the record on appeal by making any objection at trial, and, as to the evidence regarding the plaintiff’s molasses suit, the plaintiff’s DNR problems, and the plaintiff’s suit against Bolivar Redi-Mix, plaintiff directly injected those issues into evidence in his case in chief.

Appellant’s Point Relied On VII does not identify the rulings of which appellant complains. Merely claiming error in “several pre-trial rulings” does nothing to provide notice to defendants as to the challenged ruling or the issue being presented on appeal. Accordingly, defendants find it extremely difficult to reply to Point VII, without knowing the exact ruling or rulings of which appellant complains. Likewise, defendants are uncertain as to the exact evidence referenced in the Point described as the “admission of irrelevant and prejudicial evidence.”

“A brief impedes disposition on the merits where it is so deficient that it fails to give notice to this Court and to the other parties as to the issue presented on appeal. If the defective brief fails to meet that standard, the point will be disregarded”
Wilkerson vs. Prelutsky, 943 S.W.2d 643, 647 (Mo.banc 1997).

Further, Rule 84.04(d)(1) requires that a point relied on (a) identify the trial court ruling or action challenged, (b) state concisely the legal reasons for the claim of reversible error, and (c) explain in summary fashion why, within the context of the case, those legal reasons support a claim of reversible error. Point VII does not identify the

trial court ruling or action which is challenged. Rather, it refers to “several pre-trial rulings”, none of which are identified or specifically described within the point.

Point VII also fails to state the legal reasons for the claim of reversible error. It states only that the several pre-trial rulings created confusion and resulted in the admission of irrelevant but prejudicial evidence and an inadequate verdict. This does not satisfy the requirement for stating the legal reason for the claim of reversible error. The reasons cited provide no notice to defendants as to the legal reason upon which the point is based.

Further, a point relied on violates Rule 84.04 when it groups together multiple contentions unrelated to a single issue. Therefore, separate issues should be stated in separate points relied on. *Lamar Advertising of Missouri v. McDonald*, 19 S.W.3d 743 (Mo.App. S.D. 2000). Making the entire judgment one error and listing multiple grounds for that error results in a point containing multiple legal issues. *Id.* This is what appellant has done in Point Relied On VII, by citing several unidentified pre-trial rulings and discussing three different issues of evidence claimed to be “irrelevant and prejudicial.”

In an attempt to respond to the issues described in the argument portion of Point VII, defendants first note, once again, that a ruling on a motion in limine is a preliminary expression of the court’s opinion as to admissibility of evidence which is subject to change during trial. Where an objection has been sustained in a hearing on a motion in limine, an offer of proof must be made at trial. See *Wilkerson*, 943 S.W.2d at 646. This was not done in the present case with regard to any of the issues described in Point VII,

nor did the plaintiff ask the trial judge, on the record at trial, to reconsider his ruling on the motion in limine, within the context of the evidence presented at trial.

Plaintiff cites as error the admission into evidence of certain records of the Department of Natural Resources. He also objects to the court's ruling on a Motion in Limine seeking to exclude the records of the DNR from evidence. Defendants filed a Notice of Intent to Introduce Records Under Section 490.692, R.S.Mo., on April 13, 2000, eleven days before the commencement of trial. (L.F.11, Supp. L.F.11-13). Attached to the notice were the contents of the Department of Natural Resources file on its investigation of the plaintiff's dairy farm located at Bois D'Arc, Missouri.

First, plaintiff directly injected the issue of the DNR's investigation of his animal waste and pollution problem into evidence during his direct examination. (T.149-155). He denied that the problem in any way effected the health of his cattle (T.151.155) and he testified that, before the pollution incident, he had over 300 dairy cows. (T.153).

The import of defendants' presentation of such evidence was outlined and discussed in defendants' response to Point Relied On III. The evidence that the DNR required an abatement of the animal waste problem and that plaintiff voluntarily agreed to comply by reducing his dairy herd to 100 or fewer dairy cattle was presented (Parsons depo.12) in direct contrast to plaintiff's own testimony that the reduction in his herd was caused by the necessity of culling 126 dairy cows because they ingested aflatoxin-contaminated corn. (T.223). Further, the illness and disease complained of by plaintiff in his direct testimony was contradicted by the testimony of defendants' expert

witnesses Dr. Gavin Meerdink (T.712, 724-725) and Dr. Don Rollins (T.794), who testified that the types of symptoms plaintiff described in his dairy herd could be caused by the filthy conditions produced by the animal waste-infested environment.

In the cross-examination of the plaintiff by defendants' counsel, plaintiff was asked questions about the purpose and scope of the DNR investigation of his Bois D'Arc farm. There were also inconsistencies in plaintiff's testimony and evidence regarding the numbers of dairy cattle on his farm at different periods of time at issue in the case. In cross-examination, plaintiff was shown various letters and orders directed to him by the DNR requiring compliance with the Clean Water Law and mandating a reduction in his dairy herd. The records also identified the number of cows in the herd at specific points in time, which contradicted plaintiff's prior testimony. (T.191-199). Those letters and documents from the DNR records, attached to the pre-trial Notice of Intent to Introduce Records filed by defendants, were offered into evidence as Exhibits J, K, L, and M. (Supp.L.F.11-13; A-7 to 10; A-11 to A-14). Plaintiff's attorney specifically stated he had no objection to the exhibits being received into evidence, and the exhibits were admitted by the court. (T.199). Accordingly, plaintiff preserved nothing for appeal

when no record was made at trial as to any objection he might have to testimony regarding the actions of the DNR or the admission of its records into evidence.

In plaintiff's direct testimony, he discussed a "molasses incident," which occurred in December, 1990, which resulted in him having to also cull cows from his dairy farm. He described symptoms exhibited by the cows at that time including a loss

of milk production over a period of time. (T.95-99). During this testimony, introduced by plaintiff, he also discussed a suit previously brought against the same defendants for a loss of milk production as a result of the “molasses incident.”

Plaintiff’s attorney specifically questioned plaintiff, “[O]ther than these two instances with Mr. Shook, have you ever sued anyone?” Plaintiff responded, “No, sir.” (T.246). This testimony was injected into the testimony, following plaintiff’s description of his earlier molasses incident and suit against defendants.

In cross-examination of plaintiff, following the described testimony, defendants’ counsel questioned plaintiff with regard to a Greene County Circuit Court Case styled *Bolivar Redi-Mix and Material v. Glen Hancock and Laurel Hancock*. (T.258). Plaintiff admitted filing a counter-claim in that case against Bolivar Redi-Mix in which he was asking for \$60,000, plus attorney’s fees. (T.258). Plaintiff also testified that his present trial counsel, Mr. Gammon, represented him in the *Bolivar Redi-Mix* suit, as well. (T.260).

Such cross-examination was directed at plaintiff by defendants’ counsel because of plaintiff’s direct injection into evidence of the fact that he had never sued anyone other than the defendants. It was offered as direct impeachment of his own gratuitous testimony, and for no other purpose. “Either party is entitled to introduce evidence to rebut that of his adversary, and for this purpose any competent evidence is admissible. . . . ‘Impeachment’ is directed to the credibility of a witness for the purpose of discrediting the witness. . .” *Budding v. Garland Floor Co., Inc.*, 939 S.W.2d 419 (Mo.App. E.D. 1996).

As previously stated, plaintiff solicitously injected the issue of the prior “molasses suit” that he filed against defendants during his direct testimony. Plaintiff’s first witness was defendant Bill Shook. Plaintiff’s attorney also questioned Mr. Shook at length about the molasses incident and the plaintiff’s earlier suit against defendants. (T.14-22). (See transcript of plaintiff’s direct testimony at pages 95-99.) He talked also at some length, in the very beginning of his direct testimony, about damages and losses he claimed to have sustained from the earlier molasses incident.

In cross-examination, plaintiff was questioned about those losses and about the overlap of the losses claimed in the first suit with his claims now presented at trial. In the molasses suit, plaintiff also claimed that all 160 cows in his dairy herd were effected by bad molasses (T.205-206) resulting in the cull of cows, loss of milk production, and increased disease and illness. (T.219-221). Specifically, when his deposition was taken in the earlier suit regarding the “molasses incident,” plaintiff was asked how long he continued to sell dairy cattle as culls as a result of the earlier incident. His answer in that case, as presented by way of impeachment through the use of deposition testimony from the earlier case, was that he culled cows as a result of the “molasses incident” through January 1, 1993. (T.209-210). To the extent that plaintiff was also claiming a loss from having to cull cows from March, 1992 through 1994, as a result of the aflatoxin incident, he was seeking to recover the same damages previously claimed in his earlier suit regarding the “molasses incident.”

Defendants then presented evidence of a settlement agreement, dated and signed by the plaintiff on March 10, 1995, a copy of which has been attached as an appendix

to Appellant's Brief. (Exhibit U, Appellant's Brief, A-22-A26). Further, plaintiff admitted that, by virtue of signing the settlement agreement with defendants, he received \$42,500 for damages claimed to his dairy cattle in his first suit against defendants. Additionally, he received \$37,700 from a second defendant, Tindle Mills. (T.212-213). These sums included payment for his claim of losses to his dairy herd through January 1, 1993. (T.213).

To the extent that plaintiff was claiming damages for the same types of losses and for the same time period as in his previous suit against defendants, he was seeking a double recovery for the very same damages. For that reason, defendants offered the settlement agreement from the prior suit into evidence. The subject of the prior suit and the "molasses incident," however, was directly injected into the trial evidence by the plaintiff. Plaintiff cannot now complain of evidence of the prior suit not being excluded by the court.

Plaintiff also contends that the jury verdict was inadequate because of certain unidentified rulings of the court. Inconsistencies and contradictions between the evidence presented by plaintiff and the evidence presented by defendants has been discussed in several different contexts previously in respondents' brief. A description of that evidence will not be revisited here. The issue of the plaintiff's damages, however, was hotly contested by defendants, whose position at trial was that the only damages sustained by plaintiff was four days' worth of lost milk which he was forced to dump by Mid-America Dairymen, which marketed his milk.

Defendants' counsel specifically discussed these damages, suggesting how the jury should approach awarding damages to plaintiff, in her closing arguments. (Supp.T.2-4). Defendants' counsel suggested different approaches the jury might consider in basing an award of damages to the plaintiff on the value of his dumped milk. The value of the dumped milk was discussed at a gross milk price and a net milk price, as discussed in the testimony of plaintiff's expert witness, Larry Cox. (T.458-517). A possibility was also discussed of valuing it at a lower milk cost than that arbitrarily assigned by plaintiff. Further, defendants' counsel suggested to the jury that it would even be entitled, under the evidence, to double or triple any of the figures suggested in evidence as being representative of the value of plaintiff's dumped milk. (Supp.T.2-5).

The jury verdict was precisely in line with the argument of defendants' counsel regarding methods by which the jury might value the plaintiff's loss of milk for four days. Clearly, there was a basis in the evidence for the jury to find that the plaintiff's only loss was the value of four days' worth of milk, and the jury's verdict was consistent with such evidence. (L.F.54).

VIII.

The court did not err in its pre-trial and trial rulings and the court's ruling on plaintiff's First Motion in Limine is not preserved in the record on appeal, nor are the other "erroneous and inconsistent rulings" which "prejudiced plaintiff and resulted in an inadequate verdict."

Point Relied On VIII does not identify the rulings of which the plaintiff complains. Merely citing error in "several other pretrial and trial rulings" does nothing to provide notice to defendants as to the challenged ruling or the issue being presented on appeal. Once again, defendants find it difficult to reply to Point VIII, without knowing the exact rule or rulings of which appellant complains.

Further, Rule 84.04(d)(1) requires that a point relied on (a) identify the trial court's ruling or action challenged, (b) state concisely the legal reasons for the claim of reversible error, and (c) explain in summary fashion why, within the context of the case, those legal reasons support a claim of reversible error. Point VIII does not identify the trial court ruling or action which is challenged. It refers only to "several other pretrial and trial rulings", none of which are identified or specifically described within the point. It also complains of admission of documents by defendants "on subjects excluded by the ruling on Plaintiff's First Motion in Limine".

Moreover, Point VIII fails to explain how such rulings and documents "prejudiced plaintiff and resulted in an inadequate verdict." Point VIII fails to state the legal reasons for the claim of reversible error, making it difficult to reply since the

Point provides no notice to defendants as to the legal reasons upon which the Point is based.

As in Point VII, Point Relied On VIII also cites several unidentified pre-trial and trial rulings, without identifying those rulings, pertaining to the admission of documents “on subjects excluded by the ruling” which “prejudiced plaintiff and resulted in an inadequate verdict.” A point relied on violates Rule 84.04 when it groups together multiple contentions unrelated to a single issue. Separate issues should be stated in separate points relied on. *Lamar Advertising of Missouri v. McDonald*, 19 S.W.3d 743 (Mo.App. S.D. 2000).

On April 13, 2000, defendants filed five separate Notices of Intent to Introduce Records under §490.692, R.S.Mo. (Supp.L.F.11-25, L.F.11-12). Plaintiff complains of the defendants’ actions but cites this court to no objection by plaintiff on the record to any such objection made by plaintiff. Defendants filed the notices pursuant to §490.692, R.S.Mo., which allows the admission of business records into evidence, without the need for foundational testimony, if the records and an affidavit prepared in accordance with the statute are filed seven days prior to the commencement of trial. Such business records are still subject to substantive or procedural objections. Of those records filed with the court pursuant to §490.692, plaintiff made no objection on the record to the use of any such records for any substantive or procedural reasons. The only purpose of the notice filed with the affidavit and the applicable record is to avoid the necessity of presenting foundational testimony and was the only purpose for which defendants made such filing. Defendants could very well have subpoenaed the custodian

of the described records to establish the appropriate foundational requirements. The statute relieves a party of the need for such additional testimony.

Defendants filed the notice, affidavits and records eleven days prior to the commencement of trial, well in compliance with the statutes. The records consisted of plaintiff's files maintained by various agencies and organizations, such as the Missouri Department of Natural Resources, the Greene County Department of Health, Mid-America Dairymen, U. S. Department of Agriculture, and the Production Credit Association. (L.F.11-12, Supp.L.F.11-25). Since plaintiff made no objection to any of the evidence at trial, nothing was preserved for review and there is nothing on the record to discuss or review.

Plaintiff also appears to complain of the court's granting defendants' Motion to Strike Expert Witnesses or, in the Alternative, For a Continuance and Accompanying Scheduling Order (L.F.30-34), on March 6, 2000. On March 14, 2000, after a hearing by the court, the court entered its order continuing the trial from April 3, 2000 to April 24, 2000 and striking two of the plaintiff's designated expert witnesses. The order specifically noted that, upon completion of the depositions of plaintiff's disclosed expert witnesses, defendants might designate additional expert witnesses to testify on behalf of defendants.

A trial court has broad discretion to control discovery, which extends to the court's choice of remedies. Further, judicial discretion is only abused when a trial court's ruling is clearly against "the logic of the circumstances then before the court and then so arbitrary and unreasonable as to shock the sense of justice and indicate a

lack of careful consideration.” *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 648 (Mo.banc 1997).

Plaintiff fails to show how the court’s granting a three-week continuance from the original scheduled trial date and allowing defendants to name an additional expert witness upon the completion of discovery of the opinion of plaintiff’s expert witnesses in any way prejudiced the plaintiff.

Plaintiff’s additional complaint of error in the court’s ruling that “defendants had no duty to disclose the several hundred pages of documents pursuant to Plaintiff’s Request for Production” is a complaint to which defendants simply cannot reply, since defendants have no knowledge as to what type ruling or action plaintiff refers.

Likewise, plaintiff complaints of additional errors of the court, which include “(a) denying Plaintiff’s Motion to Compel contemporaneous, *res gestae*, investigation reports of defendants’ insurance investigators”, is an area of which defendants have no knowledge.

Defendants find no court ruling on “Plaintiff’s Motion to Compel” anywhere in the record, and counsel now have no recollection of the extent or nature of the ruling of which plaintiff complains on page 51 of his appellant Brief. And, finally, defendants have no notice as to the nature of the error cited by plaintiff pertaining to “reading portions of the depositions of the managers of the businesses where he bought the corn.” Further, defendants find no evidence on the record which “injected the issue of possible fault by third parties”, discussed by plaintiff at the conclusion of Point VIII.

CONCLUSION

Appellant has not demonstrated any ruling or action of the trial court with justifiable legal reasons supporting reversible error. Of those rulings and actions of the trial court of which appellant cites as error, the exact rulings or nature of the action of the court challenged as being erroneous are not specifically identified in Points VII and VIII. The evidence challenged in Points I, II, III, and IV were well within the broad discretion of the trial court. The error alleged in Count V was not preserved for appellate review for the reason that it was not included in plaintiff's Motion for a New Trial. Additionally, many of the court's actions challenged by the appellant within the argument portions of his Brief pertain to matters not preserved on the record for appellate review. Appellant has failed to cite any error of the trial court which, either singularly or considered cumulatively, constituted reversible error. Appellant has failed to show how any of the actions or rulings of the trial court prejudiced his case.

Respondents respectfully request this appellate court to uphold the verdict of the jury and the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE REQUIRED BY RULE 84.06(c)

I, the undersigned, hereby certify that the foregoing Respondents' Reply Brief:

- 1) Includes information required by Rule 55.03;
- 2) Complies with the limitations contained in Rule 84.06(b);
- 3) Contains 17,002 words; and
- 4) Has been scanned for viruses by Norton Systems Anti-Virus software and is virus-free.

Respectfully submitted,

By: /s/JoAnne Spears Jackson

JoAnne Spears Jackson

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that true and correct copies of the foregoing instrument has been served upon the following by hand-delivering two (2) copies and a computer disk containing said instrument to the following this 15th day of August, 2001:

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