

1980

Paul Shurtleff, Max S. Andrews, Ned Shurtleff,  
Harvey R. Carson And Garry R. Cole, General  
Partners, Dba American Sales Company, (Asco), A  
Utah Limited Partnership v. Jay Tuft & Company, A  
Utah Corporation : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

PAUL SHURTLEFF, MAX S. :  
ANDREWS, NED SHURTLEFF, :  
HARVEY R. CARSON and GARRY :  
R. COLE, General Partners, :  
dba AMERICAN SALES COMPANY, :  
(ASCO), a Utah Limited :  
Partnership, :

Plaintiffs-Respondents :

vs. :

JAY TUFT & COMPANY, a :  
Utah corporation, :

Defendant-Appellant :

Case No. 16470

APPELLANT'S BRIEF

Appeal from the Judgment of the District Court  
for Salt Lake County  
Honorable James S. Sawaya

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FILED

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Clark, Supreme Court, Utah

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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PAUL SHURTLEFF, MAX S.	:	
ANDREWS, NED SHURTLEFF,	:	
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Partnership,	:	
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Plaintiffs-Respondents	:	
	:	Case No. 16470
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	:	
JAY TUFT & COMPANY, a	:	
Utah corporation,	:	
	:	
Defendant-Appellant	:	

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APPELLANT'S BRIEF

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STATEMENT OF THE CASE

This is an action to recover unpaid rental in the amount of twenty thousand six hundred forty-seven dollars and seventy-five cents (\$20,647.75) allegedly due on the lease of a used model 35 American backhoe, serial no. 330W. The action also seeks to recover fifteen thousand six hundred fifty-one dollars and seventy-three cents (\$15,651.73) for unpaid repairs made on the said backhoe during the lease term. The defendant filed a counterclaim based on breach of express and implied warranties and negligence. The counterclaim requested certain damages for alleged loss of profits which occurred because the backhoe was not merchantable in that it sustained substantial repairs and down time during the lease term

and also because certain mechanics were incompetent and unable to repair the backhoe; thereby making it necessary for the defendant to lease other equipment which operated at a reduced efficiency.

#### DISPOSITION IN THE LOWER COURT

The case was tried before the Honorable James S. Sawaya sitting with a jury of seven women and one man on April 9, 10, 11, 12, 13, 18, 19, 20, and 23, 1979. [R. 249]. The jury returned its verdict awarding to the plaintiffs the sum of thirty-six thousand three hundred and seventy-six dollars and nineteen cents (\$36,376.19) which was the total amount requested less four hundred and eighty dollars (\$480.00) for an admitted credit which had not previously been given to the defendant. [R. 386]. One of the jurors, Dawna Probst, found in favor of the defendant on its counterclaim and would have awarded damages for loss of profits. [Tr. 985]. Thereafter on May 1, 1979, the defendants served upon the plaintiffs the DEFENDANT'S MOTION TO AMEND JUDGMENT OR IN THE ALTERNATIVE FOR A NEW TRIAL. [R. 396]. The said motion was denied by the Honorable James S. Sawaya in that certain ORDER dated May 11, 1979. [R. 398]. On May 16, 1979, the defendant filed its NOTICE OF APPEAL appealing from the JUDGMENT ON VERDICT OF JURY, a copy of which was attached to the said NOTICE OF APPEAL. [R. 403].

#### RELIEF SOUGHT ON APPEAL

The appellant seeks to reverse the JUDGMENT ON VERDICT OF JURY appealed from and to have this Honorable Supreme Court set aside the jury verdict awarding the plaintiffs the sum of Fifteen Thousand Six



Hundred Fifty One Dollars and Seventy-Three Cents (\$15,651.73) in repairs to the backhoe and to order a new trial on the remaining issues raised in the plaintiffs' COMPLAINT dealing with alleged delinquent rentals and in the defendant's COUNTERCLAIM dealing with loss of profits on the Alpine job.

#### RECORD REFERENCES, DESIGNATION OF EXHIBITS, AND IDENTIFICATION OF THE PARTIES

For purposes of clarification, the three-volume transcript prepared by the court reporter will be referred to as [Tr.], and any reference to the official record other than the court reporter's transcript will be designated as [R.].

Some of the exhibits are enlarged documents fastened onto pieces of cardboard. These enlarged exhibits measure approximately 24" X 40" and are more appropriately in the nature of "charts". In order to clearly identify which exhibit is being discussed, the defendant will refer to the "regular" exhibits as [Ex. P-2], [Ex. D-15], etc.; and the "enlarged" documents will be referred to as [Ex. D-3(chart)], etc. The defendant hopes this explanation will assist the court to more readily find the particular exhibit.

The parties will be referred to in this brief as plaintiffs and defendant, the way they are identified during the trial.

#### STATEMENT OF FACTS

The defendant is a Utah corporation engaged primarily in building water and sewer lines for municipalities under competitive contract bidding [R.797]. The plaintiff, American Sales Company,

(hereafter referred to as ASCO) is a Utah limited partnership. [See ¶1 of plaintiff's Complaint-R. 2]. ASCO's general partners were Paul Shurtleff, Max S. Andrews, Ned E. Shurtleff, Harvey R. Carson and Garry R. Cole. [R. 2]. ASCO sold and rented backhoes and all types of dirt equipment such as rollers, compactors, etc. [Tr. 5]. One of the general partners, Harvey R. Carson, was the manager of ASCO. [Tr. 5].

On or about March 23, 1977, the parties executed an EQUIPMENT LEASE AGREEMENT [Ex. P-1, Ex. D-3(chart)]. In this agreement, the defendant leased from the plaintiff American Sales Company one (1) used American hydraulic backhoe model 35, serial number 330W equipped with a two (2) cubic yard bucket. Plaintiffs' witness Darrell Lester stated this was one of the shorter lived pieces of equipment in the industry. [Tr. 206-207]. The monthly rental was forty-eight hundred dollars (\$4,800.00) per month plus applicable taxes. Plaintiffs own witnesses admitted this monthly rental contained a reserve for depreciation, repairs and maintenance to the backhoe. [Tr. 7, 54-55, and 206]. The said monthly rental contemplated the use of the backhoe upon a basis not to exceed eight (8) hours per day and five (5) days per week and one hundred seventy-six (176) hours per month [See ¶8A. of Exs. P-1 and D-3(chart)]. The lease term was for a minimum period of thirty (30) days beginning on March 21, 1977, with rental payments becoming due and payable every thirty (30) days.

Harvey Carson, one of ASCO's officers, testified that prior to the execution of Exhibit P-1, the plaintiffs' performed a "final servicing" on the backhoe. [Tr. 44-45]. The purpose of this service was to put the backhoe in good operating condition so when a

customer takes it out there are no defects in it. [Tr. 45]. Plaintiffs witnesses further admitted they knew the backhoe would be used by the defendant to fulfill certain obligations under contracts with municipalities which contained deadlines for completion. [Tr. 790-792]. Mr. Carson admitted he represented the backhoe would be able to do the work for which it was intended, had just been completely serviced, and did not have any defects that he knew about. [Tr. 45].

Notwithstanding these express warranties and representations regarding the merchantable condition of the backhoe, it broke down immediately! The very next day after it was delivered to the Murray job site, the left axle broke. [Ex. P-6]. The defendant called Harvey Carson who dispatched three mechanics from Shurtleff & Andrews to repair the axle, to wit: Ray Baldwin, Chip Woods and Gordon Taylor. [Tr. 25, Ex. P-6]. When they arrived at the job site, they determined there were several other serious problems and repairs that had to be made. These included an alternator that would not charge, a horn button that was missing, a counter-balance that was leaking, a swing motor that was leaking on top, and other hydraulic problems. [Ex. P-6]. The three mechanics spent a total of twenty five and one-half (25 1/2) hours repairing the backhoe at a cost of seven hundred twenty-eight dollars and twenty-eight cents (\$728.28). [Ex. P-6]. The repairs were all itemized on a Shurtleff & Andrews work order R0-070 dated 3/22/77. [Ex. P. 6]. ASCO acknowledged they were responsible for repairing all these defective items, and did not pass on the charges to defendant.

From the day the backhoe was delivered to the Murray job site on March 21, 1977, until the day it was picked up from the Alpine

job site ten months later on January 23, 1978, the backhoe experienced regular and serious disrepair, problems of all sorts, and substantial down time. [Exs. P-6, D-7 through D-17. Tr. 752 et seq which is a chronological summary of the defects].

The main categories of problems which the defendant experienced on the backhoe were with (1) the axle which broke twice (once in the Murray job site on March 22nd and again in the Wellington job site on June 15th, less than three months later), (2) the charging system (which required replacement of an alternator on the Murray job site, and again on the Wellington job site as well as replacement of a regulator, batteries, and other electrical parts); and (3) substantial and numerous hydraulic problems that are reflected in nearly every invoice from March 22, 1977, through January 23, 1978. [Ex. P-6 and D-7 through D-17].

The total cost of these repairs amounted to nearly sixteen thousand dollars (\$16,000.00) as noted on plaintiff's Exhibit P-22. The down time which the defendant experienced during the ten month period of the lease agreement because of the defective condition of the backhoe was approximately 22 days as more fully set forth on defendant's Exhibit D-45 (chart).

The problems with the hydraulic system became so serious that by November 16, 1977, the backhoe could not operate at all because the boom and bucket stuck in the trench and could not be lifted out. [Tr. 541]. This created a dangerous condition which made it impossible to operate the backhoe any further until the problems with the hydraulic system were corrected. [Tr. 541, 670-672]. At this point the ASCO mechanics were also baffled, and although they were at the

job site on November 16, 17, 18, 21, 22, 23, 24, and 25, attempting to fix the same problems with sticky valves which continued to reoccur each day, they were unable to do so. [Tr. 326-330]. Finally, by November 28, 1979, the entire hydraulic system broke down and became so contaminated with metal filings and other impurities that it had to be completely flushed out and numerous parts were replaced at a cost of some twelve thousand dollars (\$12,000.00). [Tr. 326-330, Ex. D-14]. Even after this transfusion, the hydraulic system still continued to malfunction and mechanics were sent out for repairs on December 19, 1979, and January 6, 1980. [Tr. 326-330].

The defendant Jay Tuft & Company was under certain contract deadlines to complete the installation of the sewer line at Alpine. When the leased backhoe broke down with the hydraulic problems, the defendant asked the plaintiffs for a substitute backhoe in order to meet its contract obligations. [Tr. 794-796]. ASCO was the only dealer in the State of Utah who had a model 35 backhoe. [Tr. 794]. Although the plaintiffs had a substitute model 35 machine available at their Salt Lake City offices, they refused to let the defendant take it, presumably because they were negotiating for its sale to other third parties. [Tr. 794-796]. The said sale never materialized. [Tr. 796].

After being turned down by ASCO, the defendant brought other backhoes consisting of a Drott 50 and later a Cat 235 to continue digging where the model 35 had broken down. [Tr. 539-541, 543-544, 813-820]. The machines use the same crews as the model 35 backhoe; however, since they were smaller, they were less efficient, and all

the witnesses acknowledged this fact. [Tr. 544, 817, 932 et seq, Exs. D-56 (chart), D-57(chart)]. This loss of efficiency and down time for repairs resulted in a substantial loss of profits on the Alpine job and constituted the basis for defendant's COUNTERCLAIM. [R. 152-157; Exs. D-56, 57(charts)].

The defendant refused to pay for the repairs to the machine because it felt they were the responsibility of ASCO for the reasons set forth in POINT I of the ARGUMENT herein. [Tr. 821-822, 843, 896-897]. It also refused to pay more than the approximately twenty-two thousand dollars (\$22,000.00) it had already paid for rental of the machine, until it could determine its own losses for down time, repairs and loss of profits and other consequential damages in connection with the repeated breakdowns in the machine. [ Tr. 843, 897].

On January 16, 1978, the plaintiffs through their counsel, Robert J. Neilson, sent a letter to the defendant stating that unless the full delinquent amount which was claimed to be due and owing was paid within five days of receipt of the letter, the plaintiffs intended to terminate their lease agreement. [Ex. P-2]. Thereafter, on January 23, 1978, the plaintiffs repossessed the backhoe.

## POINT I

THE JURY VERDICT AWARDING TO THE PLAINTIFFS FIFTEEN THOUSAND SIX HUNDRED AND FIFTY-ONE DOLLARS AND SEVENTY-THREE CENTS (\$15,651.73) FOR REPAIRS TO THE BACKHOE IS NOT SUPPORTED BY THE EVIDENCE BUT IS BASED UPON SPECULATION, CONJECTURE, PASSION, AND PREJUDICE.

1. The mechanics sent out by Shurtleff & Andrews Construction Co. to repair the backhoe were incompetent to make the repairs according to the generally accepted standards of good workmanship prevailing in the community, and they were, in fact, responsible for the breakdown of the backhoe. The jury verdict was for \$36,376.19 [R. 386]. This was the total amount requested [Ex. P-22] less a \$480.00 credit on the rent. Of this amount \$15,651.73 was for repairs [Ex. P-22]. The defendant submits the seven women on the jury did not understand the technical aspects of the backhoe as related to the three general categories of repair, to wit: the two broken axles, the charging system which required replacement of alternators, regulators, batteries, relay switches, etc., and the hydraulic system which was under constant repair, nor was there any evidence to support their verdict.

Plaintiffs' witness, Darrell Lester, admitted the American hydraulic backhoe model 35 was one of the shortest lived pieces of equipment in the industry. [Tr. 206-207]. The backhoe in the instant case had been purchased by ASCO in 1975, and by the time the instant lease agreement was executed on March 21, 1977, it had already been leased twice before by Jay Tuft & Company and also by two other construction companies. [Ex. D-42, Tr. 110, 149, 639-643]. On March 21, 1977, it had approximately two thousand three hundred and twenty (2,320) hours of operation. [Ex. D-42]. It broke down



the day after the defendant received it, necessitating a new alternator, a new axle, and repairs to the hydraulic system because of the counter-balance leaking, the swivel leaking, and the swing motor leaking. [Ex. P-6].

The hydraulic problems continued throughout the next ten (10) months. [Exs. D-7 through D-17]. During all of these times, the defendant contacted Harvey Carson at ASCO and reported the defects and problems. Harvey Carson then assigned some of Shurtleff & Andrews' mechanics to the job. [Tr. 24-25]. Ray Baldwin was assigned to nearly every work order pertaining to the backhoe during the term of the LEASE AGREEMENT. [See Exs. P-6 and D-7 through D-17].

Since nearly twelve thousand dollars (\$12,000.00) of the repairs pertain to the decontamination of the hydraulic system, the defendant will now briefly describe that system. [Mechanic Ray Baldwin Tr. 311-316, 334-340; designer Charles Wienke Tr. 396-400, 438-461; owner of construction business Harold Babcock Tr. 672-686, 697-698].

The hydraulic oil is put into the machine from a drum or other container much like gasoline enters an automobile. The oil then goes to a storage reservoir which is not completely filled. When the backhoe is started, the hydraulic oil is distributed throughout the system both by means of the pressure in the storage reservoir as well as by certain motors and pumps in the machine.

The circulating oil first enters a main 25-micron hydraulic filter which is similar to the oil filter in a car, but much larger. This filter has a magnetic separator which is placed in the middle of the filter from top to bottom. This separator is made up of tiny magnets. Both the filter and magnetic separator are safety devices



installed by the manufacturer to remove metal particles, dirt, and other impurities which are always present in the hydraulic system, simply from normal operation. When the filters and magnetic separator become clogged, they must be replaced. The manufacturer's expert witness, Charles Wienke, stated that the filters do not need to be replaced after any given number of hours of operation, but whenever they become clogged.

The condition of the filter can be seen by a visual indicator on the filter itself. This visual indicator is a small flag which can be easily seen by the operator by opening two metal doors and looking at the filter. This act takes less than three minutes. If the flag is silver in color, the filter is okay. When the flag is red, this means the oil is "bypassing" the filter. When the oil is bypassing the filter, it can be easily observed from the same "windows". In this "bypass" condition, the oil goes over the top of the filter rather than through it.

This "bypass" feature is important to the instant appeal. When the backhoe first starts up in the morning, the oil will bypass the filter until it is warmed up. During this warm-up time, the red flag will appear at the visual indicator. During this time, the operator will be able to observe the oil going over the top of the filter. After the machine is warmed up, the oil then goes through the filter and the red flag disappears and is replaced by a silver one.

The "bypass" system in the main hydraulic 25-micron filter is a safety device installed by the manufacturer to allow the hydraulic oil to get to the pumps and other moving parts in the main motors and swing motors while the machine is warming up and

during times when the main filter is clogges. If this system didn't exist, the pumps would starve from lack of oil and wou "cavitate" or deteriorate.

If the filter is clogged with metal filings, dirt, particles, and other impurities, the oil will continue to go over the top of the filter even when the machine is warmed up. This condition will then alert the operator that he should change the filter element. If he fails to change it, then the impurities in the oil will continue to flow over the top of the filter and into the main hydraulic system. These impurities can then become imbedded in valves, pistons, and other moving parts causing them to stick and the hydraulic backhoe to malfunction. They can also cause other damage such as to pumps by hitting against the pump blades, causing them to deteriorate, etc.

The pumps will also deteriorate simply through normal wear and tear without any problem of contamination in the system. Once the pumps start to deteriorate for whatever reason, they go out quickly in a matter of three to four hours. When they do deteriorate, they also spew metal filings and other impurities into the system. These impurities will be picked up by the main 25-micron hydraulic filter and magnetic separator until the elements become clogged. At that point, and unless the filter is replaced, impurities from the deteriorating pumps, etc. will circulate in the system and cause problems with the other moving parts.

After the hydraulic oil leaves the main hydraulic 25-micron filter and magnetic separator, it circulates to other parts of the system. One of these sections contains the swing motor which turns the backhoe around during operation. Before the oil gets into the swing motor, it goes through a 10-micron filter which, like the main

25-micron filter, is there to filter out smaller impurities and to protect the swing motor from contamination. If the swing system is not operating properly, there is a red light on the dash in the operator's cab which comes on to alert the operator to a potential problem. This red light in the operator's cab is the only visual indicator on the backhoe which deals solely with the swing system; and is further the only visual means an operator has to alert him to possible danger in the swing system. Sometimes the operator can detect a different noise in the swing motor if there are problems with contamination. The witnesses refer to this noise as "whining" or "yowling". [Tr. 397]. Another witness testified the motion on the backhoe would become jerky and could be felt as the operator swung the housing around. [Tr. 680].

Another safety feature is a sight glass which could be observed and which was installed by the manufacturer to allow an operator to visually determine the level of the hydraulic oil in the system. [Tr. 399].

In conclusion, the manufacturer has designed at least four safety devices to prevent the impurities in the hydraulic oil from damaging the pump and other moving parts. These are (1) the main 25-micron hydraulic filter, (2) the magnetic separator inside the hydraulic filter, (3) the bypass system which allows oil to get to the moving parts even though the filter and magnetic separator are clogged, and (4) the 10-micron filter associated with the swing motor and swing system. These are also visual indicators on the main hydraulic filter, and a red light in the operator's cab pertaining

to the swing motor and system, as well as a sight glass to determine the level of the hydraulic oil in the system.

The Shurtleff & Andrews' mechanics, Ray Baldwin and Chip Woods, had been dispatched to the Alpine job site on October 28, 1977, to repair the stick cylinder and to repack same at a charge to the defendant of one thousand one hundred sixteen dollars and ninety-four cents (\$1,116.94). [Ex. D-13]. Approximately two weeks later on November 16, 1977, the stick cylinder again malfunctioned, making it impossible to bring the stick or boom or bucket out of the trench. [Tr. 541]. The defendant called Harvey Carson who dispatched Ray Baldwin to the Alpine job site. [Tr. 303].

It was at this point that the hydraulic system began to deteriorate rapidly resulting in a cost of nearly twelve thousand dollars (\$12,000.00) for a complete decontamination job which required a major overhaul and the replacement of numerous parts in the backhoe hydraulic system [Ex. D-14].

Mr. Baldwin stated that on March 16, 1977, he diagnosed the problem as a plugged unloader valve that hung open allowing the hydraulic oil to pass through. [Tr. 305]. He testified he remedied the problem, checked the controls afterwards, and made sure the machine was operating properly that evening and then left. [Tr. 305]. He further testified he was called back the very next day on November 17th to take care of exactly the same problem that had existed the day before. The bucket or boom was off to the side of the trench. [Tr. 306-307].

In order to bring out the number of times that this "expert" mechanic was on the job site to fix the identical problem, his

deposition was published. [Tr. 326]. He was asked about his written statement which had been prepared by him and given to ASCO and which was attached as Exhibit 1 to the deposition. [Tr. 326 et seq]. He admitted each day he worked on exactly the same problem as the day before, and thought he had fixed the problem each night when he left the job site. However, he admitted the next day the problem existed and he had to go back out. [Tr. 326 et seq]. He said he was there on November 16, 17, 18, 21, 22, 23, 24, and 25, working each day on the same problem he felt he had corrected when he left the night before. [Tr. 326-330].

Ray Baldwin testified that from November 28th through December 3rd, three mechanics worked on completely decontaminating the hydraulic system and replacing all the parts. [Tr. 326-330, Ex. D-14]. Although by December 3rd, the hydraulic system had been completely flushed out, and numerous parts had been replaced, the system continued to experience problems. Ray Baldwin came out again on December 19th and later on January 6th to work on problems in the hydraulic system. [Tr. 326-330].

Mr. Baldwin was permitted to testify over objection by defendant's counsel that in his opinion the backhoe was not maintained properly. [Tr. 322]. When he was asked the question "What did Jay Tuft not do that he should have done, in your opinion?" he stated "the defendant should have visually inspected the main hydraulic filter to determine whether it was plugged or not." [Tr. 323].

The defendant submits it was negligence for Ray Baldwin not to check the visual indicators on the hydraulic filters to determine whether they were, in fact, contaminated. This was a routinely

simple operation, taking less than three minutes. Since Mr. Baldwin was permitted to testify over objection that the hydraulic system was not properly maintained by Jay Tuft & Company and since this conclusion of improper maintenance was based solely on the grounds that Jay Tuft should have checked the visual indicators, it follows ipso facto that if Ray Baldwin had a duty to check the same visual indicators during the several days he was working on the backhoe commencing November 16, 1977, that his failure to do so would also constitute negligence.

Mr. Baldwin testified he did not believe he had any duty to check the main hydraulic filter visual indicator since the maintenance of the machine was routinely the responsibility of Jay Tuft & Company. [Tr. 341-343]. However, the defendant submits when it called ASCO and reported the repairs and when ASCO sent certain mechanics to the field to take care of the repairs, that the defendant had the right to rely on ASCO to get competent mechanics to repair the hydraulic problems, and further that the defendant had the right to expect these mechanics would be able to diagnose a problem correctly and to take the necessary safeguards which were needed to both correct the defects and to do so at a minimum cost to the defendant.

Plaintiffs' own expert witness, Charles Wienke, the service manager for American Hoist Company, Duluth, Minnesota, who designed and manufactured the American hydraulic backhoe testified that a service man such as Mr. Baldwin who had been called out to repair problems such as a boom sticking in the trench and who was charging the defendant for his time, should have inspected the main hydraulic filter before he left the job each night to see if it was contaminated. [Tr. 450].

He was emphatic that a clogged filter would cause the pump to deteriorate. [Tr. 404-405]. He stated the backhoe has several sources of contamination by virtue of its normal operation. These sources are (1) wear plates in the gear pumps and valve plates and wash plates in the piston pump. [Tr. 404] (2) The hydraulic cylinder coming in contact with the ground and picking up rocks, dirt and other debris. [Tr. 405] (3) Simply from the moving parts giving out metal filings through normal use. [Tr. 406] (4) Metal filings as large as 40 microns in size that cannot be purged at the factory and continue to come from the wear of parts on the machine. [Tr. 407].

Mr. Baldwin testified that during the first several days beginning with November 16, 1977, he was working on the same problems with the sticking unloader valves, and that each night the machine was operating properly when he left the job site. [Tr. 305 and 308]. However, Mr. Baldwin admitted that he did not check the hydraulic filters. [Tr. 323]. Mr. Wienke testified that if he had been Mr. Baldwin, he would have checked the hydraulic filters before testifying that the machine was operating properly when Baldwin left each night, because sticking unloader valves would indicate some unnecessary contamination in the system. [Tr. 461]. Consequently, the plaintiffs' own expert witness testified that Ray Baldwin was negligent in the way he operated the machine by not inspecting the hydraulic filters.

Mr. Baldwin made the following significant admissions bearing on his negligence:

1. He admitted that it was ten days to two weeks from the



first time he went down to work on the hydraulic system until he determined it was contaminated, even though he was at the site every working day. [Tr. 387].

2. He, himself, never made any visual inspection of the hydraulic filters for several days prior to the time he determined the system was contaminated even though he was on the ground each day working on exactly the same problem as the day before. [Tr. 323].

3. He admitted that if he had replaced the pumps the first day he was there on November 16th, the system would not have been as contaminated as it was two weeks later. [Tr. 387].

4. If the pumps were going out, the contamination in the system would be increased substantially each day up to the point of plugging the filter. [Tr. 387].

5. He had not changed the pumps prior to the time in Alpine and did not know how long they had been on the machine. [Tr. 383].

The mechanic, Ray Baldwin, stated in his opinion the system had become contaminated because of certain pumps in the main hydraulic system which deteriorated, thereby discharging metal particles into the system. [Tr. 318, 332, 339]. He further admitted that metal filings will be in the system through normal wear and tear just because of the hydraulic oil hitting the pump. [Tr. 332]. In this connection he disagreed with plaintiffs' other expert witness Charles Wienke who testified the pumps do not go out first clogging the filter but rather the clogged filter causes the pumps to deteriorate. [Tr. 404, 405]. The defendant's position is that if Mr. Baldwin had checked the hydraulic filters several days before he actually did, he could have determined the



filters were clogged just as easily as the operator could, and the pumps could have been replaced at a nominal charge and the entire system would not have to be decontaminated resulting in numerous parts being replaced at a cost of \$12,000.00. [Ex. D-14].

Mr. Baldwin further admitted that even after the system had been totally decontaminated and most of the parts replaced, that the defendant still experienced problems with the hydraulic system. [Tr. 326-330]. The defendant submits that the reason these future problems were experienced, was because the mechanic, Ray Baldwin, did not follow the operator's manual in the way he decontaminated the system. He merely flushed out the system rather than taking out all of the parts and cleaning them separately as the operator's manual suggested. In this regard, the operator's manual was introduced into evidence as Exhibit D-36 and the check list for the decontamination procedures begins on page 150. Mr. Baldwin's testimony regarding the decontamination procedures begins at Tr. 351. He admitted that he had not removed and dismantled the hydraulic cylinders. He admitted that he did not take the track drive motors out, nor did he remove the swivel assembly from the main deck and disassemble and clean it thoroughly. He further admitted that he did not take the air cooler out and that he did not pull the travel bank valves out. [Tr. 351 et seq].

The defendant's expert witness, Harold Babcock, testified that the manufacturer's recommendations for decontaminating the system should be followed exactly and that the mechanics did not have the right to substitute their own judgment for what the manufacturer recommended. [Tr. 686]. He testified that it was not satisfactory to merely flush out the system rather than to take each part out

separately and clean it because you could not be sure that all the impurities were removed unless the system was both flushed out and the parts were taken out and cleaned separately. [Tr. 686]. He testified that if some of the impurities remain in the system, it would cause the valves to stick and present other problems in the hydraulic system. [Tr. 686].

2. There was no evidence of any operator abuse on the part of the defendant insofar as the repairs to the backhoe were concerned.

Since Mr. Baldwin was the expert mechanic dispatched to repair the sticky valves for several days prior to the time he checked the hydraulic filters, it appears clear if the operator of the backhoe had a duty to check the filters before operating each morning, that Mr. Baldwin had the same duty to check the filters before he operated the machine each night after he completed his repairs. Mr. Baldwin had no right to rely on someone else to take care of his work, especially when it would only have taken less than two minutes to look at the visual indicators to determine if the hydraulic filter had become clogged. Plaintiffs expert witness, Charles Wienke, who designed the backhoe and was a service manager of the manufacturer testified he would have checked the hydraulic filters each day. [Tr. 450, 461].

The only other ground of operator abuse was that the defendant's operators did not properly warm up the backhoe in the morning. The plaintiffs EXPERT witness Charles Wienke testified that improper warm-up procedures could cause "cavitation" of the pumps. [Tr. 393-394, 397, 404]. This condition exists when the pumps don't

get any oil and their gears don't have anything to move on. This creates a vacuum in the pump which will pull particles of metal out of the pump. He testified when the oil is cold and has a high viscosity it doesn't want to run through the filter. During this time the pumps will have to "pull" the oil; instead of the oil flowing routinely to the pumps. He admitted if the proper warm-up procedure is followed cavitation would not exist, and further the bypass system on the main hydraulic filter is designed to allow hydraulic oil to circulate to the pump under normal warming up conditions. The mechanic Ray Baldwin also testified the bypass system is a safety device that allows oil to get to the pump. [Tr. 383]. Mr. Wienke testified this condition of cavitation would spew metal particles into the hydraulic system where they would be picked up by the filter. He further testified that an operator could detect this cavitation condition by either looking at the visual indicator or by the sound of the pumps which gives off a whining, yowling noise which is a different sound than would exist under normal operating conditions. [Tr. 397].

The plaintiffs attempt to use this testimony of cavitation to "infer" the defendant's operators were negligent in not properly warming up the backhoe. However, the ready answer to that "inference" is two-fold. First Ray Baldwin was at the job site every day from November 16, 1977, until he detected the plugged hydraulic filter. He operated the machine each night before he left and did not detect either a whining, yowling noise or see any red lights on the dash in the operator's cab. Consequently he was the "operator" each day and had as much or more duty than any of Jay Tuft's employees to check the filter since he had been

dispatched by Shurtleff & Andrews to correct the hydraulic problems. Secondly, Charles Wienke's testimony of "cavitation" caused by improper warm up procedures was never linked up to any evidence of improper warm-up procedures and if the jury based its decision on the grounds of operator abuse it was based on speculation, conjecture, passion and prejudice.

None of the plaintiffs' witnesses testified they ever observed Jay Tuft's operators warming up the machine improperly. Of the five witnesses called by the plaintiffs, three of them never saw the backhoe being operated, to wit: Harvey Carson, [Tr. 72] Darrell Lester, and Charles Wienke. [Tr. 422]. One of the remaining two witnesses, Darrell Hulse, testified that he did observe the backhoe on the Murray job site; however, it was under working conditions, and he did not observe it during the warm-up period in the morning. [Tr. 134]. The final witness, Ray Baldwin, made the following confessions. (a) The backhoe was being operated properly by Jay Tuft's crews at the Decker Lake job. [Tr. 286]. (b) He admitted that most operators will open the doors and look at the visual indicator on the main hydraulic filter; however, he did not know of his own personal knowledge whether the operator on the Alpine job did or did not do this. [Tr. 330-331]; (c) He admitted he had never observed any of Jay Tuft's employees that were not warming up the machine the way he had explained to them it should be done. [Tr. 369]; (d) He admitted he had never been around the machine when it was warmed up and didn't have any personal knowledge as to whether the operators were following the correct warm-up procedures or not. [Tr. 369].

Defendant's witnesses all testified the defendant's operator Darwin Rich was one of the best in the business, and was very circumspect in warming up the backhoe. [Tr. 493-495, 528-531; 572-573].

3. The lease agreement which the parties signed and as interpreted by the plaintiffs' own witnesses provided the plaintiffs would make the repairs free of charge, and the plaintiffs did, in fact, make similar repairs free of charge. The lease agreement itself is silent as to who has the responsibility to pay for the repairs to the backhoe. [Exs. P-1, D-3(chart)]. Paragraph 6 of the lease states as follows: "(6) The lessee shall keep the equipment in good repair and condition and will return the equipment in as good condition as when leased, including final servicing, reasonable wear and tear excepted." All of the witnesses who testified as to what these terms meant in the equipment leasing business, testified that the plaintiff, ASCO, would have the responsibility to take care of all of the repairs which existed in the instant case unless there was evidence of operator abuse. [See ARGUMENT, POINT I(4) infra].

However, there is also testimony by plaintiffs' own witnesses which further establishes a policy by ASCO to pay for the three major categories of repairs that existed in the instant case. The defendant had two other similar leases with ASCO prior to the one involved in the instant case. [Tr. 110]. One of these involved the lease of the backhoe for a job in Vernal, Utah. Mr. Tuft testified the salesman, Darrell Hulse, had told him in Vernal

that ASCO repaired everything on the machine but the outside hoses and the bucket teeth. [Tr. 872, 874]. Darrell Hulse did not resume the stand to rebut this testimony; therefore, his previous testimony regarding conversations with Jay Tuft and also the policy of ASCO in paying for repairs on the backhoe must stand.

Darrell Hulse admitted he had a conversation with Jay Tuft concerning repairs and maintenance on the backhoe, and this conversation took place just prior to the time the lease was signed. [Tr. 141]. Mr. Hulse's deposition was published and when he was questioned about his comments on page 27 et seq, he admitted he told Jay Tuft that if his company had any major problems, such as if a pump or something goes out or something serious goes wrong with the machine, that Jay Tuft would merely have to call ASCO and they would come down and repair the machine. [Tr. 145]. He admitted that ASCO would come out and make the repairs free of charge if it was a major item and if it was not the customer's fault. [Tr. 145]. He admitted the major items of repair that would be taken care of free of charge by ASCO would be the axles, the alternator and generator or charging systems, and pumps in the hydraulic system. [Tr. 177].

When being asked questions about his testimony on page 28 of his deposition, he stated that if pumps or other serious breakdowns on the machine occurred that ASCO would repair them free of charge and the only responsibility of Jay Tuft & Company would be to maintain the machine and lubricate it on a daily basis. [Tr. 176-177]. He agreed that it's only where operator abuse can be

shown that the customer would have to pay for it. [Tr. 176-177]. Mr. Hulse further testified that both he and Harvey Carson, one of the owners of ASCO and also general manager of the business, would sit down and determine as to any particular repair whether they would charge the customer for it or whether ASCO would pay for it. [Tr. 172]. He said the main factor that ASCO would use in determining whether the customer should pay for the repairs or ASCO would be if the customer had abused the backhoe. [Tr. 173]. He further admitted that ASCO had the responsibility to take care of the parts that wear out through ordinary wear and tear such as a tube or a hose leaking. [Tr. 146,173-175]. Harvey Carson admitted that he was present when a conversation took place between Jay Tuft and Darrell Hulse concerning the maintenance, repairs and servicing of the backhoe; however, he himself did not enter into the conversation and he could not recall any specifics concerning it. [Tr. 15, 42-43]. Mr. Carson did, however, admit that fair wear and tear would require the hydraulic cylinder [Tr. 99] and tracks and pins [Tr. 74] to be replaced.

For the reasons set forth above, it appears clear the policy of ASCO in making the repairs depended primarily upon whether there was operator abuse or not. If there was not operator abuse shown, then ASCO would pay for major repairs such as the charging system, axles, and pumps, and would also replace free of charge those items that went out through normal wear and tear such as hydraulic hoses, o-rings, etc. This is the policy that had been followed on the prior two leases, and there is absolutely no testimony that the plaintiffs charged Jay Tuft for any repairs on the prior leases.

Furthermore, insofar as the instant lease was concerned, it appears the plaintiffs did, in fact, pay for all the repairs that were made on the Murray job site on the March 22, 1977 work order, and, the plaintiffs' office manager and bookkeeper, Darrell Lester presented a further exhibit showing an additional three thousand dollars (\$3,000.00) of repairs paid for by ASCO during the third lease term. [Ex. P-21].

The defendant is at a loss to determine why some of these repairs were paid for, and not all of them. None of the plaintiffs' witnesses gave any reasons to help resolve this dilemma. The plaintiffs' witnesses did testify that the monthly rental of four thousand eight hundred dollars (\$4,800.00) included a reserve for repairs as well as maintenance and depreciation on the backhoe. [Tr. 7, 54-55, 206]. Since the monthly rental contains a reserve for repairs and maintenance, it is unconscionable to allow ASCO to collect a second time from the defendant. This point of unjust enrichment is more fully discussed in POINT I(7) infra].

4. The testimony of all the expert witnesses who interpreted the terms of the lease agreement according to the custom and usage of those terms in the industry stated the plaintiff should make the repairs free of charge. The only paragraph in the lease agreement that deals with repairs to the backhoe is paragraph 6. [See Exs. P-1 and D-3 (chart)]. This paragraph reads as follows: "The lessee shall keep the equipment in good repair and condition and will return the equipment in as good condition as when leased including final servicing, reasonable wear and tear excepted." We have already discussed ASCO's interpretation of this paragraph



through its salesman Darrell Hulse. [See POINT I(3)] This testimony was permissible because the lease agreement itself does not define the terms, and parol evidence would therefore be admissible. Furthermore, since ASCO prepared the lease agreement [Tr. 78], it should be construed most strictly against ASCO in the event there is any ambiguity, and the court so instructed the jury. [Instruction No. 18, R. 361].

Harvey Carson, one of the owners of ASCO was plaintiffs' first witness. [Tr. 3-4]. When defendant's counsel asked Mr. Carson about what the words "reasonable wear and tear" as used in paragraph 6 of the lease agreement meant in the industry, the trial judge sustained an objection to the question. [Tr. 114-117]. The court stated:

"I don't think reasonable wear and tear is going to be that difficult of a definition. These jurors are going to be able to determine just from common experience, as far as I'm concerned. I've already got an instruction in mind on that subject. I don't know if there is any authority for it." [Tr. 117].

Later the trial judge changed his mind on this matter and required testimony to interpret the words "reasonable wear and tear" and "good repair and condition". [Tr. 371-372 (Ray Baldwin); Tr. 662 (Harold Babcock); 803-804 (Jay Tuft)].

The trial judge did not define either "reasonable wear and tear" or "good repair and condition" in the court's jury instructions, but did instruct the jury they could look to custom and usage in the industry for the meaning of these terms. [Instruction No. 19, R. 362]. The defendant submits the plaintiffs produced absolutely no evidence on the issue of custom and usage and the only testimony is that of Mr. Harold Babcock, and Jay Tuft, described below who both defined the terms in paragraph 6 to mean

that, absent operator abuse, the equipment lessor will be responsible for all of the repairs made by ASCO in the instant case and charged to the defendant.

The defendant called Harold Babcock as an expert witness. His qualifications are set out at Tr. 651-661. After ASCO repossessed the model 35 backhoe from Jay Tuft, it was leased to Mr. Babcock's company, Engineer Construction, Inc. Mr. Babcock had 35 years experience in the construction business [Tr. 652] and his company was engaged in installing water and sewer lines similar to that being done by Mr. Tuft. He had leased or purchased the backhoe, loaders, dozers, cranes, trucks, ditchers, pavers, etc. [Tr. 654-655]. He was familiar with the terms in leases that were similar to those used in ASCO's lease.

Mr. Babcock then testified that insofar as the terms "ordinary wear and tear" or "reasonable wear and tear" are concerned, and as it applied to the instant lease and the model 35 backhoe, that equipment lessors will take responsibility for normal wear and tear. [Tr. 663]. He stated they do not take responsibility for any negligence or damage done by the operator. [Tr. 663]. He testified filter elements themselves need to be replaced as they become contaminated or dirty and those are the contractor's responsibilities as are bucket teeth which are not covered by the manufacturer. [Tr. 663]. He said the equipment lessors would replace all the axle system, the battery charging systems, and the problems in the hydraulic system, unless there was proven negligence on the part of the contractor. [Tr. 663]. He testified the component parts of the hydraulic system would be replaced by the lessor free of charge such as the pumps, the motors, and the lines. [Tr. 663].

Mr. Babcock was then asked concerning Ex. D-14 which itemized all of the parts and labor used in the repair of the hydraulic system, and testified these would be items to be repaired free of charge by the lessor, except possibly the filter. [Tr. 665]. He further testified the term "reasonable wear and tear" would apply to repacking the cylinders, including the boom cylinders, the stick cylinders, and the bucket cylinders, as well as outside hoses that wear out through vibration and aging. [Tr. 672-673]. This testimony was also corroborated by plaintiffs' mechanic Ray Baldwin who was also permitted to testify as to fair wear and tear in the industry. [Tr. 371-72].

On cross-examination by plaintiffs' counsel, Mr. Babcock was asked what the language in paragraph 6 of the lease meant when it said the lessee shall keep the equipment in good repair and condition. [Tr. 731]. He stated "that means to perform the function of servicing and greasing as is normal in the industry. To keep the machine greased and functioning satisfactorily and handling it in that fashion." He was then asked the question "In the industry, the word 'repair' then would have no meaning?" He answered this question by stating "No. If the machine was damaged running into something, swinging into a tree or building or a vehicle and something was jammed up against the motor, I would feel that it would be the responsibility of the contractor to get that fixed if it was going to cause more damage." [Tr. 732].

Jay Tuft was also permitted to testify as to what the terms "fair wear and tear" or "reasonable wear and tear" meant in the industry. [Tr. 801]. Again, the trial judge stated "I think we have to have some testimony and some evidence to be able to

define the term. I don't think it's subject to interpretation without some testimony." (emphasis added) [Tr. 801]. Mr. Tuft testified that he had equipment with other equipment lessors who have repaired similar damage as repaired by ASCO and he has not been charged for the same. [Tr. 802]. He stated Arnold Machinery Company replaced a hydraulic swing motor and also an axle. [Tr. 803].

He was permitted to testify without any objection from plaintiffs' counsel that all of the problems testified to earlier that morning by his wife, LaRue Tuft [See her testimony Tr. 752 et seq] would have been taken care of and repaired free of charge by the equipment lessor under the standard custom and usage of the industry. [Tr. 803-804]. He further testified that the terms in paragraph 6 stating "the lessee shall keep the equipment in good repair and condition" do have a certain meaning in the industry. [Tr. 804]. He stated this meaning was that the lessee will grease the machine and change the oil and take care of any operator-caused damage. [Tr. 804], however, the lessee would not be responsible to take care of broken axles or problems with the charging system or the hydraulic system. [Tr. 804].

Under these circumstances, the defendant submits the only evidence in this case to assist the jury in determining what the terms used in paragraph 6 of the EQUIPMENT LEASE AGREEMENT meant was the testimony of Harold Babcock and Jay Tuft to the effect that the equipment lessors would be responsible to repair the three categories of defects and damages which were found to exist in the backhoe and that said repairs should be done free of charge to the lessee.

5. There was no contract between the parties requiring the defendant to pay for the repairs. The lease agreement does not contain any requirement that Jay Tuft & Company pay ASCO for any repairs that might be made on the backhoe. [Ex. P-1]. The trial judge himself admitted that there was no express contract. [Tr. 218]. Furthermore, it is clear the work orders which it is alleged the defendants employees executed, were between Jay Tuft & Company and Shurtleff & Andrews Construction, a separate and distinct entity from ASCO. [Ex. P-6 and D-7 through D-17, Tr. 24, 25, and 40]. These work orders specifically state in part as follows: "I, the undersigned, hereby represent to Shurtleff & Andrews the following in consideration for Shurtleff & Andrews undertaking the work herein specified. . ." [Ex. P-6 and D-7 through D-17]. ASCO's general manager, Harvey Carson, testified several times that ASCO and Shurtleff & Andrews were separate companies, [Tr. 24 and 25] and that all of the mechanics were employed by Shurtleff & Andrews [Tr. 24, 25, 40, 86, 120].

Nor is there any evidence of an implied contract. Darrell Hulse testified he told Jay Tuft to call ASCO if Tuft had any problems with the backhoe and ASCO would take care of the problem free of charge unless there was operator abuse. [Tr. 145. See also POINT I(3) supra]. Harvey Carson testified that when he got the call he dispatched mechanics from Shurtleff & Andrews to make the repairs. [Tr. 25]. Mr. Carson also admitted that Jay Tuft & Company had had two prior leases over the last year and a half using the same backhoe. [Tr. 110]. However, neither Mr. Carson nor plaintiffs' other witnesses testified Jay Tuft & Company agreed to pay for the repair work that was done, and the transcript

is therefore silent as to any evidence that would support an inference that there was a promise on the part of Jay Tuft & Company to pay ASCO for the repairs. Mr. Carson had a conversation with Jay Tuft six weeks before the backhoe was repossessed, and the amount of eleven thousand dollars (\$11,000.00) being due for the decontamination of the hydraulic system was discussed. [Tr. 39]. At that time Mr. Carson admitted Tuft denied he had any responsibility for the repairs and he wasn't going to pay for them. [Tr. 39]. Jay Tuft's testimony was to the same effect. [Tr. 821-822].

On the other hand, the record does show that the plaintiffs paid for nearly eight hundred dollars (\$800.00) worth of repairs to the machine which were found to be necessary at the Murray job site. [Ex. P-6]. This argues against any contract for Jay Tuft to pay for the repairs. Furthermore, Darrell Hulse, the office manager and bookkeeper, prepared an exhibit showing that there were other repairs made to the backhoe approximating nearly three thousand dollars (\$3,000.00) which were not charged to Jay Tuft & Company. [Ex. P-21]. The policy of ASCO to pay for repairs for major items such as axles breaking, charging systems going out, and hydraulic systems becoming contaminated requiring the replacement of pumps, etc. has already been discussed in reviewing the testimony of Darrell Hulse, who was the only one of plaintiffs witnesses who had any discussion with Jay Tuft about who was to pay for the repairs. [See POINT I(3) supra].

6. The plaintiff is not the real party in interest to collect any amounts for repairs to the backhoe because the work orders allegedly signed by the defendant's employees constituted

a promise to pay certain amounts to Shurtleff & Andrews Construction Company, a company distinct and separate from plaintiff American Sales Company herein; and there was no evidence of any assignment of these work orders to the plaintiff herein. Rule 17 of the Utah Rules of Civil Procedure provides that every action shall be prosecuted in the name of the real party in interest. As already discussed, the work orders which it is alleged the defendant's employees executed were a promise to pay certain amounts to Shurtleff & Andrews Construction, an entity separate and distinct from American Sales Company, the plaintiff herein. [Tr. 25, 40, 86, 120]. In order for American Sales Company to be able to sue on the said work orders, it would have to be shown that there was an assignment. [(Lynch v. MacDonald, 12 U. 2d 427, 367 P. 2d 464 ( 1962))]. There is no evidence in the record before this court that any such assignment was made. If ASCO is allowed to recover for these amounts, then Shurtleff & Andrews Construction still has a right to sue on their written agreement, and the defendant would be subject to a double payment.

In its AMENDED ANSWER AND COUNTERCLAIM the defendant denied there was any basis for the claim that defendant owed to the plaintiff sums of money requested. [R. 150-157]. In DEFENDANT'S ANSWERS TO PLAINTIFFS' INTERROGATORIES and in answer to interrogatory no. 3, the defendant raised the issue of Shurtleff & Andrews being the responsible parties since they were the ones who supplied the labor and parts for repairs to the backhoe. [R. 158-172].

At the close of the plaintiffs' case, the defendant made a motion to dismiss the complaint on the grounds that it was not being prosecuted by the real party in interest. [Tr. 474-479].



The trial judge denied the motion with this comment:

"I think that the evidence is sufficient and is adequate and there is a basis upon which the jury might find that there was a contractual obligation on the part of the defendants to pay for service provided as between the parties to this lawsuit. For that reason, I will deny the motion." [Tr. 479].

As pointed out above in this brief, there was no contractual obligation on the part of Jay Tuft & Company to pay ASCO for the repairs. [See POINT I(5) supra on pages of this brief].

At the hearing on defendant's motion to dismiss the complaint, no request was made by the plaintiffs to amend their complaint to show that an assignment has been made from Shurtleff & Andrews to ASCO; nor was any motion made to add Shurtleff & Andrews as a party-plaintiff in the instant lawsuit. Had such a request been made, Rule 17(a) of the Utah Rules of Civil Procedure allows discretion to the trial judge to add or substitute the real party in interest. However, this was not requested by the plaintiffs and was not done by the trial judge. It is clear from the record that both the plaintiffs and the trial judge believed there was sufficient basis in the evidence to show a contract between the parties in this lawsuit, and the real party in interest issue was not felt to be meritorious. [Tr. 474-479].

7. The plaintiffs will be unjustly enriched if the amounts charged for repairs are sustained by this court. It is clear the jury did not allow any credit whatever for fair wear and tear in the o-rings, repacking hydraulic cylinders, stick cylinders, etc.; even though all the plaintiffs' witnesses admitted this would be fair wear and tear for which the plaintiffs would be liable. [ Tr. 99, 146, 175, 371-372, 448].

The plaintiffs' witnesses further admitted the monthly



rental of four thousand eight hundred dollars (\$4800.00) contained a reserve for repairs, maintenance, and depreciation. [Tr. 7, 54-55, 206]. To allow the jury to award an additional sixteen thousand dollars (\$16,000.00) for repairs and maintenance constitutes a windfall to the plaintiffs and is unconscionable.

Finally, the defendant submits the plaintiffs backhoe has been substantially improved at defendant's expense to the point the plaintiffs offered to sell the backhoe to Harold Babcock in his lease which is dated April 1978 for eighty seven thousand dollars (\$87,000.00) which is three thousand dollars (\$3,000.00) more than the plaintiffs offered to sell the same backhoe to Jay Tuft some thirteen (13) months earlier. [Exs. P-1, D-43].

The unjust result of all this is that the plaintiffs have received back their backhoe which they offered to sell to Jay Tuft & Company for eighty four thousand dollars (\$84,000.00), have received twenty-two thousand dollars (\$22,000.00) in rent already paid by the defendant, have received thirty-six thousand dollars (\$36,000.00) awarded by the jury, or a total amount of nearly sixty thousand dollars (\$60,000.00) for rent and repair during the time Jay Tuft had the backhoe.

## POINT II

THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR IN ALLOWING RAY BALDWIN, A MECHANIC FOR SHURTLEFF & ANDREWS CONSTRUCTION CO. TO GIVE HIS OPINION THAT THE BACKHOE HAD NOT BEEN MAINTAINED IN A PROPER CONDITION; BECAUSE THE MECHANIC HAD NEVER SEEN THE BACKHOE OPERATED IMPROPERLY, HAD NEVER TALKED TO ANY OF THE DEFENDANT'S OPERATORS ABOUT HOW THEY OPERATED THE BACKHOE, ADMITTED THAT HE DID NOT KNOW WHETHER IT HAD BEEN OPERATED PROPERLY OR NOT, AND BECAUSE THE MECHANIC HIMSELF WAS THE PRINCIPAL OPERATOR OF THE MACHINE FOR SEVERAL DAYS PRIOR TO THE TIME THE HYDRAULIC SYSTEM WAS DETERMINED TO BE CONTAMINATED.

Ray Baldwin, the mechanic from ASCO was dispatched to the Alpine job site to repair the backhoe when the bucket and boom could not be moved out of the trench. [Tr. 303-304]. He further testified that he was at the job site approximately eleven (11) times from November 16th through January 7th working on the hydraulic system. [Tr. 326-330]. After testifying as to what he did during those eleven (11) times, he was asked the following question: "Based on your inspection of the machine and the work that you did do on these project, including the Alpine project, can you tell us, in your judgment, whether the machine was and had been maintained in a proper condition?" [Tr. 321].

An objection was made on lack of foundation and other reasons that there was no showing Mr. Baldwin knew how the machine was maintained, that he had checked any of the lubrication charts to know the maintenance was improper or ever had talked with the operators to determine whether it was maintained properly. [Tr. 321, 322]. The only answer to this objection was that Mr. Baldwin was an expert with seventeen (17) years of experience as a mechanic, that he made an inspection of the machine and should be able to give his opinion. [Tr. 322]. Based on this status of the record, the trial judge allowed Mr. Baldwin to answer the question. [Tr. 322].

No other witness testified the backhoe was maintained improperly and there is no other testimony in the record in the form of expert opinion directly supporting a jury finding there was operator abuse or improper maintenance of the machine insofar as the hydraulic system was concerned. This Honorable Supreme Court has held expert testimony as to the possibility of a cause will not support a verdict if such testimony is the only basis

upon which to arrive at a verdict. [Christianson v. Debry, 23 U. 2d 334, 463 P. 2d 5 (1969)].

Furthermore, it is obvious from the transcript of Mr. Baldwin's testimony that there was absolutely no foundation for his opinion. At the time the witness was permitted to give his opinion, he had testified as to the following: (a) the backhoe was being operated properly by Jay Tuft's crews at the Decker Lake job [Tr. 286]; and (b) He admitted that most operators will open the door and look at the visual indicators on the main hydraulic filter; however, he did not know of his own personal knowledge whether the operator on the Alpine job did or did not do this [Tr. 330-331].

Cross-examination of Mr. Baldwin reflected an even further lack of foundation. He testified (c) he himself never made any visual inspection of the hydraulic filters for several days prior to the time he determined the system was contaminated; even though he was on the ground each day working on exactly the same problem as the day before [Tr. 323]; (d) He admitted that he had never observed any of Jay Tuft's employees that were not warming up the machine the way he had explained to them it should be done [Tr. 369]; and (e) He admitted that he had never been around the machine when it was warmed up and didn't have any personal knowledge as to whether the operators were following the correct warm-up procedures or not. [Tr. 369].

In the case of Day Lorenzo Smith & Son, Inc., 17 U. 2d 221, 408 P. 2d 186 (1965) this Honorable Court held that a trial judge erroneously permitted a highway patrolman who did not see an accident to testify as to the point of impact, where such opinion

was not supported by sufficient facts, and what meager facts were testified to were not connected up or related to the opinion and were inadequate to support the patrolman's conclusion; and this court further held that the said error was prejudicial since the point of impact was an important fact, if not a controlling one, to be determined by the jury in reaching its verdict. Similarly in the instant case the defendant submits it was prejudicial error for the trial judge to allow Ray Baldwin to testify that the machine had been maintained improperly when this was the controlling point to be determined by the jury in reaching its verdict and when it was clear Ray Baldwin's opinion was not supported by sufficient facts, and what meager facts he did testify to were not connected up or related to the opinion and were inadequate to support his conclusion on the state of the record at the time he gave his opinion and thereafter.

### POINT III

THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR BY NOT ALLOWING DEFENDANT'S EXPERT WITNESS, HAROLD BABCOCK TO TESTIFY REGARDING THE MERCHANTABLE CONDITION OF THE BACKHOE BECAUSE SUCH TESTIMONY MUST COME FROM EXPERT WITNESSES AND IT WAS RELEVANT TO THE ISSUES RAISED IN THE DEFENDANT'S COUNTERCLAIM.

The defendant's counterclaim alleged, among other things, a breach of implied warranty of merchantability. [R. 152-157]. The counterclaim raised the issue of whether Article II of the Uniform Commercial Code dealing with implied warranties in sales transactions applies to leases. [See ¶6 of the counterclaim at R. 153]. Both parties submitted trial memoranda dealing with the applicability of the Utah Uniform Commercial Code to lease agreements. [R. 214-223, 204-213]. The trial judge ruled that the said Uniform

Commercial Code did in fact, apply to lease transactions. [See Instruction No. 21 (R. 364)].

The courts have unanimously held that such items as merchantability and fitness for a particular purpose are matters for expert testimony and cannot be left to the jury where such testimony is lacking in the record. [31 Am. Jur. 2d 712-714, EXPERT AND OPINION TESTIMONY, Christopher v. Larson Ford Sales; 557 P. 2d 1009 (Utah 1976) Hooper v. General Motors Corp. 260 P. 2d 549 (Utah, 1953)].

Defendant's expert, Harold Babcock, was permitted by the trial judge to testify as to what the terms "ordinary wear and tear" or "reasonable wear and tear" meant in the equipment leasing business insofar as it pertained to the instant lease and the model 35 backhoe. [Tr. 663]. When plaintiffs' counsel objected, the court said "Well, certainly we're going to need a definition of that term and I suppose it will have to come from those who are familiar with its usage in the industry, so I think it is relevant." Mr. Babcock further testified as to the meanings of the terms in paragraph 6 of the lease agreement requiring the lessee to keep the equipment in good repair and condition. [Tr. 731].

Mr. Babcock stated he had been in court during the time the mechanic Ray Baldwin and plaintiffs expert Charles Wienke testified and that he did recall Mr. Baldwin's experience working on the machine and the number of times he testified that he was at the job site and the type of problems he was working on. [Tr. 669]. Mr. Babcock was then asked if he had an opinion whether a backhoe with those kind of problems and as related to the lease agreement [Ex. P-1 which was exactly the same kind of lease agreement Mr. Babcock himself signed to lease the backhoe after it was repossessed

by ASCO (See Ex. D-43)] would be merchantable or not. [Tr. 669]. This was a simple yes or no type question; yet the trial judge sustained an objection to this question and stated "I think that's something that this gentleman is not qualified to answer." [Tr. 670]. The following question was then asked by the defendant's counsel:

MR. McINTOSH: Your Honor, in view of the ruling, would it be the court's interpretation that merchantable condition would not come through expert witnesses, it is something the jury would decide without any help from them?

THE COURT: That's my feeling.

MR. McINTOSH: All right.

Based on this reply by the trial judge, the defendant did not pursue the matter further, as it otherwise would have done. It is obvious the trial judge would not permit any expert testimony on the issue of merchantability or "fitness for the ordinary purposes for which such goods are used" which is how the court defined "merchantable". [See Instruction No. 27, R.370]. The trial judge appears to either believe the witness was not qualified to answer questions dealing with merchantability or that "expert" testimony is not admissible at all to prove the condition.

Mr. Babcock certainly was qualified by both schooling and experience. He had thirty five (35) years in the construction business and was the president of Engineers Construction, Inc., a Utah corporation engaged in the business of installing water and sewer lines. He held a registered professional engineer's rating in four states and had used all types of heavy equipment, including

dozers, scrapers, backhoes, loaders, ditchers, pavers, and was familiar with various leases containing language similar to that in the instant case and had, in fact, purchased and leased equipment involving hydraulic systems, axle-driving systems, and battery-charging systems similar to those found on the American hydraulic backhoe model 35 [Tr. 651-661].

The trial judge gave instructions dealing with merchantability [Instruction Nos. 25-29, R. 368-372], and defined "merchantable" to be at least such as

(a) Pass without objection in the trade under the contract description, and

(b) Is fit for the ordinary purposes for which such goods are used. [Instruction No. 27 (R. 370)].

By refusing to allow expert testimony on this issue, the trial judge permitted the jury to speculate on whether the backhoe would pass in the trade and would be fit for the ordinary purposes for which the backhoe was to be used.

Since the issue of merchantability of the backhoe was the foundation and the basis for defendant's counterclaim insofar as lost profits and consequential damages were concerned, testimony relating to this issue was critical to the defendant's burden of proof on its counterclaim. Under these circumstances the error was prejudicial since it left defendants without the required testimony on this critical issue and also permitted the jury to speculate or to find that the defendant had not covered the burden of proof.

The defendant submits the trial court's inconsistent ruling in allowing expert testimony from both Harold Babcock and Jay



Tuft as to the terms and provisions used in paragraph 6 of the lease agreement, but stating that such testimony was not admissable on the issue of merchantability of the backhoe, would further tend to confuse the jury and mislead them into thinking that it was not necessary to have expert testimony on the terms in paragraph 6 of the lease agreement and they could totally disregard the testimony of Harold Babcock on those terms also.

#### POINT IV

THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR BY REFUSING TO ADMIT EXHIBIT D-44 INTO EVIDENCE WHICH WAS A CHRONOLOGICAL LIST OF THE PROBLEMS WITH THE BACKHOE, BECAUSE IT WAS RELEVANT TO THE MERCHANTABLE CONDITION OF THE BACKHOE.

In the preceeding POINT III of this argument, the defendants have discussed the issue of prejudicial error which was committed by the trial judge in refusing to allow Harold Babcock to testify as to the merchantable condition of the backhoe. Under this POINT IV, the defendant submits the trial judge went one step further in removing from the jury certain documentary evidence which bore solely on the issue of the merchantable condition of the backhoe. This documentary evidence was in the form of Exhibit D-44. [Tr. 746].

From the day the backhoe was delivered to the Murray job site on March 21, 1977, until the day it was picked up from the Alpine job site ten (10) months later on January 23, 1978, the backhoe experienced regular and serious disrepair, problems of all sorts, and substantial down time. All of these matters dealt with the "merchantable" condition of the backhoe. These problems

were summarized in chronological order on Exhibit D-44 which defendant offered pursuant to Rules 67 and 70(1)(f) of the Utah Rules of Evidence as those rules were interpreted by the Utah Supreme Court a few months before the trial in the case of Gull Laboratories Inc. v. Louis A. Rosser, Co., 589 P. 2d 756 (Utah, 1978).

Exhibit D-44 was a summary of the problems which the defendant experienced with the backhoe during the lease term. The summary was prepared by LaRue Tuft, office manager and bookkeeper of the defendant [Tr. 258] from books and records kept in the normal course of business. [Tr. 743-745]. The summary listed the exact source where the information was obtained, that is progress reports, telephone logs, ASCO invoices, Jay Tuft's diary and journals, etc. [Tr. 743-745, Ex. D-44]. All of the underlying books and records referred to in the exhibit had been made available to plaintiffs' counsel substantially in advance of the trial date and the original books and records were in court for plaintiffs' counsel to use in cross-examination. [Tr. 743-746]. The original sources were noted on the exhibit to make it easier for the witness to produce the original source documents during cross-examination by plaintiffs' counsel.

The court refused to admit this exhibit. [Although the transcript does not reflect the court's refusal to allow the exhibit, the official exhibit sheet itself shows Exhibit D-44 was offered but refused. (R. 250). And the transcript shows the court did discuss this matter with counsel in chambers. (Tr. 747-748)]. Plaintiffs' counsel objected to the exhibit being admitted simply on the grounds that it was hearsay. [Tr. 745-

746]. Since business records are an exception to the hearsay rule pursuant to Rule 67 of the Utah Rules of Evidence, it is clear this objection was not a valid one and the court should not have sustained it.

The defendant submits the summary was admissible pursuant to Rule 67 and 70(1)(f) of the Utah Rules of Evidence as construed by the Utah Supreme Court in the Gull Laboratories case supra. The summary would certainly have been helpful to the jury in the jury room in reviewing all of the chronological problems that occurred with the backhoe. This information would have been helpful to them in resolving both the issues as to whether the mechanics were competent to make the repairs as well as the issue of whether the backhoe itself was merchantable. [Christopher v Larson Ford Sales, supra]. Since these issues were so germane to both the plaintiffs and the defendant's case, it is clear the error in refusing to admit them was prejudicial.

The trial judge did allow LaRue Tuft to testify generally as to the problems with the backhoe and to use the exhibit to refresh her memory. [Tr. 752 et seq]. And it is true that some of the problems were generally reflected on Exs. P-6 and D-7 through D-17 which are the charges ASCO made to the defendant with the Shurtleff & Andrews work orders attached. However, these exhibits do not indicate many of the problems that were noted on phone logs, progress reports, daily diaries and other documents which were more fully identified on Exhibit D-44.

## POINT V

THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION NOS. 25 and 29 BECAUSE THE SAID INSTRUCTIONS ARE AN INACCURATE STATEMENT OF THE LAW AND ARE IN DIRECT CONFLICT WITH INSTRUCTION NO. 27.

Instruction No. 29 reads as follows:

In this case the burden of proof with respect to the applicability of the implied warranty of merchantability rests upon the defendant to show by a preponderance of the evidence that the backhoe was in a defective condition at the time the lease commenced on March 21, 1977, and that there was no change in the mechanical condition of the backhoe from the time the lease commenced until such time as the backhoe experienced the mechanical difficulties in question. In the absence of proof of a defect in the backhoe on March 21, 1977, the plaintiffs may not be held liable on a theory of implied warranty. [R. 372].

Instruction no. 25 is similar in content. [R. 368]. The court's nstruction Nos. 25 and 29, were copied verbatim from the plaintiffs' proposed instruction nos. 5 and 13. [R. 312 and 304]. The defendant took an appropriate formal exception to these instructions on the same grounds and for the same reasons as set forth in this POINT V. [Tr. 980-982].

These instructions state in affect, that unless all of the troubles with the backhoe originated and existed on March 21, 1977, there is absolutely no way the plaintiffs can recover on a breach of implied warranty of merchantability. The defects and problems with the backhoe are set forth in chronological order in Exhibit D-44 which is discussed infra Point IV. These defects are also set forth in the testimony of LaRue Tuft [Tr. 752 et seq], and generally in Exhibits P-6 and D-7 through D-17. The defendant submits it is not necessary to show that each of the defects mentioned existed on March 21, 1977; rather it is only necessary to show that problems arose throughout the term of the

lease, and that the cumulative effect of these problems made the backhoe unfit for the normal purposes for which it is ordinarily used. Christopher v. Larson Ford Sales, 557 P. 2d 1009 (Utah, 1976). This is what Mr. Babcock would have testified about had he been permitted to do so. [See POINT III supra].

Some of the defects such as the problems with the charging system and the axle which broke on the job in Wellington, Utah, obviously did not exist on March 21, 1977, because the alternator and axle were replaced within a few days after Jay Tuft & Company took possession of the backhoe. [Ex. P-6]. Furthermore many of the hydraulic problems, including the deterioration of the hydraulic pumps, could be attributable to ordinary wear and tear on the machine as testified to by defendant's expert witnesses and also by plaintiffs' expert witnesses; [See POINTS I(3) and (4) supra] and yet such problems became so numerous and substantial, they made the backhoe unmerchantable simply by virtue of the existence of the said problems. Christopher v. Larson Ford Sales, supra.

By requiring the defendant to show that the defects all existed on March 21, 1977, is to totally ignore the fact that the lease agreement provided for monthly payments every thirty (30) days, and consequently the "term" of the lease was for successive periodic or monthly periods of time. The trial judge recognized this fact and instructed the jury as follows: "This implied warranty of merchantability attaches to the backhoe for each separate monthly term during which time the EQUIPMENT LEASE AGREEMENT was in effect." [Instruction No. 27. (R. 370)]. Instruction nos. 25 and 29 are totally inconsistent with these statements in instruction no. 27, and it would be impossible for

the jury not to be confused by the said statements. After first instructing the jury in instruction no. 27 that a breach of implied warranty of merchantability could be found for each separate, successive, monthly term, the trial judge then only two pages later in the instructions did a complete about face and stated that the defendant could not recover unless it could prove all the problems with the backhoe existed on March 21, 1977.

The courts have uniformly held that giving two inconsistent instructions that would tend to confuse the jury constitutes prejudicial error, and that giving a correct instruction cannot cure the error in another contradictory erroneous instruction even though the trial judge states the jury must consider the instructions as a whole. Smith v. Aberdeen, 7 Wash. App. 664, 502 P. 2d 1034 (1972). Francis v. City and County of San Francisco, 282 P. 2d 456 (Calif. 1955); MacDonald Equipment Company v. McMillon Construction Company, Colo. App., 480 P. 2d 589 (1971); Ieronimo v. Hagerman, 93 Ariz. 357, 380 P. 2d 1013 (1963).

Finally by instructing the jury the defendant had to show by a preponderance of the evidence there was no change in the mechanical condition of the backhoe from the time the lease commenced until such time as the backhoe experienced the mechanical difficulty in question is an inaccurate statement of the law and an impossible burden under the state of the evidence. In the first place the mechanical problem in Wellington in January, 1977 with the charging system and axle had already been repaired on March 22, 1977, by Shurtleff & Andrews mechanics [Ex. P-6] and therefore there was a change in the mechanical condition of the backhoe after the lease term commenced on March 21, 1977. and the change was caused by mechanics dispatched by ASCO. Moreover, the hydraulic problem in

Alpine several successive days after November 16, 1977, were represented to be corrected each night when Ray Baldwin replaced unloading valves, etc. The subsequent daily problems existed from the day before from the new unloader valve, etc and not from March 21, 1977. Under these circumstances there was a change in the mechanical condition caused by the plaintiffs own mechanic yet no allowance is made in the instruction for that fact. Finally, the instruction does not take into account the change in mechanical conditions for ordinary wear and tear which all the witnesses, both plaintiffs' and defendant's, testified would require the replacement of parts and packing of hydraulic cylinders, etc.

#### POINT VI

THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR BY GIVING INSTRUCTION NO. 20 DEALING WITH WAIVER BECAUSE IT USURPS THE PROVINCE OF THE JURY TO WEIGH THE EVIDENCE AND AMOUNTS TO A DIRECTED VERDICT AGAINST THE DEFENDANT ON THIS ISSUE.

Instruction No. 20 reads as follows:

Where it is difficult to determine whether a particular act merely sheds light on the meaning of the agreement or represents a waiver of a term of the agreement, the preference is in favor of waiver. Thus even if you find that the plaintiff on occasion did not charge the defendant for certain repairs or gave the defendant credit for down time, the preferred interpretation of such action is that the plaintiff waived its claim against the defendant for those repairs and down time not charged for rather than the interpretation of such action constitutes a course of performance which indicates an intent not to charge the defendant for any down time or for any repairs. [R. 363].

The court's instruction was copied verbatim from the plaintiffs' proposed instruction no. 28 [R. 327]. The defendant took timely formal exception to the said instruction. [Tr. 982].



The defendant submits the instruction amounted to both a finding of fact and a review of the evidence by the trial judge and takes away from the jurors the sole province which they had to weigh the evidence and make a finding whether there was in fact any so-called and alleged "waiver" or whether the gratuitous repairs on past occasions represented a policy on the part of the plaintiffs to render the future repairs also gratuitously. The trial judge effectively instructed the jury to find there was a "waiver" and has taken away from the jury its function to determine what weight should be given to Darrell Lester's exhibit P-21 and the other evidence as it bore on the critical issue of who was to pay for the repairs. By interfering with the jury's province in interpreting the evidence as it would relate to the issues of "waiver" and gratuitous repairs [even assuming that waiver was a relevant issue which defendant denies it was] the court has committed prejudicial error. [Flynn v. Harlin Construction Co., 29 Utah 2d 327, 509 P. 2d 356 ( 1973)]. This instruction is in effect a directed verdict on the issue. Durrant v. Pelton, 16 U. 2d 7, 394 P. 2d 879 (1964).

Plaintiffs' bookkeeper and office manager, Darrell Lester, introduced an exhibit showing approximately three thousand dollars (\$3,000.00) worth of repairs paid for by ASCO during the term of the lease and which were not charged to the defendant. [Ex. P-21]. It also is clear the plaintiffs did, in fact, pay for all the repairs that were made on the Murray job site to include the replacement of a broken axle, replacement of alternator, etc. [Ex. P-6. (Tr. )]. This testimony had a direct bearing on the issue of whether the repairs made to the backhoe would be made

free of charge, or whether they should be billed to the defendant. [See POINT I(3) infra], and the trial judge should have instructed the jury to determine the relevancy of this evidence rather than instructing them they must find a waiver.

There was not one shred of testimony from any of plaintiffs' witnesses dealing with the issue of "waiver", as used in the court's instruction no. 20. None of these witnesses stated the repairs were made free of charge because of any good samaritan waiver. There was in fact, no explanation by these witnesses as to why Exhibit P-21 was offered into evidence.

The defendant submits the instruction is not a correct statement of the law and has found no cases substantiating the instruction. Furthermore, the court failed to define the term "waiver" and therefore it could only be confusing to the jury to try to interpret it as used in the instruction and then relate the term to the evidence.

#### CONCLUSION

For the foregoing reasons, the defendant submits this Honorable Supreme Court should reverse the JUDGMENT ON VERDICT OF JURY appealed from and should set aside the jury verdict awarding to the plaintiffs the sum of sixteen thousand six hundred fifty-one dollars and seventy-three cents (\$16,651.73) for repairs to the backhoe; and should further order a new trial on the remaining issues raised in the plaintiffs' complaint dealing with the alleged rentals which were due and owing and the defendant's counterclaim dealing with loss of profits on the Alpine job.

RESPECTFULLY SUBMITTED,

McMURRAY & ANDERSON

CERTIFICATE OF DELIVERY

This is to certify that two copies of the foregoing APPELLANT'S BRIEF were delivered this 21st day of March, 1980, to Watkiss & Campbell, Attn: Clark W. Sessions, attorneys for plaintiffs, 310 South Main, Salt Lake City, Utah.

JAMES A. McINTOSH