

1987

Dale T. Smedley v. Leon Poulsen Construction : Brief of Appellant

Utah Court of Appeals

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BRIEF

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DOCKET NO. 870545-CA

IN THE UTAH COURT OF APPEALS FOR THE STATE OF UTAH

DALE T. SMEDLEY, dba SMEDLEY DEVELOPMENT COMPANY,)	
)	
Plaintiff/Respondent,)	Appeal No. 870545-CA
)	
vs.)	
)	
LEON POULSEN CONSTRUCTION CO., INC., a Utah Corporation,)	
)	
Defendant/Appellant.)	
)	

BRIEF OF DEFENDANT/APPELLANT
LEON POULSEN CONSTRUCTION CO., INC.

Appeal from the Second Judicial
District Court of Weber County, Utah
Judge Ronald O. Hyde

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the Second Judicial District Court of Weber County, Utah, entered on August 25, 1987, in favor of plaintiff and against defendant. Pursuant to Utah Code Ann., Sec. 78-2-2 (i) (effective through Dec. 31, 1987) the Supreme Court has appellate jurisdiction. Pursuant to notice of the Clerk of the Supreme Court dated December 3, 1987, this case was "poured-over" to the Court of Appeals for disposition.

NATURE OF THE PROCEEDINGS

This is an appeal by the defendant from the District Court's final judgment which awarded plaintiff damages in the sum of \$4,154.56, together with interest and costs for damage to a hydraulic ram attached to plaintiff's backhoe. The court below found that the damage was caused by defendant's negligence while defendant was transporting the backhoe on defendant's truck and trailer.

STATEMENT OF ISSUES

The only issue raised by defendant in this appeal is the issue of whether the evidence received by the District Court was sufficient to establish a causal connection between defendant's alleged negligence and the cost of repair or replacement of the hydraulic ram as found by the District Court.

It is defendant's contention that the evidence received by the District Court totally failed to show that the hydraulic ram inspected by an appraiser and the owner of the repair shop and deemed beyond economic repair was the same hydraulic ram that was damaged and removed from the equipment. It is further the defendant's contention that the evidence conclusively established that the hydraulic ram inspected at the repair shop was not the same unit damaged in the accident which is the subject of the instant matter.

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

Plaintiff commenced this action on or about June 20, 1985, in the District Court alleging that defendant contracted to transport plaintiff's backhoe to one of plaintiff's job sites and that defendant breached its contract by failing to deliver said backhoe safely resulting in the damages complained of. In the alternative, plaintiff alleged that defendant had undertaken to transport plaintiff's backhoe but that defendant was negligent in transporting the backhoe causing the damages complained of. The Court below granted plaintiff judgment in accordance with plaintiff's allegations of negligence.

B. COURSE OF PROCEEDINGS.

The case was tried before the Court sitting without a jury. The Court found that defendant's employee was negligent in

causing the backhoe to strike an overpass while it was being transported on defendant's truck and trailer and that plaintiff was not negligent in the matter. The Court further found that the hydraulic ram unit on the backhoe which struck the overpass was damaged to such an extent as to reasonably require replacement by plaintiff in order to restore the equipment to operating condition and that the cost of replacing the damaged hydraulic ram was \$4,154.56. The Court awarded plaintiff judgment for \$4,154.45 together with interest and costs.

C. RELEVANT FACTS.

i. SUMMARY OF EVIDENCE.

Plaintiff produced three witnesses: Kay Langston ("Langston"), the operator of the backhoe; T.H. Whisler ("Whisler"), an insurance adjuster who inspected a hydraulic ram at F & H Truck Service; and Kyle Wayne Follet ("Follet"), the owner of F & H Truck Service. As will hereinafter be demonstrated the record contains no evidence that the hydraulic ram which was inspected at F & H Truck Service (where it was determined the unit was damaged beyond economic repair) and the hydraulic ram damaged in the accident was one and the same. As will further be hereinafter demonstrated the testimony of the three witnesses in describing the hydraulic unit damaged in the accident and the one inspected at F & H Truck Service conclusively establish that they were different units.

ii. CHAIN OF EVIDENCE.

Although plaintiff argued in opposition to defendant's oral motion to dismiss at the conclusion of plaintiff's case that Langston testified that he "took that ram unit off of the backhoe [and] took it to the repair shop" (Transcript at 77), the fact is no such evidence exists anywhere in the record. The record is absolutely devoid of any evidence which identifies the hydraulic unit damaged in the accident as being the unit inspected at the repair shop. The only evidence of the amount of damage is in regard to the hydraulic unit inspected at the repair shop.

iii. CONDITION OF HYDRAULIC RAM IMMEDIATELY PRIOR TO ACCIDENT COMPARED TO CONDITION OF RAM INSPECTED AT REPAIR SHOP.

Plaintiff's witness Langston (the operator of the backhoe) testified that the hydraulic ram unit that was on the backhoe at the time of the accident on August 24, 1984, was only about two weeks old, having been recently replaced as a result of an earlier accident of a similar type. Transcript at 5. He further testified that the new ram unit damaged in the accident in question had been freshly painted with paint primer. Transcript at 17.

Plaintiff's witness Follet (the owner of the repair shop) admitted that because this particular hydraulic unit sits "right at the top" of the backhoe, it seldom suffers much abrasion or wear. Transcript at 60 and 61; Exhibit P-5. Although Follet would not admit that the hydraulic unit examined

by him appeared to be badly worn (Transcript at 61-62) the excellent color photographs of the hydraulic unit sitting in his shop show beyond all doubt that the unit inspected by him and Whisler was not a hydraulic unit that had been recently painted with primer. (Exhibit P-9, pictures 1 and 2)

iv. DAMAGE TO ROD.

Langston testified that the rod which moves in and out of the hydraulic cylinder which was damaged in the accident had scrape marks on the end of the pin connection, no damage for the next foot or so, and then scrape marks for a couple of feet beyond that point. Transcript at 22.

Whisler and Follet testified that the hydraulic unit inspected by them at Follet's shop had damage from the end of the pin and extending for a length of about two feet beyond the end of the pin. Transcript at 44 and 59. The well-defined color photos offered by plaintiff and received by the Court substantiate that all of the damage to the rod was at the pin and continued for a foot or two beyond that point. Exhibit P-1, pictures 1, 3, 4, and 5.

v. DAMAGE TO END OF CYLINDER.

While the conflicting evidence as to the overall condition of the hydraulic unit and the damage to the rod that moves in and out of the cylinder is compelling, the conflict in the evidence concerning damage to the end of the cylinder and to

the feed tube on top of the cylinder is overwhelming. Langston testified that the damage on the very end of the cylinder (where the rod moves in and out) showed damage to such an extent that "it was beveled ... like something had hit it and just shaved it right off" to such an extent that Langston didn't remember whether he could see right inside the cylinder. Transcript at 22 and 23.

Whisler was evasive and could not recall much detail concerning damage to the end of the cylinder. Transcript at 37, 38, 45 and 46. Follet, however, admitted what the photographic evidence so vividly details (Exhibit 9, picture No. 2); that is, that there was no damage on the outside of the cylinder that was inspected in his repair shop. Transcript at 59.

vi. DAMAGE TO FEED TUBE.

The difference in the condition of the feed tube along the top of the hydraulic cylinder (See Exhibits P-5 and D-1) is the "clincher." Langston vividly testified as to the extensive damage to the feed tube on top of the cylinder (confusingly sometimes also referred to as a "tube"): "The silver rod is the ram, and the black part is the tube, and it's scraped along it, and it hit the end of it, and that tube that's on top of the tube, it had taken the end of that off." Transcript at 13 and 14; Exhibit P-5. Langston further testified: "It was along this silver shaft, and then the end of the black tube -- and you can see that little tube up at the tope [sic] -- it had cut off

the top of that little tube and squashed it and hit the end of the black cylinder, and there was a great big gouge along the top of the silver." Transcript at 21. "Well, I remember the little connection that comes back in, that was completely shaved right off...." Transcript at 23.

Whisler, as in the case of his other testimony, was evasive and would not admit the condition of the feed tube, even when confronted with the detailed color photographs. Transcript at 44 and 45; Exhibit P-9.

Follet was, on this issue, more candid and openly-admitted what the photographs so clearly show:

Q. What do you call this little fitting and line that runs along the top of the unit?

A. This is a feed tube. See. on this particular cylinder, you have power both ways, depending on which side you apply your pressure to, and this one applies the pressure to this side of the piston, which would force the ram in, and when they splice that on the other end, it forces the ram out.

Q. And is there only one such feed tube on the unit?

A. No, there's a feed tube that goes clear down, and where the tube comes together here, you'll find the other fitting here.

Q. But there's only one that runs on down to the end of the unit?

A. That's right.

Q. And the picture, as I view the picture, shows no damage to that feed tube; does it?

A. No, I can't see any damage to it.

Transcript at 59-60.

ARGUMENT

SUMMARY OF ARGUMENT

Plaintiff has the burden of proving by a preponderance of the evidence that there is a causal connection between the legal wrong suffered and the damages claimed. In this case, the plaintiff totally failed to produce any evidence that the hydraulic unit that was damaged was the same hydraulic unit inspected by the appraiser and the repair shop owner and deemed to be damaged beyond economic repair. Rather, the evidence produced by the plaintiff conclusively established that the damages complained of were damages to a piece of equipment other than the piece of equipment damaged by defendant's alleged negligence.

DETAIL OF ARGUMENT

It is axiomatic that one of the essential elements of a negligence action is proof that there is a causal connection between the legal wrong suffered and the damages claimed. See Williams v. Melby, Utah, 699 P.2d 723, 726 (1985). As the Utah Supreme Court recently said:

On the issue of the fact of causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general, has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter

remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

Weber v. Springville City, Utah, 725 P.2d 1360, 1367 (1986) (quoting W. Keeton & W. Prosser, Prosser and Keeton on the Law of Torts, Sec. 41, at 269 [5th Ed. 1984]).

More recently the Utah Supreme Court affirmed the lower court's order granting a new trial on the grounds that plaintiff failed to prove sufficient causation tying defendant's conduct to the damage suffered by the plaintiff. Jackson v. Hicks, 60 Utah Adv. Reps. 11 (1987). As the court there stated: "The jury verdict was improper in that it imposed liability on defendant for injuries not shown by the evidence to have been proximately caused by defendant's conduct." Id. at 12.

In the instant case, the court's findings are improper in that they impose liability on the defendant for injuries not shown by the evidence to have been proximately caused by defendant's conduct. The plaintiff's evidence totally failed to identify the hydraulic ram inspected by the appraiser and the owner of the repair shop as being the same hydraulic ram that was damaged as a result of defendant's alleged negligence. There is no evidence in the record tracking the damaged unit from the time it was removed from the backhoe until it arrived at the repair shop. Lacking the necessary chain of evidence, it is pure speculation for the court to assume that the units were one and the same. It is true that there is some evidence that the unit damaged as a result of the alleged negligence of the defendant

and the unit inspected at the repair shop were both owned by the plaintiff, but who is to say that the plaintiff (who never testified) didn't substitute an old totally worthless hydraulic ram for the one only recently rebuilt. The failure of the plaintiff to offer any evidence tracking the damaged unit from the time of its removal from the backhoe until its inspection at the repair shop is, in and of itself, fatal to the plaintiff's case.

However, in this case, we have even more compelling reasons why the court's decision should be reversed. The plaintiff's own witnesses conclusively demonstrated that the hydraulic ram damaged in the accident was not the same hydraulic ram inspected at the repair shop and determined to be damaged beyond economic repair. The two units were different in overall appearance. The two units suffered damage in different locations to the rod which moves in and out of the hydraulic cylinder. The unit damaged in the accident had the end of the cylinder scraped off at an angle to the extent that it may have opened the cylinder to the atmosphere, and the feed tube and fitting on the top of the cylinder was cut off and "squashed" whereas the unit inspected at the repair shop had no damage to the cylinder or the feed tube. Thus, the plaintiff through its own evidence conclusively proved that there were two different hydraulic rams involved between the time of the occurrence of the damage and until the inspection at the repair shop.

The plaintiff thus failed to prove that the damages complained of and awarded by the trial court were caused by the defendant.

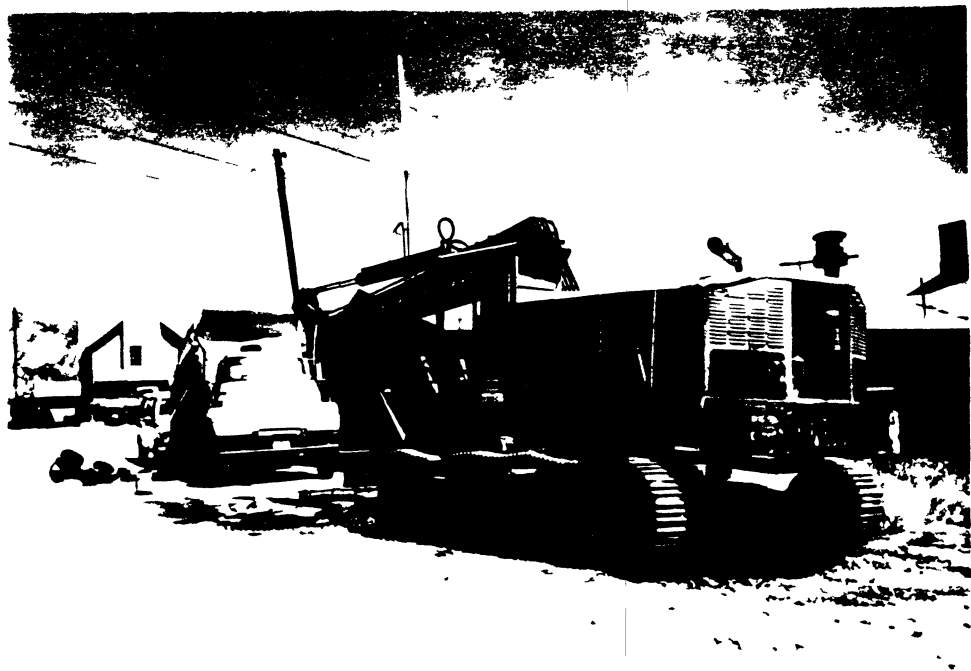
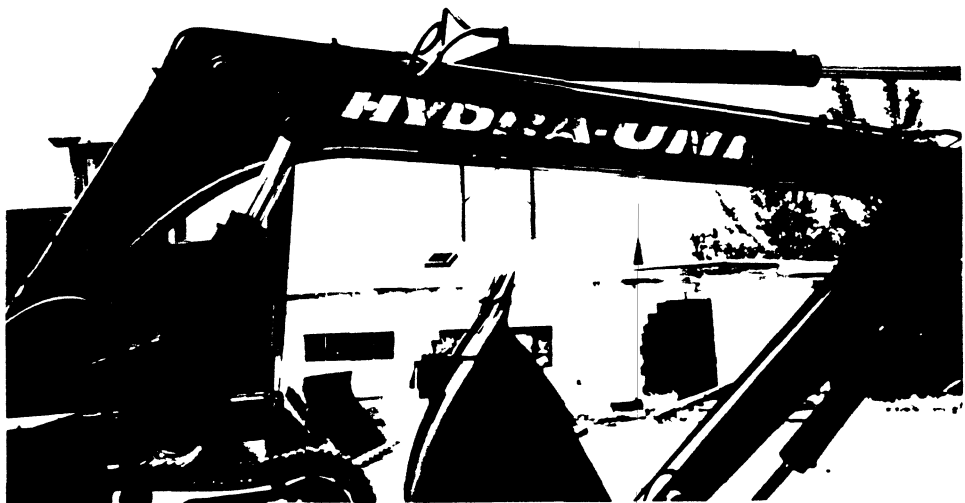
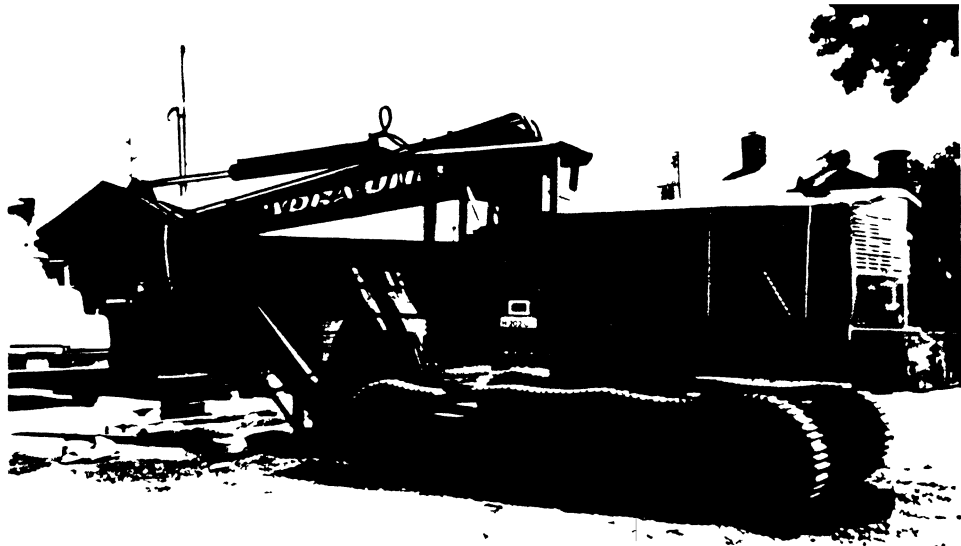
CONCLUSION

Plaintiff has the burden of proving by a preponderance of the evidence that there is a causal connection between the legal wrong suffered and the damages claimed. In this case, the plaintiff totally failed to produce any evidence that the hydraulic unit that was damaged was the same hydraulic unit inspected by the appraiser and the repair shop owner and deemed to be damaged beyond economic repair. Rather, the evidence produced by the plaintiff conclusively established that the damages complained of were damages to a piece of equipment other than the piece of equipment damaged by defendant's alleged negligence. The trial court's judgment should be reversed and judgment should be entered for the defendant, including defendant's costs.

Respectfully submitted this ____ day of April, 1988.

FRANK S. WARNER
Attorney for Defendant-Appellant

APPENDIX



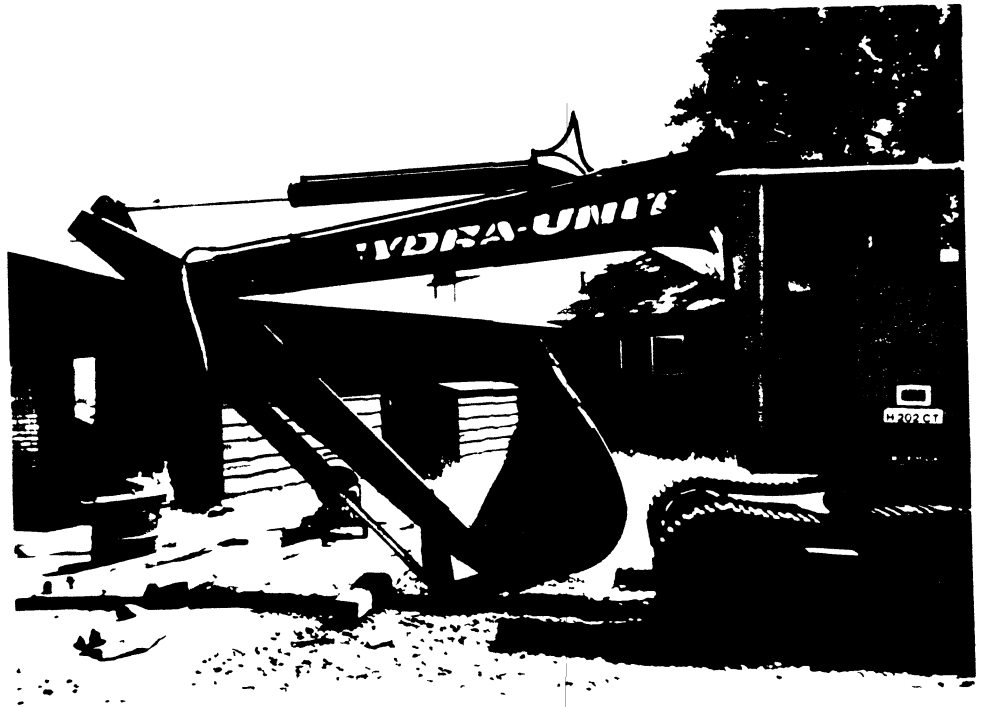


PHOTO SHEET

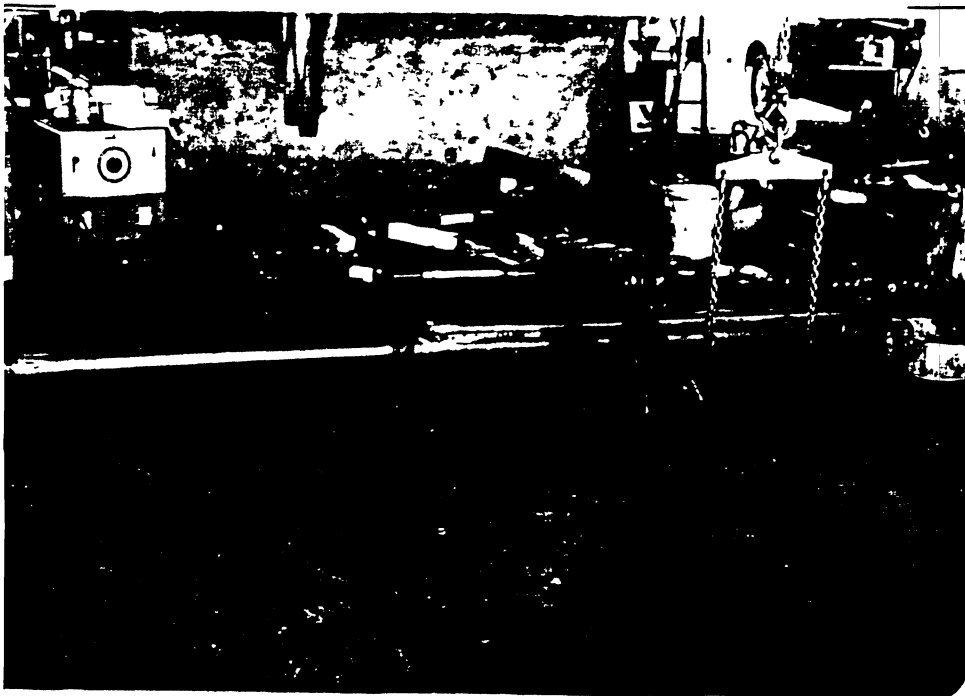
OWNER/CLAIMANT Smalley Development Co. I. D. No. _____

LOCATION 911 S. New Grand, Salt Lake City, Utah

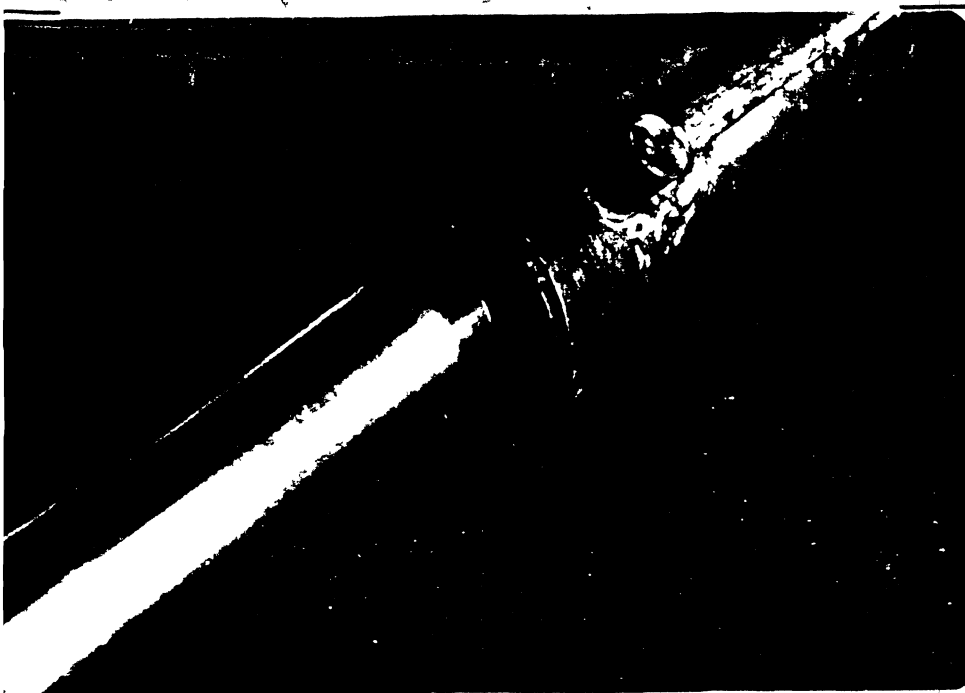
CO. CLAIM NO. _____ GAB FILE NO. 48832-06572

POLICY NO. BP626 4919 PHOTOGRAPHED BY JAW Wiley

FILM - POLAROID NEGATIVE DATE TAKEN 2-31-84



PICTURE NUMBER 1
DESCRIPTION hydraulic arm with
stainless steel rod
extended - rod
damaged at
circled area



PICTURE NUMBER 2
DESCRIPTION damaged
rod of hydraulic
arm

PHOTO SHEET

OWNER/CLAIMANT _____

I. D. No. _____

LOCATION _____

CO CLAIM NO. _____

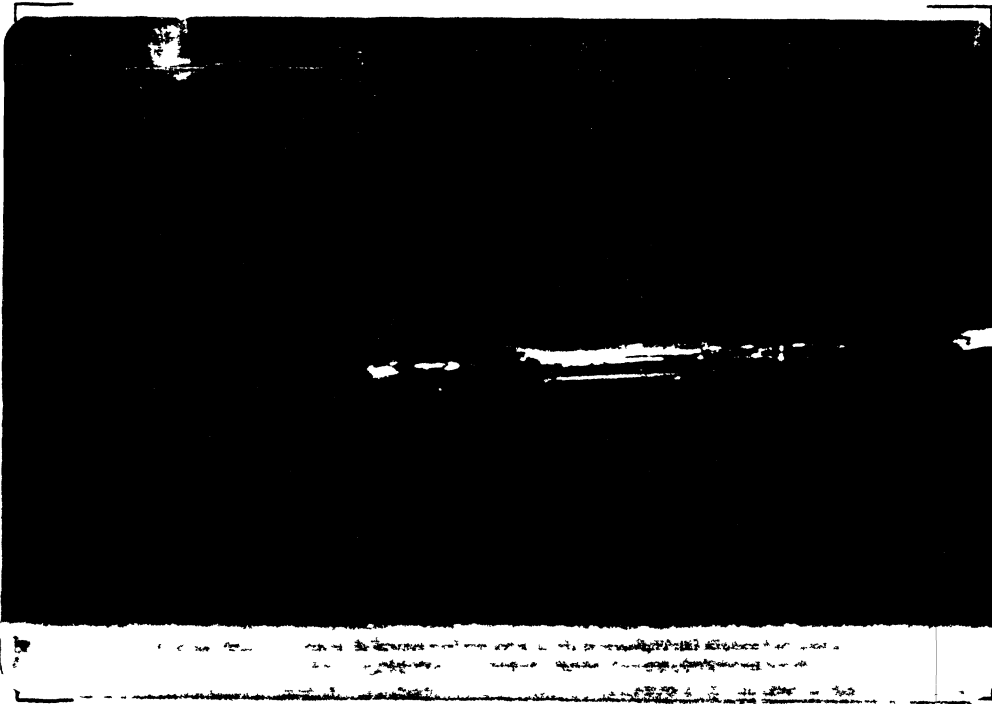
GAB FILE NO. _____

POLICY NO. _____

PHOTOGRAPHED BY _____

FILM — POLAROID NEGATIVE

DATE TAKEN _____



PICTURE NUMBER 3

DESCRIPTION *stainless steel non rod*



PICTURE NUMBER 4

DESCRIPTION *stainless steel non rod - gouge & scratches*

PHOTO SHEET

OWNER/CLAIMANT _____

I. D. No. _____

LOCATION _____

CO. CLAIM NO. _____

GAB FILE NO. _____

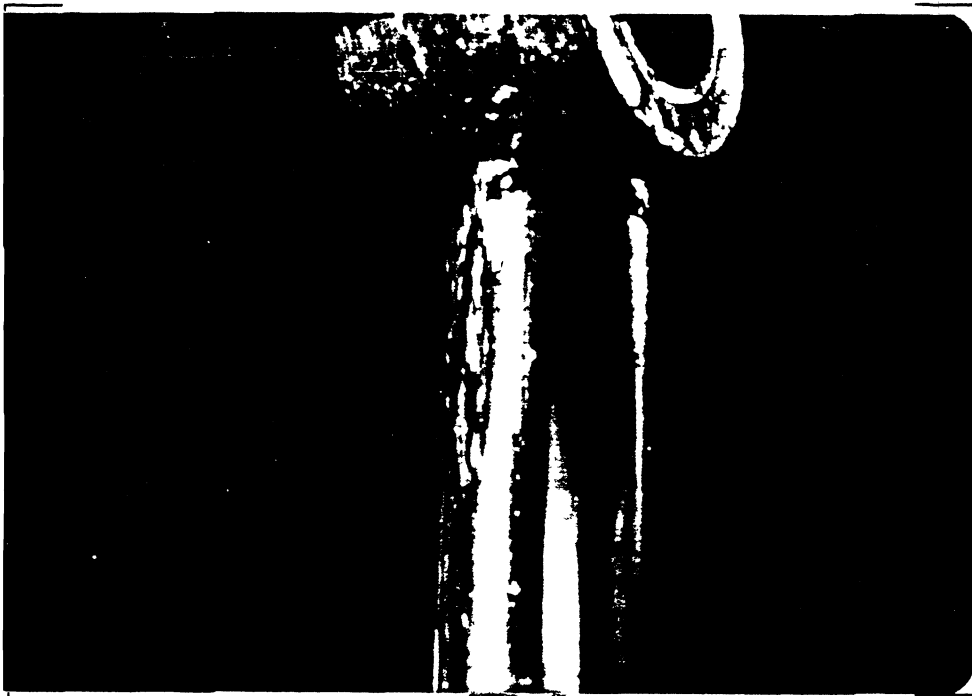
POLICY NO. _____

PHOTOGRAPHED BY _____

FILM — POLAROID

NEGATIVE

DATE TAKEN _____



PICTURE NUMBER 5

DESCRIPTION *Close up of
gauge in handle
steel ram rod*

PICTURE NUMBER _____

DESCRIPTION _____

ITEM	PART NUMBER	DESCRIPTION	QTY
1	040691	Base End W/ Bushing	1
2	220123	Rushing Only	3
3	400015	Grease Fitting	3
4	031246	Tube-Cyl. Port Ext.	1
5	020492	Plug	2
6	040688	Tube W/Cyl.Ports & Bush.	1
7	800543	Rod Nut	1
8	800544	Lock Washer	1
9	010151	O-Ring	2
10	010122	Piston Ring	4
11	040602	Collar	1
12	040003	Piston	1
13	010103	O-Ring	1
14	400666	Flange	6
15	400022	Bolt	12
16	040582	Guard	1
17	400116	Bolt	4
18	010118	O-Ring	2
19	040598	Spacer	1
20	010115	O-Ring	1
21	040604	Guide	1
22	010116	Seal	1
23	040605	Head	1
24	010117	Wiper	1
25	040690	Rod End W/ Bushing	1
26	040689	Rod W/ Bushing	1
27	400693	Clamp	1
28	400694	Clamp	1
29	040324	Lock	1
		As Req'd	

NOTE: For complete cylinder assembly order part number 040640. For bare cylinder (less items 4,13,14,15,16,17 & 27) order part number 040601.

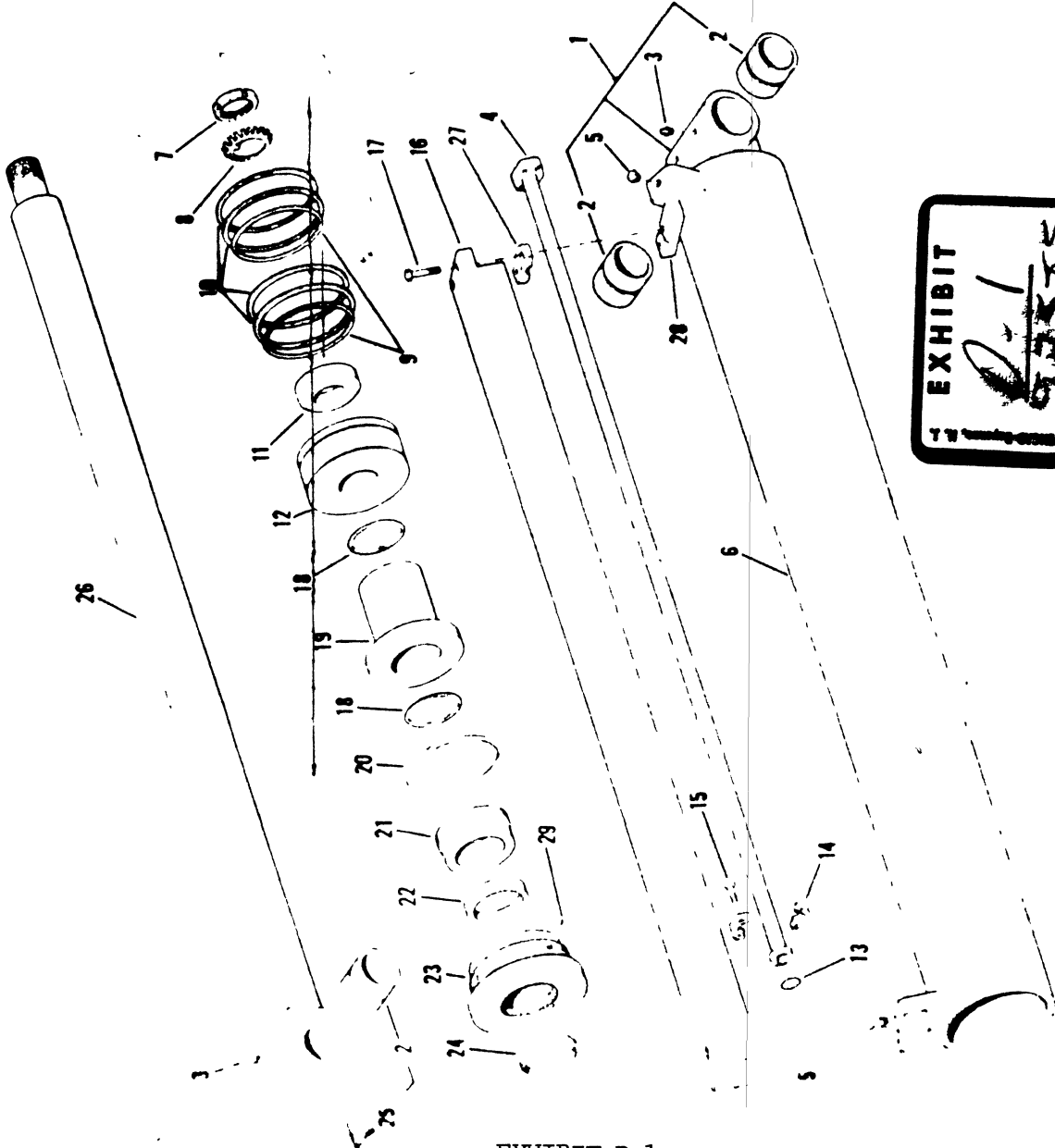


EXHIBIT D-1

7" DIPSTICK CYLINDER

EFFECTIVE

SN 14-1769

Date Dec. 1, 1970

Hein-Werner

1 Q Had the backhoe been damaged previously?

2 A Yes. It was roughly two months before that that
3 they had -- the ram in question, they had hit a bridge at
4 33rd South in Salt Lake City, transporting this same
5 machine, and it had damaged the same ram or the same type
6 ram.

7 Q And what repair was done?

8 A They replaced it with a new ram, with the whole
9 unit, the ram cylinder and everything.

10 Q So, then, the ram unit that was on the backhoe
11 on August 24, 1984, that ram unit was approximately a
12 couple of months old?

13 A Well, it was actually only about two weeks old.

14 Q And were you aware of any problems or damage to
15 that ram unit at that time?

16 A There was none. It was new.

17 Q I'd like to ask you now what you recall or what
18 you know about the damage that was done to the backhoe on
19 August 24th. First of all, where was the backhoe on that
20 day?

21 A It was in East Layton in a project called LaDonna
22 Mesa.

23 Q And was the backhoe to be moved to another
24 location?

25 A Yes.

1 you had directed him to take?

2 A No.

3 Q Did you have occasion to inspect the backhoe for
4 damage that had been done by hitting the overpass?

5 A Yes.

6 Q Tell me what you did as far as your inspection
7 of the backhoe?

8 A Well, I unloaded it off the truck and pulled it
9 off to the side out of the way so it wasn't impeding any
10 of the construction work, and I took it off.

11 Q What do you mean you took it off?

12 A I removed it from the machine.

13 Q The ram unit?

14 A Yes.

15 Q What did you find as far as damage to the ram
16 unit?

17 A Well, the ram unit itself was scarred up, and
18 then the outside of the tube had been hit and part of it
19 scraped off.

20 Q Looking at Exhibit 5, can you identify to the
21 Court what exactly is the ram unit that we're talking about?

22 A The silver rod. The silver rod is the ram, and
23 the black part is the tube, and it's scraped along it, and
24 it hit the end of it, and that tube that's on top of the
25 tube, it had taken the end of that off.

1 Q So essentially, the silver rod and the black tube
2 had appeared to have been damaged?

3 A Yes.

4 Q How much experience have you had in transporting
5 backhoes or other heavy equipment?

6 A Well, since I went to work for Smedley's and
7 started running a backhoe, we always loaded our own on the
8 transport. He had his own transport for a while, and then
9 if it was down, he'd use others.

10 Q So had you been loading backhoes for Smedley
11 since probably 1975?

12 A Yes.

13 Q Do you believe that you acted as a reasonably
14 prudent backhoe operator would have acted in loading a
15 backhoe?

16 MR. WARNER: Objection.

17 THE COURT: Sustained.

18 Q (BY MR. HANSEN) Okay. After you had loaded the
19 backhoe onto the transport, did you believe that you were
20 fully responsible for making sure that the backhoe arrived
safely at the project? Was that your responsibility?

22 A No. I discussed the route with the driver, and he
23 said he understood right where he was going and understood
24 the roads.

25 MR. HANSEN: Okay. No further questions.

1 A Yes.

2 Q Did you personally have anything to do with
3 replacement of that ram unit two months prior to the incident
4 in question?

5 A I would have been the one that put it back on the
6 machine. I would have taken it off -- in fact, I took it
7 off and give it to Smedley's, and then when they got another
8 ram, I put it back on.

9 Q When you say got another ram, did this new ram
10 you got, was it all factory fresh painted with names
11 imprinted on it and everything?

12 A There's no names or nothing on it. They usually
13 come -- whenever they've got a ram exchange and through
14 Rasmussen, it's come, but it's primered. They'll just have
15 a primered paint on it. It basically won't be painted the
16 same color as the rest of the machine.

17 Q Do you sometimes exchange rams, you take your
18 damaged or worn ram in and get one that they have rebuilt,
19 and put back on the machine?

20 A Yes.

21 Q And this particular one that you put back on the
22 machine, was it primered paint?

23 A It was primered, yes.

24 Q And you don't know for certain where it came from?

25 A No, I don't.

1 A Yes.

2 Q Do you know whether or not for certain he followed
3 your instructions?

4 A No.

5 Q No, you don't know whether he followed your
6 instructions?

7 A No, I don't.

8 Q I didn't have an opportunity to see where you
9 described the damage to the ram unit. Your Honor, if you're
10 done with those photographs.

11 THE COURT: Sure.

12 Q (BY MR. WARNER) Showing you what has been
13 marked as Plaintiff's Exhibit 5, would you point out to me
14 and the Court --

15 A It was along this silver shaft, and then the end
16 of the black tube -- and you can see that little tube up
17 at the tope -- it had cut off the top of that little tube
18 and squashed it and hit the end of the black cylinder,
19 and there was a great big gouge along the top of the silver.

20 Q Was the gouge along the silver rod -- how long
21 would you say that gouge was?

22 A It would have been two, two and a half feet.

23 Q And at what location on the silver rod?

24 A Well, it would have been kind of a black area
25 here, and it would have been there about the point where it

1 hit the black cylinder.

2 Q So the damage -- would you call this the eye?
3 The far end of the extended rod, would you call that an
4 eye, or what would you call that?

5 A Well, that's the pin connection. There's a pin
6 that holds that there. Now, there was -- well, it wasn't
7 what you could call damage. There was marks on the end of
8 this, but it didn't do any damage to this. It just looked
9 like it just scraped there, too, but there wasn't no damage.

10 Q And that was on the pin connection at the end
11 rather than on the rod?

12 A Yes.

13 Q And then the next damage started a foot or so
14 behind that pin connection?

15 A Yes.

16 Q And then extended for a couple of feet?

17 A Yes.

18 Q And then there was damage -- describe the damage
19 on the very end of the cylinder, if you would.

20 A It's kind of flat, and it was beveled, like it
21 was on the bevel right -- like something had hit it, and
22 just shaved it right off.

23 Q Like an abrasion?

24 A Yes.

25 Q Had it opened the end up?

1 A Well, I remember the little connection that comes
2 back in, that was completely shaved right off, and it was
3 going on an angle inwards, and the top of the tube was cut
4 on kind of the same angle, but I don't remember if I could
5 see inside the head at all, no.

6 Q Do you know how -- once you had the hydro-unit
7 backhoe loaded on the transport, do you know what the
8 maximum height to the top of the unit was?

9 A No, we never measured it.

10 Q Do you have an estimation of its height?

11 A Around 14 and a half, maybe 15 feet.

12 Q You do know the importance of controlling the
13 height of that unit for transport as a result of your
14 earlier experiences hitting bridges; do you not?

15 A Yes.

16 Q Do you know how high the bridge is that he would
17 have had to have gone under on this I-84 underpass?

18 A It's a minimum of 16 feet, because it's not
19 marked.

20 Q Do you recall a time when they lowered the
21 surface of US 89 where it passes under that bridge?

22 A Yes.

23 Q And that was because of the lowness of that
24 particular underpass; is that not true?

25 A Yes.

1 required to repair it.

2 Q Did you take pictures of the rod?

3 A Yes, I did.

4 Q I'd like to show you what's been marked as
5 Exhibit P-6. Tell me if you can identify that document?

6 A Yes.

7 Q What is that document?

8 A It's a photosheet of one -- three pages containing
9 five photographs.

10 MR. HANSEN: And I would move for the admission
11 of P-6.

12 MR. WARNER: No objection.

13 THE COURT: Admitted.

14 Q (BY MR. HANSEN) And these pictures that you
15 have, you have five pictures it appears, that you took?

16 A Yes.

17 Q Can you identify to us the damage that these
18 pictures showed on the rod, or can you briefly just
19 describe what these pictures show?

20 A Photo No. 1 is a picture of the cylinder with the
21 rod extended out, and was intended to show damage at the
22 left side of the picture at the end of the extended
23 stainless steel rod. Picture No. 2 is of the seal for the
24 hydraulic unit.

25 Q And it was damaged there at the seal; is that

1 No. 1 is a picture of the hydraulic ram, the stainless
2 steel rod damage. No. 2 is the damage seal of the hydraulic
3 unit. No. 3 is the stainless steel ram rod. No. 4 is the
4 stainless metal rod gouged and scratched, and No. 5 is the
5 closeup of the gouge and the stainless steel ram rod.

6 Q Now, looking at all of those photographs, where
7 would you say the damage on the rod itself occurs?

8 A Out of the end of the unit, extended.

9 Q It's out at the end of the unit close to the
10 pin on the end of the unit?

11 A Uh-huh.

12 Q Is there any damage, say, from two feet below
13 the pin on in towards the cylinder?

14 A I don't recall, but I don't believe so.

15 Q Do the photographs show any?

16 A I would think that there was not.

17 Q What's your answer?

18 A I would think that there is not, but I do
19 not recall.

20 Q Was there any damage to the little hydraulic
21 pipe cylinder that ran across the top of the main cylinder?

22 A Are you referring to the little cylinder here?

23 Q Yes.

24 A I don't recall.

25 Q Well, do you see any in the photograph that

1 you're looking at?

2 A No.

3 MR. WARNER: May I look at these?

4 THE COURT: Sure.

5 Q (BY MR. WARNER) Let me show you what has been
6 marked as Exhibit P-5, and refer you to what appears to be
7 a hydraulic unit on the top of the boom coming out from the
8 ram unit. Does that appear to be the same type of
9 hydraulic cylinder that you investigated?

10 A Yes.

11 Q And was it your understanding that that was a
12 cylinder that came from a hydro-unit used in this application?

13 A Yes.

14 Q Is there more than one small tube running --
15 connected with the large tube on a unit of that kind? You
16 can see in this photograph, P-5, can you not, that there's
17 a small tube that runs from where the rod comes out of the
18 unit along the top of the unit? Can you see that?

19 A Yes.

20 Q Is that the same small tube that appears in this
21 photograph, which is the second of the series of photographs?

22 A I would imagine it is.

23 Q Are there any other such tubes?

24 A Not that I know of.

25 Q Is there any damage to what I would refer to as

1 Q On the cylinder that you examined and tore down
2 and disassembled, was there any damage on the rod other
3 than in the area circled in picture No. 1?

4 A As I recall, there was a length of it. Here in
5 picture No. 4, it shows about a two foot length here
6 where the ram was damaged.

7 Q And would that be all of the damage on the rod
8 of the unit that you examined?

9 A Yes.

10 Q Was there any apparent damage to the cylinder
11 itself?

12 A No, there wasn't on the outside.

13 Q What do you call this little fitting and line that
14 runs along the top of the unit?

15 A This is a feed tube. See. on this particular
16 cylinder, you have power both ways, depending on which
17 side you apply your pressure to, and this one applies the
18 pressure to this side of the piston, which would force the
19 ram in, and when they splice that on the other end, it
20 forces the ram out.

21 Q And is there only one such feed tube on the unit?

22 A No, there's a feed tube that goes clear down,
23 and where the tube comes together here, you'll find the
24 other fitting here.

25 Q But there's only one that runs on down to the

1 end of the unit?

2 A That's right.

3 Q And the picture, as I view the picture, shows
4 no damage to that feed tube; does it?

5 A No, I can't see any damage to it. Of course,
6 even if the tub is just damaged, the tube could be
7 replaced, That would be cheaper than buying a new one.

8 Q Does the unit look like a unit that had just
9 recently been new or replaced recently prior to this
10 incident?

11 A It looks like it's fairly new. If you notice
12 here on the gland nut, when they work out with them in
13 the field, you'll find they round those all off. In fact,
14 they'll get down here, and they't not much of the
15 tank left on them where they've taken them apart and
16 repacked them.

17 Q Did it appear to be a unit that had just, within
18 the past month or so, been completely reconditioned and
19 new primer on it?

20 A It could be.

21 Q That particular unit in its location on the
22 equipment, does not in the ordinary course of work,
23 suffer alot of abrasion on the outside?

24 A No, because it sits right at the top.

25 Q In fact, let me show you what has been marked as

1 Exhibit P-5, showing the unit in place on top of the arm.

2 A It's this arm right up here.

3 Q And I notice there's very little abrasion or
4 anything on that unit, whereas, the unit down closer to the
5 bucket appears to be quite worn.

6 A That's right. They catch that in the trench when
7 they're digging.

8 Q And that's typically the one that gets a lot of
9 wear?

10 A That's right.

11 Q So if this unit on top had been completely
12 reconditioned, primed and replaced on the unit within the
13 last month, would you expect it to look in as bad a condition
14 on the outside surface as these photographs in Exhibit P-9?

15 MR. HANSEN: Objection as to Counsel's
16 characterizations.

17 THE COURT: Overruled.

18 THE WITNESS: It doesn't look that bad to me.

19 Q (BY MR. WARNER) Okay. Is the brown stuff on
20 there, would that be rust; do you recall?

21 A I don't recall. It could be rust or it could be
22 sand that's wet, sticking on there.

23 Q What about the black coloration in picture No. 2
24 of Exhibit P-9?

25 A I would suspect that would be paint.

1 Q And where the black material isn't there, would
2 that be where paint had been worn off?

3 A It could be that, or it could be just dirt on the
4 unit.

5 Q Let me show you what has been marked as Exhibit
6 D-1, and ask you if you could identify what that might be
7 a photocopy of?

8 A This looks like it's a parts breakdown of the
9 cylinder we're referring to.

10 Q In fact, are you familiar with these kind of
11 diagrams?

12 A Yes.

13 Q Do you have them in shop manuals in your shop?

14 A Yes.

15 Q And do you notice this particular one says Hein-
16 Werner on it? Is that a brand different from Hydro-unit?

17 A Hein-Werner builds alot of the rams for Hydro-unit.
18 There's a number of different hydraulic units that just bid
19 on equipment and what the manufacturers specify they need,
20 and whoever is the cheapest bidder is the one that builds
21 the ram for them.

22 MR. HANSEN: Your Honor, if Counsel would ask the
23 witness to testify on this exhibit, I'd like an opportunity
24 to review it. I think it ought to be admitted before he's
25 questioned and interrogated as to that document.

1 damaged by defendant's employee. I think the testimony is
2 sufficient to demonstrate that it was the same ram unit.
3 Kay Langston testified that he loaded the backhoe of Smedley
4 Development Company on the truck, that defendant's employee
5 took the truck, arrived at the job site, and admitted to
6 him that he had hit an overpass with the backhoe, with the
7 ram unit. Mr. Langston testified that he, at that time,
8 examined the unit, found that there was damage on the ram
9 unit. He described the damage. It's consistent with the
10 damage that was identified by the adjustor and also Mr.
11 Follet, the mechanic. And Mr. Langston testified that he
12 took that ram unit off of the backhoe, took it to the repair
13 shop. Mr. Follet testified that he received that ram unit
14 from Smedley Development Company, and that the damage on
15 that unit was consistent with sustaining a blow, as opposed
16 to simply wear and useage. So I don't think that there's
17 any basis for defendant's motion to dismiss.

18 Further, defendant argues that they're not
19 liable on the theory of agency, that their employee was an
20 agent of the plaintiff. Defendant has put on no evidence
21 to demonstrate that there was an agency relationship. The
22 only evidence we've heard to date is that the plaintiff's
23 employee did point out a route that could safely be taken
24 for the defendant driver to get the backhoe to the job site.
25 Apparently, defendant's driver did not follow that route,

CERTIFICATE OF MAILING

I hereby certify that I served a true and correct copy of the foregoing Brief of Defendant-Appellant Leon Poulsen Construction Co., Inc. on John E. Hansen, Morgan, Scalley & Reading, Attorneys for Plaintiff-Respondent, by mailing a copy thereof to him at 261 East 300 South #200, Salt Lake City, Utah 84111, via first-class U.S. Mail, postage prepaid this 4th day of April, 1988.

FRANK S. WARNER
Attorney for Defendant/Appellant