

1996

Western Rock Products Corporation v. Tri-County Confinement Systems, Inc. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WESTERN ROCK PRODUCTS)
CORPORATION, a Pennsylvania)
Corporation,)

Plaintiff and Appellee,)

VS.

TRI-COUNTY CONFINEMENT)
SYSTEMS, INC., a Pennsylvania)
Corporation,)

Defendant and Appellant.)

BRIEF OF APPELLANT

TRI-COUNTY CONFINEMENT
SYSTEMS, INC.

CASE NO. ~~960290~~

960838.CA

**Appeal From Grant of Summary Judgment of the Fifth Judicial District Court
In and For Beaver County, Honorable J. Philip Eves**

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Clerk of the Court

IN THE UTAH COURT OF APPEALS

WESTERN ROCK PRODUCTS)	
CORPORATION, a Pennsylvania)	
Corporation,)	
)	BRIEF OF APPELLANT
Plaintiff and Appellee,)	
)	TRI-COUNTY CONFINEMENT
vs.)	SYSTEMS, INC.
)	
TRI-COUNTY CONFINEMENT)	
SYSTEMS, INC., a Pennsylvania)	
Corporation,)	CASE NO. 960290
)	
Defendant and Appellant.)	

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1996).

STATEMENT OF ISSUES

The determinative issue(s) in this case is whether the trial court erred in determining that there were no genuine issues of material fact precluding summary judgment. Because Appellant believes that the trial court erred in several particulars, Appellant states the issues as follows:

1. Whether the trial court erred in determining that there were no genuine issues of material fact precluding summary judgment with respect to whether the parties reached an agreement.
2. Whether the trial court erred in determining that there were no genuine issues of material fact precluding summary judgment with respect to the alleged terms of the alleged agreement between the parties.
3. Whether the trial court erred in determining that there were no genuine issues of material fact precluding summary judgment with respect to the purpose that funds were deposited in escrow.
4. Whether the trial court erred in determining that there were no genuine issues of material fact precluding summary judgment with respect to the "Formalization Agreement" and the repudiation of the alleged agreement.

5. Whether the trial court erred in determining that there were no genuine issues of material fact precluding summary judgment with respect to the "Confirmation Memo."

6. Whether the trial court erred in determining that there were no genuine issues of material fact precluding summary judgment with respect to the escrow instructions.

7. Whether the trial court erred in determining that there were no genuine issues of material fact precluding summary judgment with respect to whether the acts of the parties demonstrated the existence of an enforceable agreement between the parties.

8. Whether the trial court erred in determining that there were no genuine issues of material fact precluding summary judgment with respect to the trial court's conclusion that the form and effect of the "Formalization Agreement" was not material to Appellee's claim.

9. Whether the trial court erred in determining that there were no genuine issues of material fact precluding summary judgment with respect to whether there was actually a meeting of the minds or mutual assent of the parties.

10. Whether the trial court erred in determining that there were no genuine issues of material fact precluding summary judgment when it determined that if there was an agreement entered into between the parties, such agreement was not repudiated by a separate agreement reached between the parties on the following day.

11. Whether the trial court erred in determining that there were no genuine issues of material fact precluding summary judgment when it concluded that there was no basis for

estopping Appellee from enforcing the “Conformation Memo” and that both parties should instead be estopped from denying the existence of the alleged agreement.

STANDARD OF REVIEW

This Court is called upon in this appeal to review the trial court’s grant of summary judgment in a number of particulars. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah Rules of Civil Procedure 56(c); *Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist*, 773 P.2d 1382, 1385 (Utah 1989). This Court accords “no deference to the trial court’s conclusion that the facts are not in dispute nor the court’s legal conclusions based on those facts.” *Kitchen v. Cal. Gas Co., Inc.*, 821 P.2d 458, 460 (Utah App. 1991), *cert. denied*, 832 P.2d 476 (1992).¹ Additionally, this Court “review[s] all relevant facts, including all inferences arising from those facts, in a light most favorable to the losing party.” *Id.* This has been interpreted to mean that this Court must accept Appellant’s facts as set forth before the trial court and in sworn testimony and they determine whether the facts create genuine issues of material fact. *See, e.g., Beehive Brick Co. V. Robinson Brick Co.* 780 P.2d 827 (Utah App. 1989). Under applicable standards of review, this Court must resolve all doubts in favor of Appellant. *Draper Bank & Trust Co. v. Lawson*, 675 P.2d 1174 (Utah 1983). “If, after a review of the record, it appears that there is a

¹ Said another way, because this Court resolves only legal issues when reviewing a grant of summary judgment, it does not defer to the trial court’s ruling in any particular. *Ferree v. State*, 784 P.2d 149, 151 (Utah 1989).

material factual issue, [this Court is] compelled to reverse the trial court's grant of summary judgment." *Amica Mut. Ins. Co. V. Schettler*, 768 P.2d 950, 957 (Utah App. 1989). **"One sworn statement under oath [involving a material fact] is all that is necessary to create a factual issue, thereby precluding the entry of summary judgment."** *Id.* With respect to this Court's handling of its review of the facts in an appeal from a summary judgment motion, it is improper for the trial court or this Court on appeal to weigh the evidence or assess its credibility or make any determination about the opposing party's ultimate chance of prevailing in a trial on the merits. *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles*, 681 P.2d 1258, 1261 (Utah 1984); accord *Reeves v. Geigy Pharmaceutical, Inc.*, 764 P.2d 636, 639 (Utah App. 1988).²

DETERMINATIVE STATUTES

Appellant is unaware of any statutes that are determinative in this action.

STATEMENT OF THE CASE

Nature of the Case

This case involves a dispute between Appellant and Appellee as to whether they actually entered into an agreement and, if so, what the terms of the agreement actually are. Appellee

² In *White v. Deseelhorst*, 879 P.2d 1371 (Utah 1984), the Utah Supreme Court addressed this issue and cast some dispersions on whether the party opposing summary judgment and appealing the grant of summary judgment could actually prevail in a trial on the merits. The Court noted, however, that such consideration at the appellate level was not appropriate. The Court was obligated to resolve all doubts in that party's favor regardless of how the Court felt about that party's ability to ultimately succeed at trial.

maintains that the parties reached a binding agreement. Appellant, on the other hand, maintains that the parties did not reach an agreement, but instead only participated in preliminary discussions and negotiations. In short, that there was no meeting of the minds or mutual assent. Appellant further maintains that even if it can be argued that the parties reached an agreement, the parties have not agreed to numerous and material terms and conditions thereof. As a result, Appellant maintains that there were numerous genuine issues of material fact both with respect to whether the parties actually entered into an agreement and the terms and conditions of any alleged agreement.

Course of the Proceedings

Appellant was a general contractor on a large industrial project in Beaver County, Utah. Appellee was hired by a sub-contractor to perform certain tasks and supply certain material on the project. The sub-contractor failed to pay Appellee for its services on the project. Appellee threatened to file a mechanic's lien on the project. Appellant entered into discussions and negotiations with Appellee with the goal of avoiding the filing of a mechanic's lien. As part of the negotiations, Appellant escrowed a significant amount of money as a show of good faith and which Appellee could access if efforts failed to force the sub-contractor to pay the money owing to Appellee.

Appellee apparently believed that it had entered into an agreement with Appellant. When Appellee deemed that Appellant had not performed under the alleged agreement, Appellee filed

a Complaint for Breach of Contract against Appellee. Shortly thereafter, Appellee filed a Motion for Summary Judgment on the issue of whether a legally enforceable agreement existed between the parties. Appellant both answered the Complaint and opposed the Motion for Summary Judgment. Judge J. Philip Eves in the Fifth District in and for Beaver County granted Appellee's Motion for Summary Judgment and held that an enforceable agreement did exist between the parties.

Disposition of the Trial Court

Judge J. Philip Eves in the Fifth District in and for Beaver County granted Appellee's Motion for Summary Judgment and held that an enforceable agreement did exist between the parties. Because it is a summary judgment action, inherent in the trial court's ruling is the conclusion that there were no genuine issues of material fact with respect to whether the parties actually entered into an alleged agreement or with respect to the terms of the alleged agreement itself. As shown below, there were numerous genuine issues of material fact and the trial court erred in granting Appellee's Motion for Summary Judgment.

STATEMENT OF FACTS

For illustrative purposes, because this is an appeal from a summary judgment and because this Court gives no deference to the trial court in this context, Appellant states the facts as follows:

1. Facts as set forth in the trial court by Appellant; and

2. Statement of Material Facts in Dispute Before the Trial Court.

Facts Set Forth by Appellant

The following factual statements are taken from Appellant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. (Appellant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, (R. 57-82), attached hereto as Exhibit A).

1. Appellant is a general contractor on a construction project in Beaver County, Utah, owned and operated by Circle Four Farms (the "Project"). (Appellant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p.4, (R. 60)).

2. Appellee provided concrete work on the Project at the request of Precise Concrete, a subcontractor on the Project. (Appellant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p.4, (R. 60)).

3. Precise failed to pay Appellee for work and supplies provided on the Project. (Appellant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p.4, (R. 60)).

4. Discussions and negotiations were held between Appellee and Appellant regarding the nonpayment by Precise. Due to a pending financial transaction, Circle Four and Appellant wanted to avoid the filing of a mechanic's lien upon the Project. (Appellant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p.4, (R. 60)).

5. In order to avoid the filing of a the mechanic's lien, the parties discussed an arrangement whereby certain funds would be escrowed by Appellant on certain conditions. (Appellant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p.4, (R. 60); *see also* Affidavit of Terry Weaver, at ¶¶ 5-7, (R. 93), attached hereto as Exhibit B).

6. The discussions regarding the terms of such an arrangement began between Mr. Wayne Smith, acting for Appellee, and Mr. Terry Weaver, acting for Appellant. Mr. Weaver and Mr. Smith discussed the various points to be included in any such agreement by telephone on or about November 6, 1995. The discussions between Mr. Weaver and Mr. Smith were followed by a confirmation memo sent to Mr. Smith by Mr. Weaver on November 7. (Affidavit of Weaver, at ¶¶ 7-8, (R. 92-93); Confirmation Memo (R. 72), attached hereto as Exhibit D).

7. On the following day, November 8, 1995, Mr. Smith contacted Mr. Solt, Chief Financial Officer of Appellant. Mr. Smith supplied Mr. Solt, by fax, with proposed escrow instructions, and with a proposed agreement (the "Formalization Agreement") prepared by Western's attorney, presumable to carry into effect the discussions held the day before. (Affidavit of Ronald Solt, (R. 89-91), attached as Exhibit C; Formalization Agreement (R. 73-78), attached hereto as Exhibit E).

8. In the conversation on November 8, 1995, Mr. Smith advised Mr. Solt that Appellant was required to sign the Formalization Agreement and the Escrow Agreement and deposit the funds that day, or Western Rock would file its lien. (Affidavit of Solt, at ¶ 4. (R. 62)).

9. The Formalization Agreement contained additional terms which were not included in the prior discussions of the parties, and which were not included in the memo of November 7, 1995, or terms different than those in the discussions and the Confirmation Memo. The applicable paragraphs, with the additional and different terms highlighted, all of which are substantial and material, are quoted from the Formalization Agreement as follows:

1. ***On or before 5:00 p.m. on November 8, 1995,*** Tri-County shall cause to be deposited in an interest-bearing account the sum of One Hundred Eighty-five Thousand Three Hundred Seventeen and 26/100 Dollars (\$185,317.26).

2. It is expressly understood that performance by the escrow agent of its duty to make the disbursement described above is **conditioned only and exclusively upon the expiration of the six-month period. There shall be no other condition relating to disbursement from escrow.**

4. Western Rock shall attempt to collect the Precise account indebtedness from Precise Concrete. **Western Rock's efforts to do so shall be solely and exclusively determined and governed by Western Rock's own discretion.** Accordingly, Western Rock shall not be required to pursue judicial action, nor formal proceedings of any kind; but rather may choose to merely conduct informal negotiations in its attempt to collect the indebtedness. In sum, the efforts to be made and/or methods to be used by Western Rock in this regard shall be the sole and exclusive prerogative of Western Rock.

5. Tri-County expressly acknowledges that Precise Concrete may assert that the sums owed by Western Rock on the Precise account are incorrect or inaccurate, or that the labor, services or materials, or some portion thereof, supplied by Western Rock were defective. Notwithstanding any such assertion, and whether it be proven accurate or not, **Tri-County hereby waives any claims, rights, defenses or causes of action it may have to reduce, offset or be reimbursed for the settlement funds be paid by Tri-County pursuant to this agreement.**

(R. 61-63).

10. In the discussions on November 8, 1995, Mr. Solt attempted to persuade Mr. Smith to allow additional time to check with counsel and to otherwise analyze the Formalization Agreement and the escrow instructions. No time was allowed. Mr. Smith told Mr. Solt that if the escrow instructions and Formalization Agreement were not signed that day and the funds deposited, that a mechanic's lien would be filed. (Affidavit of Solt, at ¶ 8. (R. 63)).

11. Finally, after considerable negotiations, Mr. Solt and Mr. Smith agreed that the funds would be deposited, but that it would be done merely as a showing of good faith and without commitment of the parties. In that discussion, Mr. Smith agreed that he would not file a mechanic's lien. Mr. Solt agreed that he would deposit the funds and sign the escrow instructions, but that the escrow instructions would not be effective until the parties finalized the terms of the Formalization Agreement itself. (Affidavit of Solt, at ¶ 9. (R. 63)).

12. To confirm this understanding, Mr. Solt sent a letter to Mr. Smith confirming the following:

Confirming our conversation of today, I have executed a wire transfer to Southern Utah Title Company, through Sun Capital Bank. I have also returned to you via fax the escrow instructions pending finalization of the original agreement. I will forward a copy of the proposed changes as soon as I have them worked out.

(Affidavit of Solt, at ¶ 10, (R. 63); Letter from Solt to Smith (R. 82), attached hereto as Exhibit F).

13. Thereafter, the parties continued to negotiate, by themselves and through their attorneys, in an attempt to complete the Formalization Agreement. The contract was never reached. The draft agreement attached to Appellant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (Attached hereto as Exhibit G) represents several drafts whereby the parties attempted to finalize the terms of the agreement, which they were unable to do. (Affidavit of Solt, at ¶ 12. (R. 64).

Statement of Material Facts in Dispute Before the Trial Court

Because it is important for this Court to understand just how many material facts were in dispute before the trial court, and remain in dispute, Appellant sets forth the following disputed facts.

1. Appellee claimed in its summary judgment action that the parties entered into an agreement on or about November 7, 1995. (R. 17). Appellant countered that the parties had only

begun negotiations for an agreement and that they had not entered into an agreement on or about November 7, 1995, and that this was a dispute as to a material fact. (R. 58). In support of this claim, Appellant submitted a sworn statement from Appellant's President, Terry Weaver, that stated, in pertinent part:

8. The memo contains a reference that the attorney for Western Rock is to prepare escrow documents. It was my intention at the time that the terms discussed would not be binding upon either party until the escrow documents had been prepared by the attorney for [Appellee], reviewed by us and our attorney, and signed by the parties. This was specifically discussed by Mr. Smith and myself in our telephone conversation and we agreed that neither party would be bound until the final documents had been prepared.

See Affidavit of Terry Weaver, at ¶ 8. (R. 94). This single sworn statement was sufficient to create a dispute as to a material fact and to overcome Appellee's Motion for Summary Judgment.

2. Appellee claimed in its summary judgment action that pursuant to the alleged agreement, Appellee agreed to forebear filing a mechanic's lien upon the Project and to use its best effort to collect money owed to Appellee from Precise. (R. 18). Appellant countered that there was a material issue of fact in dispute as to the negotiations and ultimate terms of the alleged agreement. (R. 58). In support of this claim, Appellant submitted sworn statements from Mr. Weaver and Appellant's Chief Financial Officer, Ronald Stolt, that stated, in pertinent part:

Terry Weaver:

8. The memo contains a reference that the attorney for Western Rock is to prepare escrow documents. It was my intention at the time that the terms discussed would not be binding upon

either party until the escrow documents had been prepared by the attorney for [Appellee], reviewed by us and our attorney, and signed by the parties. This was specifically discussed by Mr. Smith and myself in our telephone conversation and we agreed that neither party would be bound until the final documents had been prepared.

9. The following day, on November 8, 1995, I became aware that Western Rock had submitted to Tri-County for approval and signature the escrow documents which were discussed. This is consistent with the agreement reached between myself and Mr. Smith; that is, that the documents would be prepared and submitted for signature before the funds were paid.

10. I have subsequently reviewed the documents which were prepared and submitted by Western Rock and find that they are inconsistent with the terms discussed between myself and Mr. Smith in the following particulars:

A. The required payment of the funds within just a few hours. Mr. Smith and I did not discuss the exact amount of time that would be needed, but I do not believe that a few hours on the following day is a reasonable time.

B. There was no waiver or release of Western Rock by Tri-County discussed as set forth in the proposed agreement.

C. We specifically discussed that Western Rock would use its best efforts to aggressively collect from Precise. The agreement as submitted provides that Western Rock may use whatever efforts it chooses, presumably including no efforts at all, to collect from Precise.

See Affidavit of Weaver, at ¶¶ 8-10. (R. 93-94).

Ronald Solt:

4. After reviewing the documents, Mr. Wayne Smith and I had a telephone conversation. Mr. Smith was in Utah. I was in Pennsylvania. Mr. Smith advised me that unless Tri-County signed the documents immediately, as drafted, Western Rock intended to

file a mechanic's lien. I expressed objection to this, stating that Tri-County needed time to consult with its attorneys and to review the documents in detail. At the time I did not know the specifics of the terms discussed between Mr. Weaver and Mr. Smith the day before.

5. Initially, Mr. Smith remained firm in his position that the documents had to be signed and returned, and the funds paid, that day.

6. I contacted our attorney. Because he was in another meeting, I only had the chance to talk to him briefly and he only had the opportunity to review the documents briefly.

7. After the discussions with our attorney, I again contacted Mr. Smith and explained to him the objections which I had to the documents. Those objections included the following:

- A. Tri-County objected to the release clause contained in the documents.
- B. Tri-County objected to the fact that Western Rock could unilaterally decide what efforts, if any, it wanted to expend in pursuing Precise Concrete.
- C. We did not have sufficient time to review the agreement.
- D. The agreement was couched in the terms of payment to Western Rock, rather than as a reserve deposit.
- E. The agreement eliminated the mutuality of performance.

8. Mr. Smith continued to insist that the funds had to be paid that day, and that the documents had to be signed. I continued to insist that we would not sign the documents as drafted.

9. As a matter of compromise, I agreed to pay the funds into escrow, and to sign the escrow agreement with Southern Utah Title Company. As Mr. Smith and I discussed, this was done as a show of good faith but was not intended to be a final agreement of the parties since the terms of the agreement had not been reached.

See Affidavit of Ronald Solt, at ¶¶ 4-9. (R. 89-90).

These sworn statements were sufficient to create a dispute as to several material facts and to overcome Appellee's Motion for Summary Judgment.

3. Appellee asserted in its summary judgment action that as a demonstration of the existence of the agreement, Appellant placed \$185,317.26 in an interest-bearing escrow account. the terms of the alleged agreement were consistent with the Confirmation Memo. (R. 18) Appellant countered that the parties never reached an agreement and that the money was deposited only as a show of good faith while the parties continued the ultimate terms of the escrow agreement. (R. 58). In support of these claims, Appellant submitted the sworn statement from Mr. Solt as set forth in the preceding paragraph, which statement also included the following:

9. As a matter of compromise, I agreed to pay the funds into escrow, and to sign the escrow agreement with Southern Utah Title Company. As Mr. Smith and I discussed, this was done as a show of good faith but was not intended to be a final agreement of the parties since the terms of the agreement had not been reached.

10. I signed the escrow agreement, I deposited the funds by wire transfer, and I sent a letter to Mr. Smith indicating that all of this was done pending finalizing the final terms of the agreement. A copy of my letter to Mr. Smith is attached hereto as Exhibit A and incorporated herein by this reference.

See Affidavit of Solt, at ¶¶ 4-10 (R. 89-90).

These sworn statements were sufficient to create a dispute as to a material fact and to overcome Appellee's Motion for Summary Judgment.

4. Appellee asserted in its summary judgment action that the terms of the alleged agreement were consistent with the Confirmation Memo. Appellant countered that the parties had

not reached an agreement and that it did not intend the contents of the Confirmation Memo to be anything more than a step in the negotiation process and not a final and binding agreement between the parties. In support of these claims, Appellant submitted sworn statements from Mr. Weaver and Mr. Stolt, as set forth above and in their affidavits. (R. 58). These sworn statements were sufficient to create a dispute as to a material fact and to overcome Appellee's Motion for Summary Judgment.

5. Appellee asserted in its summary judgment action that the parties signed an escrow agreement. (R. 19). Appellant agreed that an escrow agreement was prepared and signed, but asserted that there were material facts in dispute surrounding the signing of the escrow agreement. (R. 58). Specifically, the escrow agreement was accompanied by a document entitled Agreement that was also intended to be signed by the parties and was to be an integrated companion document to the escrow agreement. (R. 58). The accompanying agreement (referred to by Appellee and hereinafter as the **"Formalization Agreement"**) contained terms and conditions that were not acceptable to Appellant and that were not part of the parties' negotiations. (R. 58-59). In support of these claims, Appellant submitted sworn statements contained in Mr. Solt's affidavit as set forth above. *See* Affidavit of Solt, at ¶¶ 4-10 (R. 89-90). Again, these sworn statements were sufficient to overcome Appellee's motion for summary judgment.

6. Appellee asserted in its summary judgment action that the Formalization Agreement embodied the terms and conditions of the agreement reached by the parties as a result their oral

discussions. (R. 19-20). Appellant countered that the Formalization Agreement contained several additional terms that were never part of the discussions and negotiations between the parties. (R. 59). In support of these claims, Appellant submitted the sworn statements contained in Mr. Stolt's affidavit as set forth above. (R. 88-91). These sworn statements were sufficient to overcome Appellee's motion for summary judgment.

SUMMARY OF THE ARGUMENT

I

This Court is called upon in this context to decide only whether the trial court erred in determining that there were no genuine issues of material fact. It is not this Court's role to rule on the merits of the facts alleged by either party, only to determine whether the facts as alleged have created a genuine issue of material fact. This Court owes no deference to the trial court's ruling in a summary judgment action. One sworn statement under oath that creates a genuine issue of material fact, is sufficient to defeat a motion for summary judgment. In the present case, Appellant submitted numerous statements sworn to under oath demonstrating that there were genuine issues of material fact with respect both to the alleged agreement as well as to the terms and conditions of the alleged agreement. Therefore, there were numerous genuine issues of material fact and the trial court erred in granting Appellee's Motion for Summary Judgment.

II

As demonstrative of the above point, is the fact that there was no meeting of the minds or mutual assent of the parties with respect to the alleged agreement or any terms or conditions thereof. This is evident both from the writings of the parties as well as the sworn statements submitted by the parties in the summary judgment action. These writings and statements clearly demonstrate that the parties did not reach an agreement and that Appellant believed at all times that it was engaged only in negotiations and that it would not be bound by any terms arising out of the negotiations without its consent to be bound thereby. Because there was no meeting of the minds or mutual assent of the parties, there could be no agreement. Thus, there were significant and numerous genuine issues of material fact before the trial court including the most fundamental question of all--whether the parties actually formed an agreement. Appellee maintained that the parties had reached an agreement. Appellant submitted testimony sworn to under oath from two of its officers involved in the negotiations indicating that they did not reach an agreement but were only engaged in preliminary discussions and negotiations. This is a classic genuine issue of material fact. Therefore, there were numerous genuine issues of material fact and the trial court erred in granting Appellee's Motion for Summary Judgment.

III

Appellee asserts that the parties were bound by the terms and conditions set forth in the Confirmation Memo. Appellee asserts that the Confirming Memo is evidence that the parties had reached an agreement. However, on the very day following the Confirmation Memo, Appellee

sent to Appellant the Formalization Agreement and demanded that it be signed by Appellant. The Formalization Agreement contained numerous terms and conditions that were neither part of the Confirmation Memo nor the parties discussions and negotiations. Under law, the Formalization Agreement, with terms and conditions that differed from the Confirming Memo, is clear evidence that no agreement had been reached between the parties and that they were still in the negotiation process. These two documents demonstrate that there were genuine issues of material fact before the trial. Therefore, there were numerous genuine issues of material fact and the trial court erred in granting Appellee's Motion for Summary Judgment.

IV

Appellant argued before the trial court that Appellee should be estopped from enforcing the Confirming Memo because of its express rejection of the Confirming Memo in the Formalization Agreement. The underlying argument here is that because there was a genuine issue of material fact, generated in part because of Appellee's rejection of the Confirming Memo, Appellee should be estopped from enforcing the Confirming Memo. Additionally, because estoppel is highly factual in nature and is not easily subject to disposition in a summary judgment proceeding. Therefore, there were genuine issues of material fact and the trial court erred in granting Appellee's Motion for Summary Judgment.

ARGUMENT

I

APPELLANT MET ITS BURDEN OF DEMONSTRATING THE EXISTENCE OF DISPUTED MATERIAL FACTS AND THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT

This Court should keep in mind that it is not necessary for Appellant, in this context, to prevail on the merits of legal arguments and analysis with respect to its underlying claims and defenses before the trial court. It is likewise not even necessary that Appellant somehow prove its facts by a preponderance of the evidence, which Appellant was not afforded the opportunity to do. Additionally, it is not even necessary for Appellant to demonstrate that it will prevail at trial on the merits of its claims and defenses--this would be an irrelevant consideration for this Court in this context. It is only necessary that Appellant demonstrate that there was and is a genuine issue of material fact. *Amica Mut. Ins. Co.*, 768 P.2d at 957. If Appellant carries this burden, and demonstrates that one single material fact is in dispute, this Court is mandated by law to reverse the summary judgment and remand this case to the trial court for whatever proceedings the trial court and the parties deem necessary and appropriate. *Id.*

This Court should also keep in mind that "[o]ne sworn statement under oath [involving a material fact] is all that is necessary to create a factual issue, thereby precluding the entry of summary judgment." *Id.* Additionally, this Court must review all relevant facts, and all inferences that can be drawn therefrom, in a light most favorable to the losing party--Appellant.

Kitchen, 821 P.2d at 460. This has been interpreted to mean that this Court must resolve all questions of doubt in favor of Appellant. *Draper Bank & Trust Co. v. Lawson*, 675 P.2d 1174 (Utah 1983)

Without addressing the merits of the opposing claims at this point, the pedagogical and laborious factual exercise set forth above in this Brief, clearly demonstrates that there was at least one, and in fact many, genuine issue of material fact that should have precluded entry of summary judgment. The most ominous and certainly dispositive genuine issue of material fact is with respect to whether the parties actually entered into an agreement or whether they were merely engaged in negotiations with the hope of reaching an agreement. The following summary of genuine issues of material fact demonstrates this point:

1. Appellee claimed that the parties reached a binding agreement.

Appellant submitted statements made under oath from its President and Chief Financial Officer, both of whom were participating in the negotiations, demonstrating that Appellant did not believe that the parties had reached an agreement, but, at most, that the parties had engaged in the negotiation process with the hope that they might at some point settle their dispute with each other.³

³ This issue revolves around whether there was a meeting of the minds between the parties. This determination has in fact not yet been determined. However, it is not necessary for Appellant to prove that there was not a meeting of the minds. It is only necessary for Appellant to demonstrate, which it has done, that there was a material factual dispute with respect to whether there was a meeting of the minds.

Appellant therefore carried its burden of demonstrating a genuine issue of material fact and the entry of summary judgment was improper. *Id.*

2. Appellee alleged that there were certain terms and conditions that were material to the alleged agreement. Appellant submitted statements made under oath from its President and Chief Financial Officer, both of whom were participating in the negotiations, demonstrating not only that there was a material fact in dispute as to the existence of the alleged agreement, but also as to the terms of alleged agreement. Simply put, Appellant submitted sworn statements placing the alleged terms of the agreement in dispute.⁴ Appellant therefore carried its burden of demonstrating a genuine issue of material fact and the entry of summary judgment was improper. *Id.*

3. Appellee alleged that Appellant's act of placing \$185,317.85 in an interest-bearing escrow account demonstrated the existence of the agreement. Appellant submitted statements made under oath from its Chief Financial Officer, who was participating in the negotiations, that the money was not deposited as a result of an agreement, but in actuality because of duress and threats by Appellee and in response to the duress and threats as a show of good faith by Appellant

⁴ Appellant notes that if there is a genuine material factual issue over the alleged terms of the agreement, under general contract law as discussed below in the text, there was not a meeting of the minds and, *a fortiori*, no agreement.

while the parties continued to negotiate towards and agreement. Appellant therefore carried its burden of demonstrating a genuine issue of material fact and the entry of summary judgment was improper. *Id.*

4. Appellee claimed that the terms of the alleged agreement ultimately reached by the parties was consistent with what it referred to as the Confirmation Memo. Appellant submitted statements made under oath from its President and Chief Financial Officer, both of whom were participating in the negotiations, demonstrating that the Appellant intended the Confirmation Memo to be nothing more than a step in the negotiation process and not a final and binding agreement between the parties. Appellant therefore carried its burden of demonstrating a genuine issue of material fact and the entry of summary judgment was improper. *Id.*

5. Appellee claimed that the parties signed an escrow agreement and that this demonstrated that the parties had reached an overall agreement. Appellant submitted statements made under oath from its Chief Financial Officer, who was participating in the negotiations, demonstrating that the escrow agreement was accompanied by a document entitled "Formalization Agreement" that Appellee demanded that Appellant sign but which contained terms and conditions that were not acceptable to Appellant and that were not part of the parties' negotiations.

Appellant therefore carried its burden of demonstrating a genuine issue of material fact and the entry of summary judgment was improper. *Id.*

There is no question that Appellant carried its burden in demonstrating that there were genuine issues of material fact precluding the entry of summary judgment. In this case it was the ultimate material fact that was and is in dispute--whether the parties actually reached and entered into an agreement. Even if there is a question as to whether Appellant has demonstrated the existence of a genuine issue of material fact, the outcome is the same. This Court must resolve all such questions in favor of Appellant and reverse the trial court's grant of summary judgment. This Court should therefore reverse the trial court's grant of summary judgment and remand this case for further proceedings.

II

THERE WAS NO MEETING OF THE MINDS OR MUTUAL ASSENT AND THEREFORE THERE WAS NO AGREEMENT AND THIS COURT SHOULD REVERSE THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT

As a preliminary matter, and at the risk of being repetitive, it is not incumbent upon this Court to determine whether there actually was or was not a meeting of the minds or mutual assent. On the contrary, this Court's job is far easier. This Court must only determine whether there was a genuine issue of material fact with respect to a meeting of the minds or mutual assent. Again, if there is any question as to whether there is a genuine issue of material fact over these issues, Appellant wins. That is, this Court must resolve all such questions or doubt in favor of Appellant

which leaves only one course of action--a reversal of the trial court's grant of summary judgment. *Kitchen*, 821 P.2d at 460. The following discussion and analysis clearly demonstrates that there were genuine issues of material fact with respect to whether the parties had a meeting of the minds or whether there was mutual assent to the alleged agreement.

The body of law on mutual assent (meeting of the minds) is vast, and it is sometimes unclear. However, there are several general principals which can be applied to the analysis of this case. The fundamental principal which controls in this case is that there **must be mutual assent or meeting of the minds on all essential elements or terms in order to form a binding contract**. *Vasels v. LoGuidice*, 740 P.2d 1375 (Utah App. 1987) (emphasis added); *see also* 17 Am. Jur. 2d. *Contracts* § 26 (1991). It is also fundamental that there can be no contract unless all of the parties involved intended to enter into a contract. 17 Am. Jur. 2d. *Contracts* § 26 (1991).

In the present case, as discussed in detail above, there was no mutual assent or a meeting of the minds on all essential elements or terms of the alleged agreement. Consequently, there could be no agreement. *Vasels*, 740 P.2d at 1377-1378. Not only was there no meeting of the minds or mutual assent between the adverse parties, but even Appellee admits that there was not a formal agreement reached between the two parties. Wayne Smith, Appellee's Cedar City Manager, testified in one part of his affidavit that there was an agreement reached (and implicitly that he intended to form a contract), and yet in the very same affidavit he acknowledges that "the

agreement was to be more formally set forth in a future document." (R. 36-39). As discussed above and as will be more fully discussed below, the "future document" was vastly different than the alleged agreement terms specified in the Confirmation Memo--this is sufficient to show that there was no meeting of the minds or mutual assent.

In *Crismon v. Western Company of North America*, 742 P.2d 1219 (Utah App. 1987), the parties stated in correspondence that they would enter into a lease agreement in accordance with the terms generally specified therein. The court held that the correspondence, even though it expressed the terms of the leases, did not constitute a contract between the parties because they contemplated that another agreement to formalize the transaction would be prepared. The Court stated:

Under basic contract law principles, a contract is not formed without a meeting of the minds. [C]ontractual mutual assent requires assent by all parties to the same thing in the same sense so that their minds meet as to all the terms. Determining whether the specific terms omitted were essential to the agreement requires an examination of the entire agreement and the circumstances under which the agreement was entered into.

In this case, the language in Eppes' January 11 letter indicates that the parties were still negotiating. The letter states that Western's legal department would be sending a prepared lease. That statement indicates that both parties understood that a binding contract would be entered into in the future. Subsequent correspondence between the parties also demonstrates that the January 11 letter evidenced preliminary negotiations.

. . .

Finally, the subsequent leases exchanged by the parties demonstrate that there was no meeting of the minds. Eppes sent Crismon a lease which Crismon rejected by sending back a lease

with different terms with regard to term, rent, maintenance, insurance and default. **The parties' exchange of proposed leases clearly demonstrates that they did not have a meeting of the minds as to all of the essential terms of the lease.**

Id. at 1221-1222 (emphasis added).

Crismon case is substantively similar to the present case. In both cases, the writings expressed that a subsequent document would be prepared. In both cases, one of the parties subsequently prepared a detailed agreement, which included terms and conditions which were not covered in the original negotiations or correspondence. In both cases, the parties subsequently exchanged several drafts of the anticipated final agreement. In *Crismon*, the Court held that the preliminary correspondence did not constitute an agreement. In this case, there is at least an issue of fact as to whether there was a meeting of the minds.

There is also a genuine issue of material fact as to whether the parties intended an agreement based on the Confirmation Memo and discussions. Appellant claims that there was an agreement reached on November 7, 1995, and that the agreement is memorialized by the written Confirmation Memo sent from Mr. Weaver to Mr. Smith. Mr. Weaver, on the other hand, states in sworn testimony that there was to be no agreement until the written document to be provided by Appellee's attorney had been prepared, reviewed and signed by both parties. *See* Affidavit of Weaver, at ¶ 8. (R. 93-94). The Confirmation Memo states that "[Appellee] counsel will draw up escrow document and forward to [Appellant]". (R. 72). Mr. Weaver's intention was that until the escrow documents were finalized, there was not an agreement that would bind either party.

See Affidavit of Weaver, at ¶ 8. (R. 93-94). Appellee's own conduct substantiates Mr. Weaver's position. The day after the Confirmation Memo, documents were prepared and submitted to Appellant for signature. If the contract was intended to be memorialized in the confirming memo, when and why, then, did the Appellee prepare an agreement significantly different from the confirming memo? Appellee must have considered that negotiations were still open because the document contained many additional terms beyond those set forth in the alleged confirming memo. Some of the additional terms and conditions were substantial and significantly altered the rights of the parties. (R. 60-61). The law on the point is clear and solidly supports Appellant's position.

[T]he fact that parties to negotiations contemplated the drawing and execution of a formal written contract is regarded in numerous cases as evidence that they intended the prior oral or informal agreement, by correspondence or otherwise, to be merely tentative and not final. Indeed, this circumstance has been considered as "strong evidence" that the parties did not intend that the negotiations should amount to an agreement prior to the execution of the formal writing.

17A Am. Jur. 2d, *Contracts* § 38 (1991).

The fact that several drafts of the Formalization Agreement containing substantially differing terms were submitted by the parties must, under law, be considered strong evidence that there was not an agreement in the first place, but merely negotiations, thus raising a genuine issue of material fact to be decided by the trier of fact. *Crismon*, 742 P.2d at 1222. If nothing else, it clearly and positively demonstrates that there were genuine issues of material fact with respect

to the alleged agreement and that the trial court erred in granting Appellee's motion for summary judgment.

III

APPELLEE'S ACTIONS ON THE DAY FOLLOWING THE CONFIRMATION MEMO DEMONSTRATE THAT THERE WAS NO AGREEMENT AND THAT THERE WERE MATERIAL ISSUES OF FACT SURROUNDING THE TERMS AND CONDITIONS OF THE ALLEGED

Appellee argued below that there was not a genuine issue of material fact with respect to the agreement that was embodied in the Confirming Memo. However, Appellee's actions on the very next day completely undercut Appellee's position and just as clearly demonstrate that there were considerable genuine issues of material fact with respect to the agreement and the terms thereof. Specifically, the Formalization Agreement sent by Appellee to Appellant on the day following the Confirming Memo was totally inconsistent with the Confirmation Memo and contained numerous terms and conditions that had not been part of the parties communications or negotiations. The proposed Formalization Agreement contained the following significant provisions which were not part of the Confirmation Memo:

A. The Formalization Agreement imposed a time limited in paragraph 1a of less than four hours. Since there was no time specified in the Confirmation Memo, the law will imply a reasonable time. There is an issue of fact as to whether four hours is a reasonable time. This was not part of the Confirmation Memo, the parties'

communications or negotiations. *See* Affidavit of Weaver, at ¶ 10 (R. 94); *See* Affidavit of Solt, at ¶ 7 (R. 89-90).

B. The Formalization Agreement contained a complete waiver by Appellant of all defenses to the quality of the materials, and "any claims, rights, defenses or cause of action it may have to reduce, offset or be reimbursed for the settlement funds." This was not part of the Confirmation Memo, the parties' communications or negotiations. *See* Affidavit of Weaver, at ¶ 10 (R. 94); *See* Affidavit of Solt, at ¶ 7 (R. 89-90).

C. The Confirmation Memo requires Appellee to use "its best efforts to collect monies owed." The Formalization Agreement, on the other hand, is essentially illusory on the point, granting to Appellee the right to use whatever efforts it chooses, or no efforts at all, in "the sole and exclusive prerogative of [Appellee]." This was not part of the Confirmation Memo, the parties' communications or negotiations. *See* Affidavit of Weaver, at ¶ 10 (R. 94); *See* Affidavit of Solt, at ¶ 7 (R. 89-90).

D. The Formalization Agreement, in Section 1c, removes the mutuality of the obligation contained in the Confirmation Memo by providing that the funds will be paid to [Appellee] at the end of six (6) months without regard to the performance by [Appellee]. This was not part of the Confirmation Memo, the parties' communications or negotiations. *See* Affidavit of Weaver, at ¶ 10 (R. 94); *See* Affidavit of Solt, at ¶ 7 (R. 89-90).

These differences are so substantial and so materially different from the Confirmation Memo and the parties' communications and negotiations, that Appellant could not, in good faith, agree to them. After considerable discussion, and after direct threats by Appellee that it would file a mechanic's lien if Appellant would not immediately sign the agreement, the parties finally agreed to convey the funds into escrow pending finalizing the agreement itself. *See* Affidavit of Solt, at ¶ 9 (R. 90). By imposing conditions beyond those contained in the Confirmation Memo, the parties' communications and negotiations, and by forcing Appellant to act in a manner directly inconsistent with the Confirmation Memo, if there ever was a contract between them for the escrow of the funds, it was repudiated by Appellee and the funds paid were under the separate and distinct agreement which was reached the following day; that is, that the funds would be conveyed into escrow in good faith pending the finalizing of the formal agreement. At the very least, the terms and conditions in the Formalization Agreement and the Confirming Memo demonstrate that the parties never had a meeting of the minds or mutual assent to the agreement or the terms thereof and that there are significant genuine issues of material fact. Therefore, the trial court erred in granting Appellee's motion for summary judgment.

IV

THE ISSUE OF ESTOPPEL IS HIGHLY FACTUAL IN NATURE AND IS NOT READILY SUBJECT TO DISPOSITION ON SUMMARY JUDGMENT ESPECIALLY WHERE, AS IN THIS CASE, NUMEROUS MATERIAL ISSUES OF FACT REMAIN IN DISPUTE

Appellant argued below that, based on the events discussed in the previous section, Appellee should be estopped from now trying to enforce the Confirmation Memo—a document that it rejected when it submitted to Appellant the Formalization Agreement containing significant and material differences. Estoppel is by nature highly factually dependent and is not readily subject to disposition on summary judgment. *See United American Life Insurance Co. v. Zions First National Bank*, 641 P.2d 158 (Utah 1982); *Ehlers & Ehlers v. Carbon County*, 805 P.2d 789, 792 (Utah App. 1991). This is especially true where, as in this case, there are serious and numerous genuine issues of material fact surrounding the underlying reasons that Appellant is requesting Appellee to be estopped.

Estoppel arises when one of the parties changes position or adopts a cause of action in reliance on the representations of another. *Blackhurst v. Transamerica Insurance Co.*, 699 P.2d 688, 691 (Utah 1985). In this case, the funds were paid by Appellant, not in accordance with the Confirmation Memo, but with the clear understanding that there was no contract and that there would be subsequent discussions. *See Affidavit of Solt*, at ¶ 9 (R. 90). Therefore, the trial court erred in granting Appellee's motion for summary judgment.

CONCLUSION

For the reasons set forth above, there are numerous genuine issues of material fact precluding summary judgment. The trial court therefore erred in granting Appellee's Motion for Summary Judgment in the fact of the genuine issues of material fact. This Court should therefore reverse the trial court's grant of summary judgment.

DATED this 18th day of April, 1997.

HIGBEE & JENSEN

THOMAS M. HIGBEE

BLAINE T. HOFELING

Attorneys for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing Appellant's Brief were mailed, first class, postage prepaid, on this 18th day of April, 1997, to:

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Exhibit A

FILED

APR 1 C 1996

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

WESTERN ROCK PRODUCTS)	
CORPORATION, a Pennsylvania)	
Corporation,)	
)	MEMORANDUM IN OPPOSITION
Plaintiff,)	TO PLAINTIFF'S MOTION FOR
)	SUMMARY JUDGMENT
vs.)	
)	
TRI-COUNTY CONFINEMENT)	96-CV-15
SYSTEMS, INC., a Pennsylvania)	Civil No. 95-CV-115
Corporation,)	
)	Judge J. Philip Eves
Defendant.)	

The Defendant above named, by and through counsel, submits its Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. This memorandum is submitted pursuant to Rule 56 of the Utah Rules of Civil Procedure, and Rule 4-501(2) of the Utah Code of Judicial Administration.

STATEMENT OF DISPUTED MATERIAL FACTS

Pursuant to Rule 4-501(2)(b) of the Utah Code of Judicial Administration, the Defendant submits the following statement of material facts which the Defendant contends to be at issue.

The material facts are numbered by paragraph to correspond to the statement of material facts contained in the Plaintiff's Memorandum in Support of Motion for Summary Judgment, beginning at page 2.

8. There is a material issue of fact as to whether there was an agreement entered into between Tri-County and Western Rock on or about November 6-7, 1995. Affidavit of Terry Weaver, ¶ 8.

9. There is an issue of fact as to the negotiations, and ultimate terms, of the alleged contract. Weaver Affid., ¶¶ 8-10; Affidavit of Ronald Solt, ¶¶ 4-9.

11. There was never a final contract reached, because the funds were deposited only as a show of good faith while the parties continued to negotiate towards the ultimate terms of the escrow. Solt Affid., ¶ 4-10. Thus, there is an issue of fact as to whether there was an agreement, and if there was an agreement, what the terms thereof were.

12. There is an issue of fact as to whether there was an agreement, and if so, what were the terms of the agreement. Paragraph 12 of the Statement of Facts in the Plaintiff's memorandum simply recites the terms of the Confirmation Memo. Weaver Affid.; Solt Affid.

13. As to paragraph 13, the Defendant agrees that an escrow agreement was prepared and signed, but believes there are other additional facts related thereto. The escrow agreement was indeed prepared by Western Rock's counsel and forwarded to Tri-County. However, it was included with a document entitled Agreement which was also intended to be signed by the parties and was to be an integrated companion document with the escrow instructions. The Agreement, reference herein as the Formalization Agreement to be consistent with the Plaintiff's

memorandum, contained terms and conditions which were not acceptable to Tri-County. Thus, there are issues of fact as to whether there was a contract, and if there was, what the terms of the contract were. *Id.*

14. There is an issue of fact as to the form and effect of the Formalization Agreement referred to in paragraph 14 of the Plaintiff's memorandum. Plaintiff's counsel characterized it as "setting forth in greater detail the operative terms of settlement." As a matter of fact, it contains several additional terms that were never included in the discussions, and the Plaintiff threatened to file its mechanic's lien if the Formalization Agreement was not signed. Thus, there is an issue of fact as to the terms, nature and effect of the terms submitted in the Formalization Agreement. *Id.*

15. There is an issue of fact as to the proposed terms of the Formalization Agreement, the relationship between the Formalization Agreement and the other discussions and correspondence between the parties, and the conduct of the parties at the time the Formalization Agreement and escrow agreement were submitted. *Id.*

16. There is an issue of fact as to the proposed terms of the Formalization Agreement, the relationship between the Formalization Agreement and the other discussions and correspondence between the parties, and the conduct of the parties at the time the Formalization Agreement and escrow agreement were submitted. *Id.*

DEFENDANT'S STATEMENT OF FACTS

The Defendant submits the following statement of facts, as it sees them. This statement of facts includes facts which are not disputed, the Defendant's version of the facts which are

disputed, and additional facts which are not referenced at all by the Plaintiff, all of which the Defendant believes to be material.

1. Tri-County is a general contractor on a construction project in Beaver County, Utah, owned and operated by Circle Four Farms (the "Project"). Plaintiff's Memorandum, Statement of Material Facts, ¶ 1.

2. Western Rock Products provided concrete work on the Project at the request of Precise Concrete, a subcontractor on the Project. *Id.*, ¶¶ 2-5.

3. For the purposes of this motion, Defendant agrees that there is a balance owing to Western Rock by Precise in the amount of One Hundred Ninety Thousand Three Hundred Thirty-two and 37/100 Dollars (\$190,332.37). *Id.*, ¶ 5. By admitting this fact for the purposes of this motion, the Defendant does not agree to be bound by this fact at any other point in the proceedings.

4. There were negotiations held between Western Rock and Tri-County regarding the nonpayment by Precise. Due to a pending financial transaction, Circle Four and Tri-County did indeed wish to avoid the filing of a mechanic's lien upon the Project. Weaver Affid., ¶ 5.

5. In order to avoid the filing of a the mechanic's lien, the parties discussed an arrangement whereby certain funds would be escrowed by Tri-County on certain conditions. Weaver Affid., ¶¶ 5-7.

6. The discussions regarding the terms of such an arrangement began with Wayne Smith, acting for Western Rock, and Terry Weaver, acting for Tri-County. Mr. Weaver and Mr. Smith discussed the various points to be included in any such agreement by telephone on or about

1995, or terms different than those in the discussions and the Confirmation Memo. The applicable paragraphs, with the additional and different terms highlighted, all of which are substantial and material, are quoted from the Formalization Agreement as follows:

1a. *On or before 5:00 p.m. on November 8, 1995*, Tri-County shall cause to be deposited in an interest-bearing account the sum of One Hundred Eighty-five Thousand Three Hundred Seventeen and 26/100 Dollars (\$185,317.26).

2. It is expressly understood that performance by the escrow agent of its duty to make the disbursement described above **is conditioned only and exclusively upon the expiration of the six-month period. There shall be no other condition relating to disbursement from escrow.**

4. Western Rock shall attempt to collect the Precise account indebtedness from Precise Concrete. **Western Rock's efforts to do so shall be solely and exclusively determined and governed by Western Rock's own discretion.** Accordingly, Western Rock shall not be required to pursue judicial action, nor formal proceedings of any kind; but rather may choose to merely conduct informal negotiations in its attempt to collect the indebtedness. In sum, the efforts to be made and/or methods to be used by Western Rock in this regard shall be the sole and exclusive prerogative of Western Rock.

5. Tri-County expressly acknowledges that Precise Concrete may assert that the sums owed by Western Rock on the Precise account are incorrect or inaccurate, or that the labor, services or materials, or some portion thereof, supplied by Western Rock were defective. Notwithstanding any such assertion, and whether it be proven accurate or not,

November 6, 1995. The discussions between Mr. Weaver and Mr. Smith were followed by a confirmation memo sent to Mr. Smith by Mr. Weaver on November 7 (the "Confirmation Memo"). A copy of the Confirmation Memo is attached to the Plaintiff's memorandum as Exhibit C, and is attached to this memorandum as Exhibit A. The confirmation memo contains several crucial points. Those dispute are quoted as follows:

A. "Western shall use its best efforts to collect monies owed and resolve differences with Precise."

B. "Western agrees to provide internal documents to Tri-County regarding Precise account in order assist in concluding matters."

C. "Western counsel will draw up escrow document and forward to Tri-County."

7. On the following day, November 8, 1995, Wayne Smith contacted Ron Solt, Chief Financial Officer of Tri-County Confinement Systems, Inc. Mr. Smith supplied Mr. Solt, by fax, with proposed escrow instructions, and with a proposed agreement (the "Formalization Agreement") prepared by Western's attorney, presumable to carry into effect the discussions held the day before. A copy of the Formalization Agreement and the escrow instructions, as submitted, are attached hereto as Exhibits B and C, respectively.

8. In the conversation on November 8, 1995, Mr. Smith advised Mr. Solt that Tri-County was required to sign the Formalization Agreement and the Escrow Agreement and deposit the funds that day, or Western Rock would file its lien. Solt Affid., ¶ 4.

9. The Formalization Agreement contained additional terms which were not included in the prior discussions of the parties, and which were not included in the memo of November 7,

Tri-County hereby waives any claims, rights, defenses or causes of action it may have to reduce, offset or be reimbursed for the settlement funds be paid by Tri-County pursuant to this agreement.

Each of the paragraphs set forth above are in addition to or different from the terms that were discussed between Mr. Smith and Mr. Weaver on the days before, and they substantially and materially alter the rights of the parties.

10. In the discussions on November 8, 1995, Mr. Solt attempted to persuade Mr. Smith to allow additional time to check with counsel and to otherwise analyze the Formalization Agreement and the escrow instructions. No time was allowed. Mr. Smith told Mr. Solt that if the escrow instructions and Formalization Agreement were not signed that day and the funds deposited, that a mechanic's lien would be filed. Solt Affid., ¶ 8.

11. Finally, after considerable negotiations, Mr. Solt and Mr. Smith agreed that the funds would be deposited, but that it would be done merely as a showing of good faith and without commitment of the parties. In that discussion, Mr. Smith agreed that he would not file a mechanic's lien. Mr. Solt agreed that he would deposit the funds and sign the escrow instructions, but that the escrow instructions would not be effective until the parties finalized the terms of the Formalization Agreement itself. Solt Affid., ¶ 9.

12. *To confirm this understanding, Mr. Solt sent a letter to Mr. Smith confirming the following:*

Confirming our conversation of today, I have executed a wire transfer to Southern Utah Title Company, through Sun Capital Bank. I have also returned to you via

fax the escrow instructions pending finalization of the original agreement. I will forward a copy of the proposed changes as soon as I have them worked out.

A copy of the letter is attached hereto as Exhibit D and incorporated herein by this reference.

Solt Affid., ¶ 10.

13. Thereafter, the parties continued to negotiate, by themselves and through their attorneys, in an attempt to complete the Formalization Agreement. The contract was never reached. The draft attached as Exhibit E to the Plaintiff's memorandum represents several drafts whereby the parties attempted to finalize the terms of the agreement, which they were unable to do. Solt Affid., ¶ 12.

ARGUMENT

POINT I

THERE WAS NO MEETING OF THE MINDS OR MUTUAL ASSENT, AND THUS THERE WAS NO CONTRACT

The body of law on mutual assent (meeting of the minds) is vast, and it is sometimes unclear. However, there are several general principals which can be applied to the analysis of this case. The fundamental principal which controls the issue is that there must be mutual assent or meeting of the minds on all essential elements or terms in order to form a binding contract. *Vasels v. LoGuidice*, 740 P.2d 1375 (Utah App. 1987); 17 Am. Jur. 2d. *Contracts* § 26 (1991). It is also fundamental that there can be no contract unless all of the parties involved intended to enter one. *Id.* §27. In the case at bar, there are issues of fact on both of these fundamental points. Wayne Smith has testified in affidavit that there was an agreement reached (and implicitly that he intended to form a contract). Yet in the very same affidavit he acknowledges

that "the agreement was to be more formally set forth in a future document." Smith Affid., ¶ 17. As will be more fully discussed below, the "future document" was vastly different than the alleged agreement terms specified in the Confirmation Memo.

Terry Weaver for Tri-County has testified in affidavit that there was no contract until the final documents were signed, and that the funds would not be paid until that point. Weaver Affid., ¶ 8. The Confirmation Memo was preliminary. In *Crismon v. Western Company of North America*, 742 P.2d 1219, the parties stated in correspondence that they would enter into a lease agreement in accordance with the terms specified. The court held that the correspondence, even though it expressed the terms of the leases, did not constitute a contract between the parties because they contemplated that another agreement to formalize the transaction would be prepared. The Court stated:

Under basic contract law principles, a contract is not formed without a meeting of the minds. [C]ontractual mutual assent requires assent by all parties to the same thing in the same sense so that their minds meet as to all the terms. Determining whether the specific terms omitted were essential to the agreement requires an examination of the entire agreement and the circumstances under which the agreement was entered into.

In this case, the language in Eppes' January 11 letter indicates that the parties were still negotiating. The letter states that Western's legal department would be sending a prepared lease. That statement indicates that both parties understood that a binding contract would be entered into in the future. Subsequent correspondence between the parties also demonstrates that the January 11 letter evidenced preliminary negotiations.

. . .

Finally, the subsequent leases exchanged by the parties demonstrate that there was no meeting of the minds. Eppes sent Crismon a lease which Crismon rejected by sending back a lease with different terms with regard to term, rent, maintenance, insurance and default. The parties' exchange of proposed leases clearly demonstrates that they did not have a meeting of the minds as to all of the essential terms of the lease.

Id. at 1221-1222.

Note how many facts from the *Crismon* case are also present here. In both cases, the writings expressed that a subsequent document would be prepared. In both cases, one of the parties subsequently prepared a detailed agreement, which included terms and conditions which were not covered in the original correspondence. In both cases, the parties subsequently exchanged several drafts of the anticipated final agreement. In *Crismon*, the Court held that the preliminary correspondence did not constitute an agreement. In this case, there is at least an issue of fact as to whether there was a meeting of the minds.

There is also an issue of fact as to whether the parties intended an agreement based on the Confirmation Memo and discussions. The Plaintiff claims that there was an agreement reached on November 7, 1995, and that the agreement is memorialized by the written Confirmation Memo sent from Terry Weaver to Wayne Smith. Terry Weaver, on the other hand, states that there was no agreement until the written document to be provided by the attorney for the Plaintiff had been prepared and signed. Weaver Affid. ¶ 8. The Confirmation Memo states this precisely as follows:

Western counsel will draw up escrow document and forward to Tri-County. Mr. Weaver's intention was that until the escrow documents were finalized, there was not an agreement that would bind either party. Weaver Affid., ¶ 8. The Plaintiff's own conduct substantiates Mr. Weaver's position. The next day documents were prepared and were submitted to Tri-County for signature. If the contract was intended to be memorialized in the confirming memo, when, then, did the Plaintiff prepare an agreement significantly different from

it? The Plaintiff must have considered that negotiations were still open because the document contained many additional terms beyond those set forth in the alleged confirming memo. Some of them were substantial and significantly altered the rights of the parties. See ¶¶ 6, 9, Defendant's Statement of Facts. The general law on the point solidly supports the Defendant's position.

[T]he fact that parties to negotiations contemplated the drawing and execution of a formal written contract is regarded in numerous cases as evidence that they intended the prior oral or informal agreement, by correspondence or otherwise, to be merely tentative and not final. Indeed, this circumstance has been considered as "strong evidence" that the parties did not intend that the negotiations should amount to an agreement prior to the execution of the formal writing.

17A Am. Jur. 2d, *Contracts* § 38 (1991).

The fact that several drafts of the Formalization Agreement containing substantially differing terms were submitted by the parties may be considered as evidence that there was not an agreement in the first place, thus raising an issue of fact to be decided by the trier of fact. *Crismon v. Western Company of North America, supra*, at 1222. At root, whether there is or is not a contract depends on the intention of the parties. In this case, we have two parties whose intentions were different. Both of their intentions are sufficiently justified in the facts, and there is, therefore, an issue of fact to be decided by the trier of fact.

POINT II

IF THERE WAS AN AGREEMENT REACHED IN ACCORDANCE WITH THE CONFIRMATION MEMO, THAT AGREEMENT WAS REPUDIATED AND THE ESCROWED FUNDS WERE PAID PURSUANT TO ANOTHER AGREEMENT ENTERED THE FOLLOWING DAY

Even if there was a contract based on the confirming memo, the circumstances of the following day completely changed that agreement. The Formalization Agreement submitted by the Plaintiff the following day was totally inconsistent with the Confirmation Memo. The proposed Formalization Agreement, which is set forth as Exhibit B to this memorandum, contained the following significant provisions which were not part of the confirming memo.

A. The Formalization Agreement imposed a time limited in paragraph 1a of less than four hours. Since there was no time specified in the Confirmation Memo, the law will imply a reasonable time. There is an issue of fact as to whether four hours is a reasonable time.

B. The Formalization Agreement contained a complete waiver by Tri-County of all defenses to the quality of the materials, and "any claims, rights, defenses or cause of action it may have to reduce, offset or be reimbursed for the settlement funds."

C. The Confirmation Memo requires Western to use "its best efforts to collect monies owed." The Formalization Agreement, on the other hand, is essentially illusory on the point, granting to Western Rock the right to use whatever efforts it chooses, or no efforts at all, in "the sole and exclusive prerogative of Western Rock."

D. The Formalization Agreement, in Section 1c, removes the mutuality of the obligation contained in the Confirmation Memo by providing that the funds will be paid to Western Rock at the end of six (6) months without regard to the performance by Western Rock.

These differences are so substantial and so materially different from the confirming memo, that Tri-County would not agree to them. After considerable discussion, and after direct threats by Western Rock to file a mechanic's lien if Tri-County would not sign the agreement, the parties finally agreed to convey the funds into escrow pending finalizing the agreement itself. By imposing conditions beyond those contained in the Confirmation Memo, and by forcing Tri-County to act in a manner directly inconsistent with the Confirmation Memo, if there ever was a contract between them for the escrow of the funds, it was repudiated by Western Rock and the funds paid were under the separate and distinct agreement which was reached the following day; that is, that the funds would be conveyed into escrow in good faith pending the finalizing of the formal agreement.

As a general principle, where one party to a contract repudiates it or refuses to perform it, the other party is not obligated to perform his promise, and such nonperformance does not render the other party liable in damages.

17A Am. Jur. 2d, *Contracts* § 704 (1991). In the Plaintiff's best case, there is an issue of fact as to the circumstances surrounding the payment into escrow on November 8, 1995, and the legal effect thereof.

POINT III

ESTOPPEL IS ALSO AN ISSUE OF FACT

The Plaintiff should be estopped from enforcing the terms of the Confirmation Memo, if it constituted a contract, because of its actions on November 8. Estoppel arises when one of the parties changes position or adopts a cause of action in reliance on the representations of another. *Blackhurst v. Transamerica Insurance Co.*, 699 P.2d 688, 691 (Utah 1985). In this

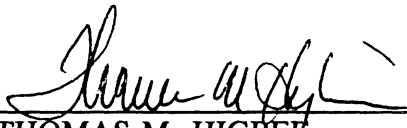
case, the funds were paid by Tri-County, not in accordance with the Confirmation Memo, but with the clear understanding that there was no contract and that there would be subsequent discussions. Solt Affid., ¶ 9. Estoppel is an issue of fact. *Ehlers & Ehlers v. Carbon County*, 805 P.2d 789, 792 (Utah App. 1991). *United American Life Insurance Co. v. Zions First National Bank*, 641 P.2d 158 (Utah 1982). There are issues of fact on this issue precluding summary judgment.

CONCLUSION

There are many material issues of fact in this case. The Plaintiff's Motion for Summary Judgment should be denied and the Court should be entitled to consider all of the evidence at a trial, to sort out the facts and apply the appropriate law.

DATED this 7th day of April, 1996.

HIGBEE & ASSOCIATES, P.C.

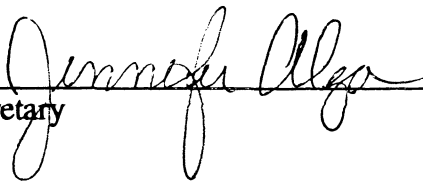


THOMAS M. HIGBEE
Attorneys for Defendant

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of April, 1996, a true and correct copy of the within and foregoing **MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** was mailed, first-class postage prepaid, to the following:

Terry L. Wade, Esq.
Snow, Nuffer, Engstrom, Drake, Wade & Smart
P.O. Box 400
St. George, Utah 84771



Secretary

\\TR\\MEMO.PLO

Exhibit B

APR 15 1996

THOMAS M. HIGBEE (1484)
HIGBEE & ASSOCIATES, P.C.
 Attorney for Defendant
 250 South Main Street
 P. O. Box 726
 Cedar City, Utah 84721
 Telephone: (801) 586-4404

Paul B. Barton Clerk
Deputy

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

WESTERN ROCK PRODUCTS
CORPORATION, a Pennsylvania
Corporation,

Plaintiff,

VS.

**TRI-COUNTY CONFINEMENT
SYSTEMS, INC., a Pennsylvania
Corporation,**

Defendant.

AFFIDAVIT OF TERRY WEAVER

Civil No. ~~95-CV-115~~

Judge J. Philip Eves

STATE OF PENNSYLVANIA)
 : ss.
COUNTY OF)

Terry Weaver, being first duly sworn, deposes and states as follows:

1. This affiant is an individual residing in Lebanon, Pennsylvania. This affidavit is made upon this affiant's own personal knowledge.

2. This affiant is the President of Tri-County Confinement Systems, Inc., a Pennsylvania corporation, doing business in Beaver County, Utah, and the Defendant herein.

3. On or about November 6, 1995, this affiant had a telephone conversation with Wayne Smith, on behalf of Western Rock Products, the Plaintiff herein. At the time of the conversation, this affiant was in the State of Pennsylvania at the business offices of Tri-County. Mr. Smith was in Utah, at the offices of Western Rock Products.

4. The center topic of conversation was the balance which Western Rock Products claims is owed by Precise Concrete on a project located in Beaver County, Utah, known as the Circle Four Farms project.

5. During the course of the conversation, the parties discussed several things related to that account. This affiant advised Mr. Smith that neither Tri-County nor Circle Four Farms wanted a mechanic's lien to be placed on the Circle Four Farms project because of pending financing. Mr. Smith expressed that he would refrain from filing a mechanic's lien if other security could be arranged.

6. The discussions ended up with a tentative approval by Mr. Smith and myself which would prevent the filing of the mechanic's lien and at the same time protect the security position of Western Rock.

7. The general terms of the conversation are set forth in the memorandum which I sent to Mr. Smith the following day, a copy of which is attached hereto as Exhibit A and incorporated herein by this reference.

8. The memo contains a reference that the attorney for Western Rock is to prepare the escrow documents. It was my intention at the time that the terms discussed would not be

binding upon either party until the escrow documents had been prepared by the attorney for Western Rock, reviewed by us and our attorney, and signed by the parties. This was specifically discussed by Mr. Smith and myself in our telephone conversation and we agreed that neither party would be bound until the final documents had been prepared and signed.

9. The following day, on November 8, 1995, I became aware that Western Rock had submitted to Tri-County for approval and signature the escrow documents which were discussed. This is consistent with the agreement reached between myself and Mr. Smith; that is, that the documents would be prepared and submitted for signature before the funds were paid.

10. I have subsequently reviewed the documents which were prepared and submitted by Western Rock and find that they are inconsistent with the terms discussed between myself and Mr. Smith in the following particulars:

A. The required payment of the funds within just a few hours. Mr. Smith and I did not discuss the exact amount of time that would be needed, but I do not believe that a few hours on the following day is a reasonable time.

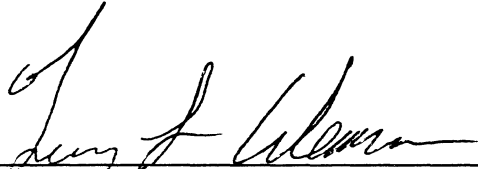
B. There was no waiver or release of Western Rock by Tri-County discussed as set forth in the proposed agreement.

C. We specifically discussed that Western Rock would use its best efforts to aggressively collect from Precise. The agreement as submitted provides that Western Rock may use whatever efforts it chooses, presumably including no efforts at all, to collect from Precise.

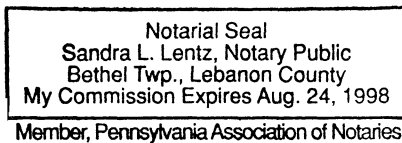
11. For these reasons, Tri-County elected not to sign the agreement submitted by Western Rock, and we believe at this time there is no agreement in place between the parties.


FURTHER AFFIANT SAYETH NOT.

DATED this 11th day of April, 1996.


TERRY WEAVER

SUBSCRIBED AND SWORN to before me on this 11th day of April, 1996.

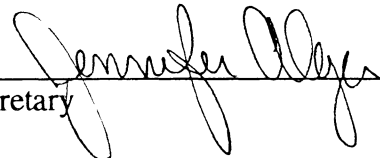



NOTARY PUBLIC

CERTIFICATE OF MAILING

I hereby certify that on the 12 day of April, 1996, a true and correct copy of the within and foregoing **AFFIDAVIT OF TERRY WEAVER** was mailed, first-class postage prepaid, to the following:

Terry L. Wade, Esq.
Snow, Nuffer, Engstrom, Drake, Wade & Smart
P.O. Box 400
St. George, Utah 84771


Secretary

\\TRI\\WEAVER.AFF



CONFINEMENT SYSTEMS INC.
608 E. EVERGREEN RD.
LEBANON, PA 17042
PH. 717-274-3488
FAX: 717-274-3781

MEMO

DATE: November 7 1995
TO: Western Rock
ATTN: Wayne Smith
FROM: Terry L Weaver
SUBJECT: Escrow Account

As per our conversation yesterday I am confirming our understanding concerning Tri County posting security for the account of Precise Concrete. This is a good faith effort to prevent a lien from being filed on the property of Circle Four Farms. We understand that you want to move promptly and will expedite upon conditions below.

ESCROW CONDITIONS

1. Tri County agrees to escrow \$185,317.26 in interest bearing account with Western legal counsel
2. Western agrees to supply lien waivers for same upon receipt of escrow funds

ESCROW RELEASE CONDITIONS

1. Western shall use its best effort to collect moneys owed and resolve differences with Precise. If this cannot be accomplished in a 6 month period Western has the right to draw on escrow for principle amount with out interest.
2. Tri County receives interest on escrow funds.

GENERAL UNDERSTANDING

1. Western agrees to provide internal documents to Tri County regarding Precise account in order to assist in concluding matters.
2. Western counsel will draw up escrow document & forward to Tri County.

Please correspond with Ron Solt if there are any questions and I am unavailable. I understand that Bart Smith is your contact when you are not in.

SWINE, POULTRY, AND LIVESTOCK EQUIPMENT

EXHIBIT A

Exhibit C

3. On or about November 8, 1995, I received a telephone call from Wayne Smith, from Western Rock Products. I also received a fax transmission by which an escrow agreement and a document entitled Agreement were submitted to Tri-County for signature. These documents were submitted pursuant to discussions between Mr. Smith and Terry Weaver of Tri-County.

4. After reviewing the documents, Mr. Wayne Smith and I had a telephone conversation. Mr. Smith was in Utah. I was in Pennsylvania. Mr. Smith advised me that unless Tri-County signed the documents immediately, as drafted, Western Rock intended to file a mechanic's lien. I expressed objection to this, stating that Tri-County needed time to consult with its attorneys and to review the documents in detail. At the time I did not know the specifics of the terms discussed between Mr. Weaver and Mr. Smith the day before.

5. Initially, Mr. Smith remained firm in his position that the documents had to be signed and returned, and the funds paid, that day.

6. I contacted our attorney. Because he was in another meeting, I only had the chance to talk to him briefly and he only had the opportunity to review the documents briefly.

7. After the discussions with our attorney, I again contacted Mr. Smith and explained to him the objections which I had to the documents. Those objections included the following:

A. Tri-County objected to the release clause obtained in the documents.

B. Tri-County objected to the fact that Western Rock could unilaterally decide what efforts, if any, it wanted to expend in pursuing Precise Concrete.

C. We did not have sufficient time to review the agreement.

D. The agreement was couched in the terms of payment to Western Rock, rather than as a reserve deposit.

E. The agreement eliminated the mutuality of performance.

8. Mr. Smith continued to insist that the funds had to be paid that day, and that the documents had to be signed. I continued to insist that we would not sign the documents as drafted.

9. As a matter of compromise, I agreed to pay the funds into escrow, and to sign the escrow agreement with Southern Utah Title Company. As Mr. Smith and I discussed, this was done as a show of good faith but was not intended to be a final agreement of the parties since the terms of the agreement had not been reached.

10. I signed the escrow agreement, I deposited the funds by wire transfer, and I sent a letter to Mr. Smith indicating that all of this was done pending finalizing the final terms of the agreement. A copy of my letter to Mr. Smith is attached hereto as Exhibit A and incorporated herein by this reference.

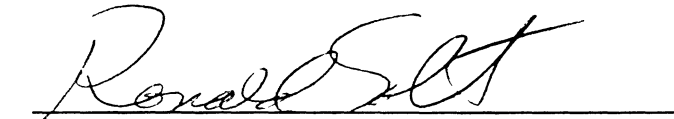
11. Mr. Smith and I expressly discussed and agreed that this was not a final completed agreement because of the unagreed terms.

12. There have been subsequent drafts of the agreement exchanged since then. At this point, Tri-County does not desire to pursue negotiations or discussions further and believes that

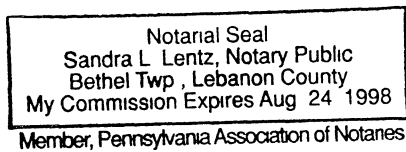
the negotiations are at an end without the completion of the contract and believes that the funds should be returned to Tri-County.

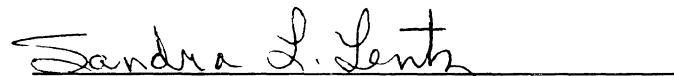
FURTHER AFFIANT SAYETH NOT.

DATED this 9th day of April, 1996.


RONALD SOLT

SUBSCRIBED AND SWORN to before me on this 9th day of April, 1996.




NOTARY PUBLIC

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of April, 1996, a true and correct copy of the within and foregoing **AFFIDAVIT OF RONALD SOLT** was mailed, first-class postage prepaid, to the following:

Terry L. Wade, Esq.
Snow, Nuffer, Engstrom, Drake, Wade & Smart
P.O. Box 400
St. George, Utah 84771

Secretary

VTR\SOLT AFF

Exhibit D



C. J. FINEMENT SYSTEMS INC.
608 E. EVERGREEN RD.
LEBANON, PA 17042
PH. 717-274-3488
FAX: 717-274-3781

MEMO

DATE: November 7 1995
TO: Western Rock
ATTN: Wayne Smith
FROM: Terry L Weaver
SUBJECT: Escrow Account

As per our conversation yesterday I am confirming our understanding concerning Tri County posting security for the account of Precise Concrete. This is a good faith effort to prevent a lien from being filed on the property of Circle Four Farms. We understand that you want to move promptly and will expedite upon conditions below.

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2. Western agrees to supply lien waivers for same upon receipt of escrow funds

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1. Western shall use its best effort to collect moneys owed and resolve differences with Precise. If this cannot be accomplished in a 6 month period Western has the right to draw on escrow for principle amount with out interest.
2. Tri County receives interest on escrow funds.

GENERAL UNDERSTANDING

1. Western agrees to provide internal documents to Tri County regarding Precise account in order to assist in concluding matters.
2. Western counsel will draw up escrow document & forward to Tri County.

Please correspond with Ron Solt if there are any questions and I am unavailable. I understand that Bart Smith is your contact when you are not in.

SWINE, POULTRY, AND LIVESTOCK EQUIPMENT

EXHIBIT A

Exhibit E

11/08/1995 12.24 71/2743791
11/08/1995 12.24 71/2743791

TRI COUNTY - PA.

PAGE 02
P.2**AGREEMENT**

THIS AGREEMENT entered this 8th day of November, 1995, by and between WESTERN ROCK PRODUCTS CORPORATION (hereinafter "Western Rock") and TRI-COUNTY CONFINEMENT SYSTEMS, INC. (hereinafter "Tri-County").

RECITALS

WHEREAS, Tri-County is the general contractor on a project located near Milford, Utah, in Beaver County consisting of the construction of improvements to be used in conjunction with a hog farming operation (hereinafter the "Hog Farm Project");

WHEREAS, the Hog Farm Project is owned by Circle Four Realty, a dba of Carroll's Foods of UT, Inc., West Lake Partners, Inc., Prestige Farms of Utah, Inc., and Smithfield of Utah, Inc. (hereinafter "Circle Four");

WHEREAS, Precise Concrete, Inc. (hereinafter "Precise Concrete") was a subcontractor of Tri-County on the Hog Farm Project;

WHEREAS, Western Rock supplied labor, services and materials to the Hog Farm Project at the request of Precise Concrete and pursuant to an open credit account maintained by the latter (hereinafter the "Precise Account");

WHEREAS, Precise Concrete is delinquent in its payment obligations to Western Rock under the Precise Account for the said labor, services and materials supplied by Western Rock to the Hog Farm Project;

WHEREAS, Western Rock has made demand upon Precise Concrete for payment of sums owed, but Precise Concrete has failed to satisfy said demand;

WHEREAS, Western Rock has notified Circle Four and Tri-County of Precise Concrete's default in its payment obligations to Western Rock;

WHEREAS, Western Rock has further notified Tri-County and Circle Four of Western Rock's intention to file a mechanic's lien upon the Hog Farm Project;

EXHIBIT B

WHEREAS, Circle Four and Tri-County wish to avoid the filing of a mechanic's lien upon the Hog Farm Project;

WHEREAS, Tri-County desires to satisfy the Precise Account indebtedness and thus avoid the filing and enforcement of a mechanic's lien upon said Project;

NOW THEREFORE, in consideration of the mutual promises and obligations set forth herein, the parties hereto agree as follows:

1. Tri-County shall pay Western Rock the sum of \$185,317.26 in full satisfaction and settlement of sums owed to Western Rock by Precise Concrete upon the Precise Account for labor, services and materials supplied by Western Rock to the Hog Farm Project. The payment of this sum shall be made as follows:

a. On or before five o'clock P.M., on November 8, 1995, Tri-County shall cause to be deposited in an interest bearing escrow account (more fully described hereafter) the said sum of \$185,317.26 (hereinafter "Settlement Funds") in lawful money of the United States of America, negotiable and payable without defalcation or discount.

b. The Settlement Funds shall remain in the escrow account for a period of six months, which period shall expire at five o'clock P.M., on May 8, 1996, after which time the Settlement Funds and any accrued interest thereon, shall be disbursed by the escrow agent, without further authorization from the parties, as follows:

(1). Western Rock shall receive the sum of \$185,317.26; and

(2) Tri-County shall receive a sum consisting of the interest which has accrued upon the Settlement Funds while in the escrow account.

c. It is expressly understood that performance by the escrow agent of its duty to make the disbursements described above is

conditioned only and exclusively upon the expiration of the six-month period. There shall be no other conditions relating to disbursement from escrow.

2. An Escrow Account shall be established at Southern Utah Title Company in St. George, Utah, in accordance with Escrow Instructions in the form attached hereto as Exhibit A. The Settlement Funds deposited into escrow shall be placed by the escrow agent in a standard interest bearing money market account at Sun Capital Bank located in St. George, Utah, at 60 South 100 East, St. George, Utah.

3. Upon receipt of the Settlement Funds (to-wit: \$185,317.26) from the escrow, aforesaid, Western Rock waives and releases all rights to mechanic's liens, contract or other claims, except such claims as Western Rock may have against Precise Concrete, which now exist or which may hereafter arise for labor, services, or materials furnished on or before the 7th day of September, 1995, at the request of Precise Concrete and upon the Precise Account for the improvements associated with the Hog Farm Project.

It is understood and agreed that this waiver is limited to those sums owed to Western Rock for labor, services and materials provided to Precise Concrete under the Precise Account, and does not extend to any labor, services or materials supplied by Western Rock to anyone else at any other time for improvements upon the Hog Farm Project.

4. Western Rock shall attempt to collect the Precise Account indebtedness from Precise Concrete. Western Rock's efforts to do so shall be solely and exclusively determined and governed by Western Rock's own discretion. Accordingly, Western Rock shall not be required to pursue judicial action, nor formal proceedings of any kind; but rather, may choose to merely conduct informal negotiations in its attempt to collect the indebtedness. In sum, the efforts to be made and/or methods to be used by

Western Rock in this regard shall be the sole and exclusive prerogative of Western Rock.

In the event that Western Rock receives a payment of some portion or all of the Precise Account indebtedness (subject hereof) from Precise Concrete hereafter, Western Rock will forward any such funds to Tri-County.

5. Tri-County expressly acknowledges that Precise Concrete may assert that the sums claimed due by Western Rock on the Precise Account are incorrect or inaccurate, or that the labor, services or materials, or some portion thereof, supplied by Western Rock were defective. Notwithstanding any such assertion, and whether it be proven accurate or not, Tri-County hereby waives any claims, rights, defenses, or causes of action it may have to reduce, offset or be reimbursed for the Settlement Funds being paid by Tri-County pursuant to this Agreement.

6. In the event a dispute arises over the terms of this Agreement, the prevailing party shall be entitled to any costs incurred in the enforcement hereof, as well as a reasonable attorney's fee.

7. This Agreement may be pled as a full and complete defense to, and may be used as the basis for an injunction against any action, suit or other proceeding which may be instituted, prosecuted or attempted in breach hereof.

8. It is expressly understood and agreed that no promises, warranties, representations, or other understandings have been made, other than those which are expressly contained or referred to herein, and that the terms of this Agreement are contractual and not a mere recital.

9. This Agreement may be executed in several counterparts and by facsimile copies, each of which shall be an original and all of which together shall constitute one instrument.

10. The undersigned parties further state that the foregoing Agreement has been read carefully and the contents thereof known and understood, and that this

document, as signed, is an act of free will, with the intention to be legally bound thereby.

WESTERN ROCK PRODUCTS CORPORATION

By Darrell G. Whitney
DARRELL WHITNEY, President

TRI-COUNTY CONFINEMENT SYSTEMS, INC.

By _____
Its _____

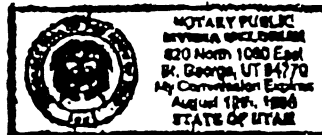
STATE OF UTAH

COUNTY OF WASHINGTON

} ss.

On this 8th day of November, 1995, before me personally appeared DARRELL WHITNEY, whose identity is personally known to or proved to me on the basis of satisfactory evidence, and who, being by me duly sworn (or affirmed), did say that he is the president of WESTERN ROCK PRODUCTS CORPORATION, a corporation, and that the foregoing document was signed by him on behalf of that corporation by authority of its bylaws or of a resolution of its board of directors, and he acknowledged before me that the corporation executed the document and the document was the act of the corporation for its stated purpose.

Mary M. Mullen
NOTARY PUBLIC
Address: 820 N. 1000 E.
My Commission Expires: Aug 12th 1998



STATE OF PENNSYLVANIA

COUNTY OF _____

} ss.

On this _____ day of _____, 1995, before me personally appeared _____, whose identity is personally known to or proved to me on the basis of satisfactory evidence, and who, being by me duly sworn

(or affirmed), did say that he is the president of TRI-COUNTY CONFINEMENT SYSTEMS, INC., a corporation, and that the foregoing document was signed by him on behalf of that corporation by authority of its bylaws or of a resolution of its board of directors, and he acknowledged before me that the corporation executed the document and the document was the act of the corporation for its stated purpose.

NOTARY PUBLIC

Address:

My Commission Expires:

TW:W:WHP: og 110706 000000 for 1/

November 8, 1995

SOUTHERN UTAH TITLE COMPANY
40 South 100 East
St. George, Utah 84770

RE: Escrow Instructions for Settlement Transaction between Western Rock
Products Corporation and Tri-County Confinement Systems, Inc.

Gentlemen:

You are requested to act as escrow agent to handle the transaction outlined in this letter. Your fee shall be paid as outlined in these instructions and the accompanying documents. Any questions may be directed to Terry L. Wade at 828-1611.

Operative Document for Settlement Transaction

You are delivered herewith the operative document outlining the nature and form of the transaction consisting of an Agreement between Western Rock Products Corporation ("Western Rock") and Tri-County Confinement Systems, Inc. ("Tri-County"), dated November 8, 1995, consisting of six pages of text and three pages of exhibits, namely these Escrow Instructions (Exhibit A). Please review this document carefully in order that you may be familiar with the transaction.

Funds To Be Deposited

You will receive funds from Tri-County in the amount of \$185,317.26. These funds (hereafter "Settlement Funds") will be sent by Tri-County on November 8, 1995, via wire transmission to Sun Capital Bank ("Sun Capital") at its branch office located at 60 South 100 East, St. George, Utah. The Settlement Funds shall be payable to Southern Utah Title Company in its capacity as Escrow Agent. You are instructed to obtain from Sun Capital a cashier's check in the amount of the Settlement Funds and to deposit the said cashier's check in a standard interest bearing money market account ("Escrow Account") at Sun Capital. The name of the account shall be Tri-County Confinement Systems, Inc. and Western Rock Products Corporation in trust by Southern Utah Title Company.

Disbursement Instructions

The Settlement Funds are to remain in the Escrow Account for a period of six months, which period shall expire at five o'clock P.M., on May 8, 1996. Immediately following the expiration of the said six-month period, you are instructed to disburse the Settlement Funds, together with accrued interest thereon, as follows:

- (1) Western Rock shall receive the sum of \$185,317.26; and

EXHIBIT C

Southern Utah Title Company
November 8, 1995
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(2) Tri-County shall receive a sum consisting of the interest which has accrued upon the Settlement Funds while in the Escrow Account.

The disbursement, as described, shall be performed, automatically, following the expiration of the six-month period, without any further notice or authorization from Western Rock or Tri-County, or from anyone else. There shall be no other conditions relating to or in any way governing or affecting disbursement, except only the expiration of the said six-month period.

General Terms

The fees to set up and administer the Escrow Account shall be \$150.00, and shall be paid by Tri-County to Southern Utah Title Company.

In the event a dispute should arise as between Western Rock and Tri-County with respect to this Escrow Account, the said parties agree to hold Southern Utah Title Company harmless from and against any liability or expense resulting to the latter as the result of such dispute, including the payment of a reasonable attorney's fee and costs.

Should any party default in any of the covenants or agreements herein contained, that defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing the terms of these Escrow Instructions, whether such enforcement is pursued by filing suit or otherwise.

These Escrow Instructions may be amended only in writing signed by the parties to this letter.

This Agreement may be executed in several counterparts and by facsimile copies, each of which shall be an original and all of which together shall constitute one instrument.

If the foregoing correctly sets forth your understanding of our agreement for you to act as Escrow Agent, please execute the enclosed copy of this letter in the space indicated below.

WESTERN ROCK PRODUCTS CORPORATION

TRI-COUNTY CONFINEMENT SYSTEMS, INC.

By Darrell C. Whitney
DARRELL WHITNEY, President

By _____
Its _____
Tax ID # _____

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TRI COUNTY - PA.
NOV 08 '95 07:55A SOUTHERN ROCKWELL & COMPANY

P. 10

PAGE 10
(1.10)

Southern Utah Title Company
November 8, 1995
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Accepted by Escrow Agent this 8th day of November, 1995:
Southern Utah Title Company

By: _____
Its: _____

TW:WWRP, escrow trust 110005 000023 (w b)

TOTAL P. 10

Exhibit F



TRI-COUNTY

CONFINEMENT SYSTEMS INC.

608 E. EVERGREEN RD.

LEBANON, PA 17042

PH. 717-274-3488

FAX: 717-274-3781

November 8, 1995

Mr. Wayne Smith
Western Rock Products Corporation
820 North 1080 East
St. George, Utah 84770

Dear Wayne:

Confirming our conversation of today, I have executed a wire transfer to Southern Utah Title Company, through Sun Capital Bank. I have also returned to you via fax the escrow instructions pending finalization of the original agreement.

I will forward a copy of the proposed changes as soon as I have them worked out.

Sincerely,

A handwritten signature in black ink, appearing to read "Ron Solt", with a long horizontal flourish extending to the right.

Ron Solt

EXHIBIT D