

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 : Brief of Respondent

Utah Supreme Court

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#### Recommended Citation

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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

Plaintiffs and  
Respondents,

Case No. 16470

vs.

JAY TUFT AND COMPANY, a  
Utah corporation,

Defendant and  
Appellant.

---

BRIEF OF RESPONDENT

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APPEAL FROM THE JUDGMENT OF THE  
DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
HONORABLE JAMES S. SAWAYA, DISTRICT JUDGE

---

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FILE

MAY

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IN THE SUPREME COURT  
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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 and :  
Respondents :

Case No. 16470

vs. :

JAY TUFT & COMPANY, a :  
Utah corporation, :

Defendant and :  
Appellant :

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RESPONDENTS' BRIEF

---

PRELIMINARY STATEMENT

JAY TUFT & COMPANY, a Utah corporation, (hereinafter termed the "Defendant"), in its appeal to this Court, seeks to reverse the judgment on a jury verdict which awarded AMERICAN SALES COMPANY (ASCO), a Utah Limited Partnership, (hereinafter termed the "Plaintiffs"), the sum of \$15,651.73 representing parts, labor and repairs to a backhoe leased by the Plaintiffs to the Defendant. The Defendant also seeks a new trial on its Counterclaim, which the jury rejected, and a new trial dealing with delinquent rentals, which the jury awarded to the Plaintiffs. The Defendant bases its challenge to the jury verdict upon six separate grounds:

## RELIEF SOUGHT ON APPEAL

The Plaintiffs seek affirmance of the Judgment on Verdict of Jury, the Order of the trial court denying the Defendant's Motion to Amend Judgment or in the Alternative for a New Trial and, in addition, seek an award of Plaintiffs' costs on appeal.

## STATEMENT OF FACTS

While certain of the facts stated by the Defendant are correct and undisputed, others are argumentative and represent the Defendant's version of the evidence. The essential facts are that the Defendant leased from the Plaintiffs, pursuant to a written agreement, a used American Hydraulic Backhoe, Model 35, for the period March 21, 1977 to January 20, 1978. The agreement, [Ex. P-1], provided in pertinent part that the lease term would be for a minimum of thirty (30) days and such additional days as the Defendant required the backhoe. The lease rate negotiated by the parties was \$4,800.00 per month plus applicable taxes of \$240.00 per month, a total of \$5,040.00 per month. The agreement could be terminated by either party upon five (5) days written notice and contained an option in favor of the Defendant to purchase the backhoe. The option to purchase was not exercised by the Defendant at any time.

The Defendant had previously leased this same backhoe from the Plaintiffs under two separate lease agreements. (Tr. 110). The Defendant was fully acquainted

with the capabilities of the machine. Prior to the commencement of the subject lease, the backhoe was serviced by the Plaintiffs and checked by the Defendant. [Ex. P-4]. During the lease term the backhoe required maintenance, servicing, repairs and parts. At no time did the Defendant terminate the lease agreement.

The Defendant refused to pay the rental payments from October, 1977 through January, 1978 totalling \$20,167.75 and charges for parts, labor and repairs in the sum of \$15,651.73. [Ex. P-22]. Following repossession of the backhoe, the above-entitled action was commenced in the District Court.

#### ARGUMENT

##### POINT I

THE JURY VERDICT AWARDED TO THE PLAINTIFFS  
\$15,651.73 FOR REPAIRS TO THE BACKHOE IS  
SUPPORTED BY THE EVIDENCE.

Defendant argues in Point I of its Brief that the verdict for repairs was not supported by the evidence for the following reasons:

1. The Defendant is not liable for repairs under the lease agreement because: (a) the lease is silent as to who has the responsibility to pay for the repairs (Appellant's Brief at 23); (b) therefore, the custom and usage of the industry with respect to repairs controls, (Appellant's Brief at 27); (c) all witnesses who testified as to custom and usage said that the custom in the industry is that the lessor

(Plaintiffs) pays for all repairs except those repairs caused by operator abuse or the lessee's negligence and except for the replacement of filters and bucket teeth, (Appellant's Brief at 26-30); and (d) there was no evidence of operator abuse (Appellant's Brief Point I(2) at 20).

2. Defendant should not be held liable for the repairs because the mechanics that performed the repairs were incompetent. (Appellant's Brief Point I(1)).

3. Plaintiffs are not the real party in interest. (Appellant's Brief Point I(6)).

4. The Plaintiffs will be unjustly enriched if they recover for repairs. (Appellant's Brief Point I(7)).

A careful review of the Defendant's Brief and its shot-gun approach to the issues already tried in this case, suggests nothing more than a re-hash of the same arguments made to the jury at trial and argued to the court in Defendant's post-trial motions. Both the jury and the court rejected all such arguments.

Without completely reviewing nearly one thousand (1,000) pages of testimony in this case, it is sufficient to say that the jury heard and considered the evidence presented, as did the court, and in considering and weighing such evidence, determined to reject the claim of the Defendant and awarded damages to the Plaintiffs. That such verdict will not be overturned and will be affirmed

unless there is substantial and prejudicial error (which cannot be supported by the record in this case) has long been the law in the State of Utah as enunciated by this Court. In Gilhespie v. DeJong, 520 P.2d 878, 880 (Utah, 1974), Mr. Justice Crockett wrote:

. . . That the parties appear to have had what they are entitled to: a full and fair opportunity to present their contentions, and the evidence supporting them, to the court and jury, and to have a verdict and judgment entered thereon. When this has been done, all presumptions are in favor of the validity of the verdict and judgment; and this court will not disturb them unless there is substantial and prejudicial error, absent which there is a reasonable likelihood that there would have been a different result.

See also, Thomas v. Union Pacific Railroad Company, 548 P.2d 621 (Utah 1976).

So it is in the case sub judice. For a period of nine (9) days the parties offered evidence to support their respective positions. The documentary evidence submitted by the Defendant numbered in the hundreds of pages. No argument can be made that the Defendant was not given a full and fair opportunity to present its contentions. While some of the evidence was conflicting, the jury sorted that evidence and rendered a verdict. The trial court, after due consideration of the post-trial motions of the Defendant, likewise rejected the Defendant's contentions.

The Defendant commences its argument with the assertion that the seven (7) women on the jury did not

understand the technical aspects of the backhoe as related to the repairs in this case. (Appellant's Brief at 9). It is noted that in the exercise of the Defendant's peremptory challenges to the jury, the Defendant elected to strike three (3) males from the panel. [R. 249]. At no time prior to the filing of the Appellant's Brief has the Defendant raised the issue of the makeup of the jury panel. The Defendant should not now be permitted to assert such a challenge, and the same should be stricken by this Court.

A. THE EVIDENCE CLEARLY ESTABLISHES THAT DEFENDANT WAS LIABLE UNDER THE LEASE TO PAY FOR ALL REPAIRS IRRESPECTIVE OF THE CAUSE.

1. The Lease Expressly Provides That The Lessee, Defendant, Shall Pay for Repairs.

The arguments advanced by the Defendant, both at trial and before this Court, are predicated upon an interpretation of the equipment lease agreement [Ex. P-1] executed by the parties. Contrary to Defendant's assertion, the agreement is not silent on the question of repairs. The agreement provides that the ". . . Lessee shall keep the equipment in good repair and condition . . ." (Emphasis added). The plain reading of that portion of the lease places the responsibility and duty of keeping the equipment in good repair and condition squarely on the lessee.

It is undisputed and a matter of common knowledge that in every equipment lease transaction such equipment will, through normal use, depreciate and experience some wear and tear. The Defendant argues, however, that all repairs performed on the backhoe were the result of "reasonable

wear and tear" and are the responsibility of the lessor, excepting only those repairs required by reason of the lessee's negligence in the operation of the backhoe. (Appellant's Brief at 26-30). Such an interpretation renders the duty placed upon the lessee to "keep the equipment in good repair and condition" meaningless and without any force or effect whatever.

The lease further provides that the lessee ". . . will return the equipment in as good condition as when leased, including final servicing, reasonable wear and tear excepted." [Ex. P-1]. It of course goes without saying that when a piece of construction equipment is returned following its use on a construction project, the tracks have been worn, the paint has deteriorated, the integral parts of the machine have experienced some wear and the machine is not in "mint" condition. That is not to say that the backhoe in this case could have been returned by the Defendant under the express terms of the agreement with a broken axle, with a malfunctioning and inoperable charging system and a hydraulic system which was totally contaminated. Such, however, is the position the Defendant now in effect urges. The Plaintiffs submit that the language in the lease agreement excepting reasonable wear and tear applies to the condition of the equipment when it is returned and does not modify, change or render a nullity the language which requires the lessee to keep the equipment in good repair and condition.

2. The Evidence Establishes That Both Parties Interpreted The Lease as Requiring the Lessee to Pay for Repairs.

Defendant's argument that the maintenance and servicing of the machine was the responsibility of the Plaintiffs is unreasonable and has no basis in the evidence. It is undisputed that the backhoe once leased is in the exclusive control of the Defendant. Somehow the Defendant seeks to impose upon the Plaintiffs a duty to service the equipment, maintain it and repair it, even though such equipment was operated by Defendant on its construction projects miles from the Plaintiffs' business.

The lease agreement is captioned "Bare Rental w/Option to Purchase". The lease agreement specifies the lessee's duty to keep the equipment in good repair and condition. Mr. Carson, one of the Plaintiffs' partners, testified that during the lease period the Plaintiffs did not rent equipment on a basis where the Plaintiff paid for repairs and servicing. (Tr. 24). Contrary to Defendant's contention, the lease rate did not include a reserve for repairs. (Tr. 24). Mr. Carson further testified that had the lease rate included servicing and maintenance, the lease rate would have been significantly higher. (Tr. 83) In fact, the negotiated lease rate was lower than the suggested industry rate on the subject backhoe by \$2,000.00 per month. (Tr. 82). Mr. Baldwin also testified that maintenance and servicing was the responsibility of the Defendant (Tr. 323 and 342).

More importantly, the Defendant recognized its responsibility. Mr. Williams, one of the Defendant's mechanics, testified that he spent some 13 hours on the maintenance, servicing and repair of the machine on the Decker Lake project alone. Mr. Broadhead, the Defendant's maintenance man, testified that he was employed by the Defendant for the purpose of maintaining the machine and completed check lists of forms indicating the services that were performed on a regular basis. [Ex. D-41]; (Tr. 609). Mr. Bowers, an employee of the Defendant, completed repairs on the backhoe as well. (Tr. 613). The Defendant paid the Plaintiff for repairs on the backhoe in the sum of \$315.97. (Tr. 193); [Ex. P-20].

The Defendant argues that the policy of Plaintiffs, as indicated by their conduct, was to pay for repairs. In fact, the testimony of Plaintiffs' witnesses, Mr. Hulse and Mr. Carson, was to the effect that although the responsibility for repairs rests exclusively with the lessee, when the Defendant indicated a real interest in purchasing the machine, the Plaintiffs, for the purpose of maintaining a good rapport with the Defendant, were more lenient in charging for repairs. (Tr. 59, 172-73). Contrary to the argument of Defendant, Mr. Hulse did not testify that Plaintiffs would pay for all of the repairs occasioned by Defendant's use of the machine. (Tr. 175). Mr. Hulse only testified that if the lessee had a problem, Plaintiffs would send a mechanic out to fix it, but that the lease required the Defendant to pay for parts and service. (Tr. 175).

Nor did Mr. Hulse testify that such major items as a broken axle or an alternator would be paid by Plaintiffs. Mr. Hulse only observed that if an axle were found to be defective, it would be repaired by Asco. (Tr. 145-47). There was no such evidence in this case. Mr. Hulse further testified that while a malfunctioning alternator would be considered a major problem, he did not specifically indicate that such an item would, as a matter of policy under the lease, be repaired at Plaintiffs' expense. (Tr. 147).

Mr. Hulse did testify that under the circumstances of this case, the decision as to who would bear the cost for an item of repair depended, to some extent, upon whether the problem was caused by operator abuse or improper maintenance. (Tr. 145-46, 177). The evidence, taken as a whole, overwhelmingly supports the argument that the major problems with the backhoe were caused directly by the poor and improper maintenance given to the machine by Defendant. (See Point IB, infra). With or without a policy on repairs, maintenance was the responsibility of Defendant and the damages caused from the failure to maintain are also the responsibility of Defendant.

### 3. Express Terms Control Custom and Usage.

The Defendant argues at length that somehow industry custom and usage changes and modifies the express duty of the lessee so that the responsibility of repairing the backhoe is placed on the lessor. This argument ignores the fact that under Utah law, express terms of a contract

control over testimony regarding custom and usage. Section 70A-1-205, Utah Code Annotated (1953) provides in relevant part:

The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade. [Emphasis added]

In construing this Section of the Uniform Commercial Code, the courts have uniformly held that Section 70A-1-205 only permits trade usages and dealings between the parties to supplement or give meaning to particular terms of a contract when it is reasonable and there is no inconsistency between the express terms of the contract and the interpretation based upon custom or usage. Where there is any inconsistency between custom and usage and the express contract terms, the contract must control. See, e.g., Colorado Bank & Trust Co. v. Western Slope Invest., Inc., 539 P.2d 501, 503 (Colo. App. 1975); Corenswet, Inc. v. Amana Refrigeration, Inc., 549 F.2d 129, 136 (5th Cir. 1979); Neal-Cooper Grain Co. v. Texas Sulphur Co., 508 F.2d 283 (7th Cir., 1974).

In the instant case, the express terms of the contract clearly placed the duty to repair upon the lessee and the contract terms are, therefore, controlling over any testimony of custom and usage by the Defendant's putative experts.

It is also well settled that the Defendant bears the burden of proving the custom and usage in an industry by

clear evidence which must not be uncertain or contradicted. Martin v. Whiteley, 405 P.2d 963 (Idaho 1965). See also, Radio Station KFH Co. v. Musicians Ass'n., 169 Kan. 596, 220 P.2d 199, 205 (1953). It is also well established that the custom or general practice in an industry must be established by the opinion of a properly qualified expert who knows and testifies to the general practices in his field. Trimball v. Coleman Co., 200 Kan. 350, 437 P.2d 219 (1968). In Trimball, the court rejected testimony by witnesses as to their individual practices which was offered to establish the general practice in the field. As a general proposition, the courts have been unwilling to accept the testimony of what one individual or one company did as constituting sufficient evidence of a custom or trade usage. See for example, Coury Bros. Ranches, Inc. v. Ellsworth, 103 Ariz. 515, 446 P.2d 458, 464 (1968). Over the objection, (Tr. 662, 666) and continuing objection, (Tr. 680) of the Plaintiffs, a Mr. Babcock, called as the Defendant's expert, was permitted to testify concerning his understanding of such industry custom and usage as to duty to repair, as was the Defendant's principal officer, Mr. Tuft. (Tr. 801-802). The flaw in the position of the Defendant was and is that neither Mr. Babcock nor Mr. Tuft were lessors or dealers of construction equipment, but, in fact, were users and customers of dealers. No foundation was ever laid with respect to their knowledge of industry standards other than as lessees. (Tr. 652, 654-655, 796-798, 801-802). No lessor or witness

from the equipment leasing industry was called or testified as to any industry standard, custom or usage with respect to the assumption of the duty to repair leased equipment by the lessor thereof. Even Mr. Babcock admitted that the handling of problems and repairs can be matters of negotiation between lessors and lessees. (Tr. 731).

In the instant case, the Defendant attempted to contradict the clear and unequivocal language in the lease regarding the duty to repair by introducing opinion testimony by unqualified witnesses as to their individual understanding of the custom in the industry. It is questionable in the first instance whether such evidence was even properly admissible. Such testimony is also in direct conflict with the testimony of Mr. Wienke that the items of repair under dispute were not items of ordinary wear and tear. (Tr. 415-146). It cannot be disputed, however, that the jury which heard and considered Defendant's evidence rejected it.

**B. THE DEFENDANT IS LIABLE FOR THE REPAIRS PERFORMED  
EVEN UNDER DEFENDANT'S INTERPRETATION OF THE LEASE.**

Defendant argues that the lessor is responsible for repairs unless the problem was caused by operator abuse or negligence of the lessee. (Appellant's Brief at 26-30). All three of the major problems with the backhoe were caused by operator abuse or negligence of the Defendant.

**1. Hydraulic System Problems.**

When Mr. Baldwin was dispatched to the Alpine job site, he personally observed the "red" condition in the sight glass. (Tr. 317). He pulled the 25 micron filter

and described what he observed firsthand. (Tr. 317). The filter was "completely packed on both sides and layers at least an inch to two inches thick on the bottom of metal filings." (Tr. 317). The filings were brass and silver in color. Mr. Baldwin showed the filter to Mr. Tuft and Mr. Bowers. (Tr. 318). Even the Defendant's witnesses admitted that by the time metal filings are found in the filter, the damage to the machine necessitating complete decontamination of the hydraulic system had already occurred. (Tr. 703); (See also, Mr. Wienke's testimony Tr. 451).

In an effort to explain the design of the backhoe and particularly the hydraulic system, the Plaintiffs called as an expert witness Mr. Charles Wienke. Mr. Wienke was the chief engineer for American Hoist and Derrick Co., the manufacturer of the backhoe, and was responsible for the actual design of the American Model 35 Backhoe, which is the subject of this case. (Tr. 390). Mr. Wienke explained in detail the design of the hydraulic system, its component parts and particularly the warm-up procedures that must be followed by the operator of the backhoe. (Tr. 392-394).

According to Mr. Wienke, the contamination of the hydraulic system could occur as a result of five possible causes. The first is in the manufacture of the backhoe itself. In that process some very fine metallic particles can find their way into the machine's system. (Tr. 406). These particles are filtered out of the machine after the first 100 hours of operation. (Tr. 406). The subject

backhoe had approximately 2,000 hours of time in operation and the contamination from that source in this case can be ruled out. Also, those particles are so small they cannot be seen in the filter (Tr. 407) and certainly those particles are not of the type described by Mr. Baldwin. (Tr. 317).

The second possible cause of contamination was damage to the boom and cylinder in the operation of the backhoe. Such admittedly occurred on the Wellington job when the Defendant scraped the side of a trench box and fractured one of the hydraulic lines. (Tr. 486). Mr. Healey testified that such was the Defendant's "fault" and that the line was replaced by the Defendant. (Tr. 486). By reason of the passage of time from June of 1978 until the contamination of the backhoe at Alpine in the Fall of 1978, the contamination as the result of that occurrence seems at best remote. It is noted, however, that even under the Defendant's position, the Defendant would be liable for repairs to the backhoe necessitated by the Defendant's admitted negligence in the operation of the backhoe.

The third possible cause of the contamination could be the failure of the Defendant to properly oil the backhoe. (Tr. 399). Even Mr. Babcock, the Defendant's expert, placed that responsibility on the Defendant. (Tr. 731). With respect to the oil, Mr. Wienke testified at length concerning its specifications and that the manufacturer specified the use of a mineral-based oil with a certain viscosity (Tr. 401) and testified that a non-mineral based

oil sometimes results in an improper mixture. (Tr. 402). In all events, the oil added to the machine must be filtered through a 10 micron filter to remove impurities and contamination from its container (Tr. 400). The Defendant was unable to present any evidence as to the type of oil added to the machine, but admitted without qualification that the required 10 micron filter was not used. (Tr. 530). If the contamination came from that source, it is clear that such was the fault of the Defendant, which had the responsibility to add proper oil to the backhoe. The contaminated oil cause can be eliminated if the filters are not clogged and are working properly. (Tr. 436). According to Mr. Baldwin, the same were clogged and were not working properly. (Tr. 319).

The fourth possible cause was the failure of the Defendant to follow proper warm-up procedures. Mr. Wienke testified that if the appropriate warm-up procedures are not followed a "cavitation condition" is caused, which in essence creates a vacuum in certain pumps in the machine, the result of which is that metal particles are pulled out of the pumps themselves and into the machine's hydraulic oil and system. (Tr. 394). The machine is designed to remove impurities from the hydraulic oil through a filtration process. It is clear, however, that the damage to the machine has been done before the oil with metal particles reaches the filter via the storage tank where proper warm-up procedures are not followed. (Tr. 703). Mr. Wienke

summarized his conclusion as follows: "When you see the metal filings, you have already failed the pump." (Tr. 451).

It should be noted that Mr. Baldwin discussed with Mr. Bowers, a supervisory employee of the Defendant, the warm-up procedures to be followed (Tr. 285) and at all times the Defendant had the operating manual for the machine [Ex. D-36], although the Defendant's operator admitted he had never read it. (Tr. 553).

The final possible cause was the failure to change filters in the machine as required and needed. It is undisputed that the filters on the machine should have been changed under normal working conditions of between 300 and 500 machine operating hours or more often if conditions required. (Tr. 414). Perhaps the best and most accurate statement of the cause of the hydraulic system contamination on this machine was stated by Mr. Wienke. Mr. Wienke testified that ". . . if the filters would have been changed on time and kept clean, you wouldn't have got those metal filings in the filter." (Tr. 415). Mr. Wienke further testified that contamination or permitting the condition of contamination to occur is not "normal wear and tear on the machine." (Tr. 415).

Defendant's own witness admitted that the changing of filters was the responsibility of the Defendant. (Tr. 563, 610 and 663) The evidence at the trial was overwhelming that the required 25 micron filter as designed and used in

the backhoe could be purchased only from an authorized dealer. (Tr. 396). It is undisputed that Shurtleff and Andrews and the Plaintiffs are the sole dealers in the State of Utah. (Tr. 396). Mr. Lester reviewed twice during the course of the trial the files and records of Shurtleff & Andrews and American Sales Company and was unable to verify the purchase of any filter by the Defendant. (Tr. 958). The Defendant was unable to verify the purchase of a filter from any source during the course of the lease term. While it is clear that under optimum conditions the 25 micron filter should have been changed at least three times during the term of the lease, in fact, the record is devoid of any evidence of a filter change by the Defendant after the backhoe left the Decker Lake job. (Tr. 563 and 578). Under the state of the evidence, the jury could not only reasonably infer but had no alternative other than to conclude that the filters in the machine were not changed timely.

## 2. Axle Problems.

After the backhoe was delivered to the Murray job, an axle on the machine was broken. The axle was replaced by the Plaintiff without charge to the Defendant. A second axle was broken on the Wellington job and it cannot be determined whether that axle was the new axle or not. (Tr. 377). It is clear, however, that the breaking of parts, including an axle, is not normal wear and tear. (Tr. 415).

The testimony at the trial was that there are two causes of axle breakage. (Tr. 348-349, 356). The first is undue stress being placed on an axle. Mr. Baldwin, who replaced the axle, testified that he observed a twisting effect in the sheared axle on the Wellington job (Tr. 363). The evidence is clear and un rebutted that the Defendant operated the backhoe on both the Murray and Wellington jobs while one axle was broken. Incredible as it seems, the Defendant operated this 42-ton machine using only one track and "limping" the machine along rather than shutting it down for repairs. This practice was rejected by the designer of the machine, Mr. Wienke (Tr. 402), by Mr. Baldwin (Tr. 289, 298, 299), and even by Mr. Williams, the Defendant's own mechanic. (Tr. 591). The testimony was further uncontradicted that such constituted improper maintenance. (Tr. 348). There was ample evidence for the jury to find that such constituted negligence on the part of the Defendant or operator abuse.

The second cause of axle failure can result from debris, rocks and mud caught in the tumbler and sprocket portion of the machine's track assembly. (Tr. 297, 417). Mr. Baldwin testified concerning the heavy, muddy conditions in which the machine was being operated on the Wellington job. He testified that he and Mr. Woods had to clean the machine with prybar-type instruments. (Tr. 297). Mr. Baldwin further testified that it was the operation of the backhoe in conditions such as he observed on the Wellington

job without removing the rocks and debris that constituted improper operation and abuse. (Tr. 298). Mr. Wienke verified that operating the backhoe under such conditions could cause an axle to break even on a new machine. (Tr. 417).

There was more than sufficient evidence for the jury to conclude that the cause of the axle breakage was improper operation and abuse.

### 3. Charging System Problems.

In Point I the Defendant argues at length that it was improperly charged for repairs to the charging system of the backhoe on the Wellington project. For a period of five (5) days, the Defendant started this machine by "jumping" the spark from a 12-volt pickup truck to a 24-volt backhoe. (Tr. 510). The evidence was uncontradicted that such a practice is highly improper. Mr. Wienke testified that you simply don't do it that way. (Tr. 416, 432). In fact, his testimony was that the pickup batteries would not charge the backhoe batteries. (Tr. 434). To trained construction people such as those in the Defendant's employ, it should have been patently obvious after five (5) days that their "makeshift" starting system was not working. Mr. Baldwin testified that if such a procedure were employed improperly in terms of the hook-up, the charging system could be seriously damaged. (Tr. 384). The problem was serious enough that separate mechanics were called in to remedy and repair the problem. [Ex. D-8]. There was not only sufficient, but virtually uncontradicted

testimony from which the jury could find and did find that those charges were properly assessed against the Defendant.

C. THE EVIDENCE SHOWS THAT THE MECHANICS  
WERE COMPETENT AND FOLLOWED PROPER  
PROCEDURES IN REPAIRING THE BACKHOE.

The Defendant argues in Point I (1) of its Brief that the mechanics who repaired the backhoe were incompetent because (1) Ray Baldwin should have checked the main hydraulic filter earlier, and (2) Ray Baldwin did not follow proper procedures in decontaminating the hydraulic system. Such assertions have no basis and cannot be supported by the evidence in this case.

The attack of the Defendant is directed primarily to the competency of Mr. Baldwin, one of the mechanics who worked on the backhoe. Mr. Baldwin had been employed as a mechanic for a period of approximately eighteen (18) years. His experience included work on all types of heavy equipment in Utah and elsewhere. (Tr. 280-281, 379-380). Most importantly, Mr. Baldwin was the mechanic who actually worked on the subject backhoe, observed its condition first hand and made repairs thereto.

It is noted at the outset that the Defendant was not required to use mechanics suggested by the Plaintiffs. The Defendant was free to use any mechanic to "keep the equipment in good repair and condition." (Tr. 90); [Ex. P-1]. It is undisputed that during the course of the lease term, the Defendant utilized the services of its own mechanics and service personnel. Interestingly enough, the

record is devoid of any objection or complaint filed or made by the Defendant to the Plaintiffs with respect to Mr. Baldwin's mechanical competence or lack thereof prior to the institution of suit in this case.

Mr. Baldwin did not have the duty to check the main hydraulic filter visual indicator and to make other inspections of the backhoe. Those duties were assumed by the Defendant and each of its witnesses so testified. (Tr. 563, 610, 663, 528-31, 551; Respondent's Brief at 20, supra). The job of the mechanic is to locate the specific problem and get the machine back in operating condition as fast as possible. (Tr. 321, 450). In any case, once the filings are in the filter, the damage is already done. (Tr. 451, 703).

The Defendant's second complaint is that Mr. Baldwin did not follow proper procedures in the repair and decontamination of the backhoe's hydraulic system. Mr. Wienke listened to the testimony of Mr. Baldwin with respect to the procedures followed by Mr. Baldwin and concluded that the procedure followed by Mr. Baldwin was acceptable. (Tr. 420).

D. DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO JOIN A REAL PARTY IN INTEREST WAS PROPERLY DENIED.

At the close of Plaintiffs' case in chief, the Defendant, for the first time, moved for a dismissal of Plaintiffs' claim for cost of repairs on the basis that the claim had not been prosecuted by the real party in interest pursuant to Rule 17, Utah Rules of Civil Procedure. Defendant claims that since the repairs were performed by mechanics from

Shurtleff and Andrews, the action for recovery of such repair costs should properly come from Shurtleff and Andrews. After considering the Defendant's oral motion made in open court, the trial court ruled that there was sufficient evidence from which the jury could find that a contract for the payment of the repairs existed between Plaintiffs and Defendant. Accordingly, the motion was denied. (Tr. 479).

The only conceivable basis of Defendant's Motion arises from the procedure by which repairs were ordered and made by the parties. The testimony at trial established that whenever Defendant required repairs it notified the Plaintiffs, specifying the nature of the problem. Since Plaintiffs employed no mechanics of its own, it would request the services of mechanics employed by Shurtleff and Andrews. (Tr. 25). Accordingly, an order for repairs would be sent from Plaintiffs to Shurtleff and Andrews and the latter would dispatch its mechanics at Plaintiffs' direction. (Tr. 25). A statement would be calculated and a bill sent from Shurtleff and Andrews to Plaintiffs for the services rendered. (Tr. 25, 35-36). Plaintiffs would then, in turn, bill Defendant for the repairs. [Exs. D-8 and D-9].

At no time did Shurtleff and Andrews send statements to or demand payment from the Defendant for the repairs. In every case Shurtleff and Andrews billed Plaintiffs. (See, e.g., Ex. D-8). Shurtleff and Andrews recognized that Plaintiffs had requested the mechanics and, therefore, Plaintiffs, not Defendant, was responsible for the charges. (Tr. 25).

If the requested repairs required specialized training, Plaintiffs retained the services of other repairmen, such as Abbott GM Diesel, Inc. Abbott also billed Plaintiffs directly. (Tr. 68-69); [Ex. D-8]. This procedure was followed throughout the lease term and the Defendant paid certain of Plaintiffs' statements without objection or comment. (Tr. 193) [Ex. P-20].

1. Timeliness of Motion.

The timing of Defendant's Motion is, at best, highly questionable. The Defendant knew from the outset that Plaintiffs employed the services of Shurtleff and Andrews to make the necessary repairs. No claim can or has been made that these facts were a surprise to the Defendant. However, contrary to the allegations of the Defendant, this issue was not raised, expressly or by implication, by the Defendant either in its Answer or any subsequent pleading.

It has long been the established rule of law that the failure of a party to timely raise an objection based upon Rule 17 in its Answer, or at the outset of the pleadings, acts as a waiver of the objection. This Court has affirmed the rule of law as above summarized on two prior occasions.

In Fritz v. Western Union Tel. Co., 25 Utah 263, 71 P. 209 (1903), the Defendant raised an objection as to the real party in interest at trial. This Court, in its ruling, stated:

[T]his objection was urged too late, and must be held to have been waived. "The objection that the plaintiff in an action is not the real party in interest . . . when available

by way of defense, must be raised by demurrer or answer, or it will be considered to have been waived." Id. at 214 (Emphasis added)

In the subsequent case of Tooele Meat & Storage Co. v. Fite Candy Co., 57 Utah 1, 168 P. 427 (1917), this Court, dealing with a defense of lack of standing, related the same to a motion for failure to prosecute in the name of a real party in interest, holding:

Such an objection is like one that the plaintiff is not the real party in interest. That objection must be made by special demurrer if it appears on the face of the complaint, and, if it does not so appear, then advantage of it must be taken by answer, and if not taken either by answer or demurrer the objection is waived. Id. at 428. (Emphasis added).

See also, Parker v. Brown, 4 Cal. 2d 344, 254 P.2d 6 (1953).

The timing of Defendant's Motion indicates that it is nothing more than a thinly-disguised attempt by Defendant to bootstrap itself into an argument for dismissal. Defendant has known from the very outset of this litigation that Plaintiffs, when requested by Defendant to repair the backhoe, would employ the services of mechanics from Shurtleff and Andrews and others. Defendant was fully aware that no monthly billings were sent by Shurtleff and Andrews to Defendant but that all statements were sent to Plaintiffs. [See Exs. D-8 and D-9].

That the Defendant never considered the possibility that it owed Shurtleff and Andrews for the repairs, rather than Plaintiffs, is also apparent. At no time did Defendant express any concern about the identity of the company

entitled to be paid for the repairs. Mr. Tuft, the principal officer of the Defendant, testified that he had a number of conversations with Plaintiffs regarding both the rental payments and the repair payments on the backhoe, but not once did Mr. Tuft raise a question as to whom payment should be made. (Tr. 845).

Not even when the Defendant was served with a Summons and Complaint seeking recovery of the repair costs did the Defendant raise an issue as to whether the wrong entity was demanding payment. Defendant's Amended Answer and Counterclaim (R. 151) filed barely one month prior to trial, contains nothing more than the customary boilerplate Motion to Dismiss for failure to state a claim. Defendant's Answers to Interrogatories add little other than an allegation that Shurtleff and Andrews might also be liable to the Defendant since Shurtleff and Andrews provided the labor and parts. (R. 159). If Defendant seriously believed Shurtleff and Andrews was responsible under the Counterclaim, one wonders why Shurtleff and Andrews was never brought into this action by the Defendant.

It is further noteworthy that Defendant in its Motion was concerned only with Shurtleff and Andrews and not with other repairmen such as Abbott GM Diesel, Inc. Defendant knew that Plaintiffs had hired Abbott to repair the charging system, just as Plaintiffs had hired Shurtleff and Andrews to accomplish other repairs.

The simple fact remains that Defendant did not timely

raise its objection under Rule 17. Under the clear facts established at trial, the Motion of Defendant was improper; is deemed waived and was properly denied by the trial court.

## 2. Real Party in Interest.

The trial court correctly ruled that since there was sufficient evidence to find that a contract to pay for the repairs existed between the parties, Defendant's Motion should be denied.

A real party in interest is defined by the case law as any party who actually owns the cause of action and is in a position to release the claim once satisfied. In Anheuser-Busch, Inc. v. Starley, 28 Cal. 2d 347, 170 P.2d 448, the California Supreme Court noted:

Where plaintiff shows such title that a judgment satisfied by the defendant will protect defendant from future annoyance or loss, and defendant can urge any defenses he could make against the real owner, the action is being prosecuted in the name of the "real party in interest." Id. at 449.

The Supreme Court of New Mexico in State v. Barker, 51 N.M. 51, 178 P.2d 401, held that the existence of a real party in interest depends on:

. . . (1) whether he is the owner of the right to be enforced; or (2) whether he is in a position to release and discharge defendant from liability on which action is grounded. Id. at 402.

It has further been noted that the ownership of the claim must be substantive and not simply technical or nominal. Maryland Casualty Co. v. King, 381 P.2d 153 (Okla. 1963).

The purpose of the rule is to allow a party to assert all available defenses against the real owner of the cause of action, thereby being allowed a full hearing on the merits of the controversy. Shaw v. Jeppson, 121 Utah 155, 239 P.2d 745 (1952).

In the case at bar the evidence clearly indicates that Plaintiffs are a real party in interest to this litigation. Plaintiffs were the party with whom Defendant contracted for the lease of the backhoe. (Tr. 834-35); [Ex. P-1]. It was the Plaintiffs that Defendant would call if the machine needed repairs. (Tr. 24). It was Plaintiffs that requested mechanics from Shurtleff and Andrews and others. The mechanics were dispatched under the direction of Plaintiffs and the services rendered were billed by Shurtleff and Andrews, not to Defendant, but to Plaintiffs. (Tr. 25-26). Plaintiffs would then see that the bill was paid to Shurtleff and Andrews, expecting to be paid in turn by the Defendant according to the clear terms of the lease agreement. (Tr. 35-36)

The Defendant was free to, and did at trial, raise every conceivable defense, including breach of all warranties. Defendant was not foreclosed from raising the issues of the value of the services performed and whether the repairs were accomplished in a workmanlike manner. In fact, Defendant spent much of the time eliciting evidence in support of those defenses.

Under the circumstances of this case it is clear that

the purpose of the Rule has been satisfied. Defendant has not claimed that the failure to join Shurtleff and Andrews deprived it of some important defense. Nor has it been shown that Shurtleff and Andrews would or could raise some action against Defendant since the orders for service came from Plaintiffs and were for Plaintiffs' backhoe.

E. PLAINTIFFS ARE NOT UNJUSTLY ENRICHED.

Defendant's claim that the enforcement of the judgment will result in unjust enrichment of the Plaintiffs' almost requires no response. Plaintiffs' action was for the recovery of unpaid rental payments for the use of the backhoe during the lease term and repairs to the backhoe occasioned by the Defendant's use of the backhoe. Plaintiffs are not asking for double payment or for any recovery not specifically provided for in the lease agreement. [Ex. P-1]. Plaintiffs simply seek to be reimbursed for the use and repair of the backhoe and nothing else.

In order to support a claim of unjust enrichment, the Defendant must show that the Plaintiffs have received a benefit which does not belong to them. In Baugh v. Darley, 112 Utah 1, 184 P.2d 335, 337 (1947), this Court ruled that:

Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.  
(Emphasis added)

The clear application of this rule of law is that the Plaintiffs cannot be unjustly enriched for simply receiving

the benefit of their bargain under the lease. Plaintiffs leased a backhoe to Defendant in return for Defendant's promise that Plaintiffs would be paid for each day of Defendant's use. [Ex. P-1]. The jury awarded to Plaintiffs the unpaid lease payments which Defendant agreed to pay for the use of the backhoe, nothing more and nothing less.

In like manner, Plaintiffs asked only to be reimbursed for the cost of repairs to maintain the backhoe pursuant to the lease. Contrary to the position of Defendant, the jury found from the evidence that Defendant was obligated to repair the backhoe and that the charges for such repairs were reasonable.

Defendant's argument that the lease payment included a reserve for repairs is simply not supported by the evidence. The testimony of Mr. Carson was to the effect that he used certain standard publications in assisting him to set a lease rate. (Tr. 7-8). The undisputed evidence as presented at trial is that had the lease rate included a reserve for repairs, the lease payment would have been substantially higher than the amount which the Defendant was required to pay. (Tr. 83-84). In fact, the testimony of Mr. Carson was that the Plaintiffs did not offer a lease which included a reserve for repairs and that during the negotiations with the Defendant, Mr. Tuft was told that he would be responsible for the maintenance and repairs on the backhoe. (Tr. 12-13). Accordingly, there was never any direct evidence that the lease in question [Ex. P-1] contained a specific reserve, in a specified, indentifiable amount, for repairs during the lease term.

The argument of Defendant is clearly without merit and in error. Plaintiffs have only been made whole by the jury award in this case and have received no windfall by enforcement of the judgment. Under these circumstances, the claim of unjust enrichment is improper and must fail.

## POINT II

### RAY BALDWIN'S EXPERT OPINION WAS PROPERLY ADMITTED.

Defendant argues in Point II of its Brief that the trial court erred in permitting Ray Baldwin to give his expert opinion that the backhoe had not been properly maintained.

Defendant does not dispute Mr. Baldwin's qualifications as an expert, Defendant merely asserts that the foundation for his opinion was inadequate because he had never observed nor did he have personal knowledge of any specific acts by Defendant which would constitute improper maintenance. Obviously, if Mr. Baldwin had actually observed or had personal knowledge of improper maintenance of the backhoe, it would not have been necessary for him to give an opinion. The purpose of allowing expert opinion testimony is to permit an expert with special knowledge or training to draw inferences or conclusions from facts perceived by, known or made known to him, which the jury, without such special knowledge or training, would not be able to draw for themselves. This general rule was expressed in Gilbert v. Quinet, 369 P.2d 267, 268 (Ariz. 1962):

An expert may be allowed, in cases where expert opinion is appropriate, to interpret facts in evidence which the jury are not qualified to interpret for themselves, McCormick, Evidence § 13, p. 28 (1954).

An argument similar to that made by Defendant was asserted and rejected in Boehler v. Sanders, 404 P.2d 885, 887 (Mont. 1968):

According to appellant's argument and the cases cited alleging support of his theory, a policy officer, who qualifies as an expert in traffic matters, cannot give opinion testimony based on his investigation if he did not witness the accident. Such is not the law for he can give an opinion based on the facts he testified to . . . . Appellant's objection to this testimony was "that it called for a conclusion and that no proper foundation was laid." This objection was properly overruled by the trial judge, . . . .

Admittedly, the expert witness must testify as to the facts upon which his opinion is based (Day v. Lorenzo Smith & Son, Inc., 17 Utah 2d 221, 408 P.2d 221 [1965]); however, Mr. Baldwin did testify extensively as to the facts upon which his opinion was based. Mr. Baldwin testified that he had performed the final servicing on the backhoe immediately prior to the lease to Defendant (Tr. 282) and that during the term of that lease, he inspected and repaired the backhoe on numerous occasions. (Tr. 282, 286-292, 293-298, 300-310, 313-315, 317-321). Mr. Baldwin further testified that during the course of repairs performed at the Alpine project, he removed the main hydraulic filter and found that it was totally contaminated. (Tr. 317).

After approximately forty (40) pages of testimony, including that testimony cited above, Mr. Baldwin was

asked, based on his inspection and the work he performed on the machine, to give his judgment as to whether the machine had been maintained in a proper condition. (Tr. 321).. He stated that ". . . [i]n my opinion, when I pulled that filter out, there was no way the machine was maintained properly." (Tr. 323).

The admissibility of expert testimony such as Mr. Baldwin's is generally left to the discretion of the trial court and this court has so held. Batt v. State, 28 Utah 2d 417, 503 P.2d 855, 858 (1972).

The admissibility of such testimony is primarily for the trial court to determine. He is allowed considerable latitude of discretion; and this court will not reverse in the absence of clear showing of abuse; but will leave the challenge to its reliability as going not to its competency, but as to its weight and credibility, which is for the jury to determine.

After reviewing the foundation for Mr. Baldwin's opinion, there can be no question that the trial court did not err or abuse its discretion in allowing this testimony. Even assuming that it was error to admit this testimony, it does not rise to the level of a prejudicial error which would warrant reversal.

Defendant contends that this alleged error was prejudicial because ". . . [n]o 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." (Appellant's Brief at 36-37).

This contention ignores the testimony of Mr. Weinke that ". . . [i]f the filters would have been changed on time and kept clean, you wouldn't have got those metal filings in the filters." (Tr. 415). Defendant's own witness, Mr. Babcock, testified that the replacement of filters is the responsibility of the contractor or lessee. (Tr. 663). Mr. Weinke also testified that hydraulic oil added to the backhoe should ". . . pass . . . through a ten micron filter before it goes into the machine." (Tr. 400). Defendant's employees admit that this was not done. (Tr. 530).

Under similar circumstances, this Court held in Christianson v. Debry, 23 Utah 2d 334, 463 P.2d 5 (1969), that even if the trial court erred in admitting certain expert opinion testimony, where there was other evidence to support the verdict, the admission was harmless error.

### POINT III

EXPERT TESTIMONY IS NOT REQUIRED IN DETERMINING  
MERCHANTABILITY AND THE TRIAL COURT DID NOT  
COMMIT PREJUDICIAL ERROR IN FINDING  
HAROLD BABCOCK UNQUALIFIED.

In Point III of its brief, the Defendant argues that the question of the merchantable condition of the backhoe "must come from expert witnesses . . ." and that the exclusion of Harold Babcock's opinion as to the merchantability of the backhoe "was prejudicial since it left defendants [sic] without the required testimony on this critical issue . . . ." (Appellant's Brief at 38 and 41) (Emphasis added).

Plaintiff does not dispute that expert opinion evidence on the issue of merchantability may be considered by the jury provided that the witness is properly qualified and testifies as to matters within his realm of special knowledge and that the trial judge determines that such opinion evidence will assist the jury. Christopher v. Larson Ford Sales, 557 P.2d 1009 (Utah 1976); Hooper v. General Motors Corp., 123 Utah 515, 260 P.2d 549 (1953). However, the Defendant argues that such evidence is required and must be introduced to discharge its burden of proving a product defect. Contrary to the Defendant's assertion, the courts have consistently held that expert testimony is not required. In Lucas v. Firestone Tire & Rubber Co., 458 F.2d 495, 497 (1972), the Fifth Circuit Stated:

"There is no burden on plaintiff to prove a specific defect by an expert witness as distinguished from other proof. The fact of a malfunction and also of a defect may be proven by direct or circumstantial evidence."

In Burrus v. Itek Corp., 46 Ill. App. 3d 350, 360 N.E.2d 1168 (1977), the Illinois court in construing § 2-314 of the Illinois Uniform Commercial Code, which is identical to § 70A-2-314 of the Utah statute, rejected the argument that expert testimony is required:

The defendant, while citing no authority, nevertheless argues strongly that specific defects . . . must be proven by expert testimony. With this contention we disagree for no mention of specific defects is found in the test of a breach of implied warranty of merchantability in our Commercial Code.

The large number of cases in which non-expert, non-opinion, direct and circumstantial evidence has been admitted

to demonstrate unmerchantability clearly show that there is no requirement to introduce expert opinion testimony. See, e.g., Guardian Ins. Co. v. Anacostia Chrysler-Plymouth, Inc., 320 A.2d 315 (D.C. App. 1974); Codling v. Paglia, 38 App. Div. 2d 154, 327 N.Y.S. 2d 978 (1972); Colorado Serum Co. v. Arp, 504 P.2d 801 (Wyo. 1972); 31 Am. Jur. 2d "Expert and Opinion Evidence" §19.

In this case, the trial court sustained an objection to the question seeking Mr. Babcock's opinion as to the merchantability of the backhoe on the grounds of lack of proper qualification. Judge Sawaya stated, "I think that's [referring to merchantability] something that this gentleman is not qualified to answer." (Tr. 670). (Emphasis added). The requisite test of proper testimony by an expert witness is outlined in Rule 56(2) of the Utah Rules of Evidence which states:

If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (a) based on facts or data perceived by or personally known or made known to the witness at the hearing and (b) within the scope of the special knowledge, skill, experience or training possessed by the witness.

The Defendant argues that Mr. Babcock's training as an engineer and his experience as a general contractor who purchased parts qualifies him as an expert as to merchantability. In order to conclude that the backhoe was unmerchantable, Mr. Babcock would have to find that the mechanical problems experienced by the backhoe were caused by defects existing in

the backhoe at the time the lease commenced, rather than by some intervening cause such as operator abuse. The record contains not one item of evidence that Mr. Babcock had any special knowledge, skill, experience or training as a mechanic which would enable him to reach a conclusion as to the cause of the problems. Defendant, in effect, is putting the cart before the horse by arguing that a user or lessee of machinery is an expert in such areas as design, and the local standard of merchantability. One could just as easily argue that a patient who had been treated with x-rays is competent to testify as an expert as to the local medical standard of x-ray treatment.

In discussing the questions of the qualifications of expert witnesses and the admissibility of their testimony, this Court has held that "[i]nherent in the position of the trial judge in the immediate control of the trial is the responsibility of passing upon whether the subject justifies expert testimony and the qualifications of the witness as to whether he can give sound and reliable help to the jury on it." Webb v. Olin Mathieson Chemical Corp., 9 Utah 2d 275, 342 P.2d 1094, 1097 (1959). And, in passing on the standard of review, the Court stated, "The practical exigencies of the situation make it necessary that the trial court be allowed considerable latitude of discretion in making such determinations. His rulings in that regard should not be disturbed lightly, nor at all unless it clearly appears that he was in error in his judgment on the matter." Id. This Court has

consistently held that the trial judge must be accorded wide discretion in determining the qualifications of experts and the admissibility of their testimony. See, e.g., Fillmore City v. Reeve, 571 P.2d 1316, 1319 (Utah 1977); Lamb v. Bangart, 525 P.2d 602, 607-608 (Utah 1974). The rule is supported by the sound policy that the trial judge who has the opportunity to observe the witness firsthand is in the best position to judge his expertise and the value of his testimony. As the rule has been stated in 31 Am. Jur. 2d "Expert & Opinion Evidence" §31:

The trial court has the primary function to determine whether or not a witness is an expert or has sufficient knowledge to qualify as an expert. The determination of the competency and qualifications of a witness offered as an expert is addressed to the judicial discretion of the trial judge before whom the testimony is offered, and his ruling or determination in this respect with regard to the proposed expert witness will not be disturbed by a reviewing court, unless that discretion has been abused, or the error is clear and involves a misconception of the law, in which case the judgment of the trial court may be reversed.

In the instant case, the trial court had the opportunity to observe and question the expert and to hear the testimony regarding his qualifications firsthand. The court did not abuse his discretion because Mr. Babcock had not operated the backhoe, was not a mechanic, had never repaired the backhoe, did not inspect the backhoe while in the possession of the Defendant, was not a lessor of backhoes and did not receive a definition of "merchantability" upon which an opinion could be based. (Tr. 700-702).

It is fundamental that the competence of an expert must be relative to the topic about which he is asked to testify. See, e.g., Ziegler v. Crofoot, 516 P.2d 954, (Kan. 1973); Hodo v. Lox, 437 P.2d 249 (Okla. 1967); 31 Am. Jur. 2d §27, "Expert and Opinion Evidence" at 527. The trial judge in his discretion simply determined that Mr. Babcock did not possess the requisite knowledge and skill relating to the matter upon which he sought to testify.

Even assuming, for purposes of argument, that Mr. Babcock had the necessary expertise, the Defendant must also show that the failure to receive his opinion into evidence resulted in prejudicial error. It is submitted that the question as to his opinion on merchantability was only one question in the course of a 9-day trial where the jury heard exhaustive evidence as to the question of merchantability and was necessarily aware of the Defendant's position. It is beyond credibility that the jury which heard and considered that evidence would change its position based upon Mr. Babcock's response to the objectionable question.

#### POINT IV

#### THE EXCLUSION OF EXHIBIT D-44 WHICH WAS MERELY A CUMULATIVE SUMMARY DOES NOT CONSTITUTE PREJUDICIAL ERROR.

In Point IV of its Brief, the Defendant argues that the trial judge committed prejudicial error in excluding Exhibit D-44 which was a summary prepared by Mrs. Tuft of the problems with the backhoe based upon Defendants' reports, invoices, telephone memoranda and the diary of Mr. Tuft.

It is fundamental that a party seeking to rely upon evidence must offer that evidence to the Court, which will then rule upon its admissibility. Here, the Defendant attempted to offer Exhibit D-44 into evidence, but were met with objections as to proper foundation and hearsay. (Tr. 745-746). Contrary to the Defendant's assertion, the record is devoid of any evidence that a ruling was obtained on the admissibility of this Exhibit. Rather than rule on the Exhibit when it was first offered, the court instructed the Defendant to ". . . offer it again in the morning and I'll rule on it." (Tr. 747). There is no indication in the record that the Defendant offered it again. If Defendant had obtained a ruling in chambers to which the Defendant took exception, the Defendant should have preserved the record on this point.

Even assuming arguendo that Exhibit D-44 was, in fact, offered and refused, the trial court's refusal to admit the Exhibit was proper. Plaintiffs fail to see the applicability of Rule 67 cited in Appellant's Brief at 44 which concerns ancient documents. It appears that in order for Exhibit D-44 to be admissible, it must qualify as an exception to the hearsay rule under Rule 65(13) and as a proper summary with the meaning of Rule 70(1)(f).

Rule 63(13) provides:

(13) Business Entries and the Like.  
Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness.

It is by no means clear that the sources from which Exhibit D-44 was prepared or "the method and circumstances of [its] preparation were such as to indicate their trustworthiness." To take but one example, portions of Exhibit D-44 were based upon Mr. Tuft's diaries. The trustworthiness of his diaries prepared only sporadically as he periodically visited various job sites was highly suspect and offered no assistance as to the cause of problems with the backhoe. In Buckley v. Altheimer, 152 F.2d 502 (7th Cir. 1945), the Seventh Circuit held that private diaries were inadmissible as a business record exception to the hearsay rule.

Even if Exhibit D-44 was properly admissible as an exception to the hearsay rule under Rule 63(13) and also had a proper foundation under Rule 70(1)(f), which the Plaintiffs deny, the Defendant must nevertheless show that its "exclusion" was prejudicial error. In Gull Laboratories, Inc. v. Louis A. Roser Co., 589 P.2d 756, 759 (Utah 1978), this Court stated the following test of prejudicial error:

Generally a jury verdict will only be upset where the error committed was so substantial and prejudicial that there is a reasonable likelihood that the result would have been different in the absence of such error. Id.

In the instant case, no such reasonable likelihood of a different result exists. Defendant offered Exhibit D-44 for the purpose of establishing that the backhoe had problems. Defendant admits in its Brief that Mrs. Tuft was permitted to

testify as to those problems and even used Exhibit D-44 to refresh her memory. (Appellant's Brief at 44). Thus, at best, Exhibit D-44 was an unnecessary, cumulative summary of evidence which was received and considered by the jury. As such, the Exhibit was clearly excludable in the sound discretion of the trial court under Rule 45 as being merely cumulative and necessitating undue consumption of time.

#### POINT V

#### INSTRUCTIONS NUMBERED 25 AND 29 ARE CORRECT STATEMENTS OF THE LAW.

The Defendant contends that the Trial Judge committed prejudicial error in giving the following instructions:

#### Instruction No. 25

In order for the Defendant to recover under a warranty of merchantability, the Defendant must prove by a preponderance of the evidence the following:

1. That the Plaintiff leased a backhoe to the Defendant which was not merchantable at the time of the lease; and
2. That the Defendant incurred damages; and
3. That such damages were caused proximately and in fact by the defective nature of the backhoe; and
4. That the Defendant notified Plaintiff of any breach of the warranty of merchantability within a reasonable time after the Defendant discovered or should have discovered any breach. [R. 368]

#### Instruction No. 29

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 Plaintiff may not be held liable on a theory of implied warranty. [R. 372]

Defendant contends that these Instructions, which state in relevant part that the Defendant must prove by a preponderance of the evidence that the backhoe was not merchantable or was defective at the time the lease commenced, are an inaccurate statement of the law and they are in direct conflict with the last sentence of Instruction No. 27, requested by Defendant, which states that the ". . . implied warranty of merchantability attaches to the backhoe for each separate monthly term during which time the Equipment Lease Agreement was in effect." (R. 370)

Plaintiffs concede that there may be some inconsistency between Instruction Nos. 25 and 29 and Instruction No. 27, which Instruction seems to imply that each month is a separate lease term for which a new and distinct warranty of merchantability arises. The Plaintiffs can find no authority or justification for the Defendant's "separate lease term" theory. On the contrary, the case law and commentators uniformly support the position that the warranty of merchantability relates to the time of the sale, which in this case would be analogous to the date the lease commenced.

White and Summers, well-recognized authorities on the Uniform Commercial Code, state in their treatise on the

subject, that a party seeking to recover on a warranty theory ". . . must prove that the goods did not comply with the warranty, that is, that they were defective at the time of the sale . . . [and] that his injury was caused, 'proximately' and in fact, by the defective nature of the goods . . . "

White & Summers, Uniform Commercial Code (1972) at 272.

Courts which have addressed this issue have consistently held that there can be no recovery under an implied warranty of merchantability unless it can be established that the injury complained of was caused by some defect in existence at the time of the sale or lease and not by some act or cause arising after delivery.

For example, in Lucchesi v. H. C. Bohack Co. Inc., 8 UCC Reporting Service 326, 329 (N.Y. Sup. Ct. 1970) it was held:

To be entitled to recover damages for a breach of that warranty [of merchantability] by reason of a defect in a product, the plaintiff must sustain the burden of affirmatively establishing that "the instrumentality causing injury was 'in a defective condition on the date it was delivered'" [Citations omitted], i.e., that there was no change in its condition from the time of its purchase until the time of the accident. (Emphasis added)

Similarly in Holcomb v. Cessna Aircraft Co., 8 UCC Reporting Service 992 (5th Cir. 1971) it was held:

In the absence of proof of a defect in an article on the date of delivery, the manufacturer thereof may not be held liable on the theory of implied warranty, United States Rubber Co. v. Bauer, supra.

. . . [I]n view of his ultimate concession that the extra tolerance was probably due to wear, we are inescapably driven to the unavoidable conclusion that as to the engines the evidence for the plaintiff simply failed to raise an issue for submission to a jury on the question of implied liability.

Two particularly relevant cases are Kriedler v. Pontiac Division of General Motors Corp., 15 UCC Reporting Service 798 (Tex. Ct. App. 1974) and Falcon Equipment Corp. v. Courtesy Lincoln Mercury, Inc., 19 UCC Reporting Service (8th Cir. 1976).

In Kriedler the Court held:

In the absence of proof that the implied warranty is of a continuing nature, such as for a fixed period of time, such warranty relates to the time of sale and does not cover future defects not in existence at such time or inherent in the article sold. [Citations omitted]

The evidence, given the construction most favorable to Kriedler's case, is not sufficient to negate the possibility of an intermediate act or agency (that is, an act or cause arising after delivery and before the engine fire), producing the engine failure. Neither is the evidence sufficient to negate access to and possible misrepair or maltreatment of the engine by others. 19 UCC Reporting Service at 483.

The holding in Falcon is similar:

The record also fails to show a breach of the implied warranty of merchantability or a breach of the express warranty since there is not sufficient evidence that any problems with the car were the result of defective conditions existing at the time of its sale or delivery. [Citations omitted] In fact, much of the repair history of the Mark IV could conceivably be viewed as mere maintenance resulting from the use of a car which had been driven approximately 33,000 miles at the time of trial. 15 UCC Reporting Service at 799.

Defendant concedes that many of the mechanical problems experienced by the backhoe ". . . could be attributable to ordinary wear and tear on the machine" (Brief of Appellant, p. 46), or were ". . . caused by mechanics" (Brief of Appellant,

p. 47). Therefore, as Defendant concedes on page 47 of its Brief, it is ". . . an impossible burden under the state of the evidence . . ." for Defendant to establish that the mechanical problems Defendant asserts constitute a breach of the implied warranty of merchantability stem from some defect or lack of merchantability existing at the outset of the lease rather than from some act or cause arising after delivery. In making this admission, Defendant concedes that it has not established a breach of the implied warranty of merchantability.

It is not Instruction Nos. 25 and 29 which are inaccurate statements of the law; it is Instruction No. 27, requested by the Defendant, which is an inaccurate statement of the law. Plaintiffs objected to that sentence in Instruction No. 27 which states that the implied warranty of merchantability attaches to the backhoe for each separate monthly term on the grounds that ". . . the backhoe was either merchantable or not at the time the same was leased and the term of the lease in this case is for an indefinite period of time after a minimum of thirty days." (Tr. 977).

The lease agreement [Ex. P-1] states that ". . . [t]he term of this lease shall be a minimum of 30 days beginning on March 21, 1977 and for such additional days as lessee may require such equipment." There is only one lease and only one warranty of merchantability. There is simply no basis in the law or in the evidence for Defendant's argument that each month of the lease constitutes a separate lease term which gives rise to a separate and new warranty of merchantability.

Under the test for reversible error with respect to instructions as enunciated by this and other courts, there must be some prejudice to the complaining party. In Rowley v. Graven Brothers & Co., 26 Utah 2d 448, 491 P.2d 1209 (1971); Wilkerson Motor Co., Inc. v. Johnson, 589 P.2d 505 (Okla. 1978); and Nelson v. Mueller, 533 P.2d 383 (Wash. 1975). Because the erroneous Instruction No. 27 was more favorable to the Defendant than the correct rule of law as set forth in Instruction Nos. 25 and 29, any prejudice caused thereby was in the Defendant's favor and thus provides no grounds for reversal.

#### POINT VI

#### THE TRIAL JUDGE COMMITTED NO ERROR BY GIVING INSTRUCTION NO. 20.

Defendant contends that the Judge committed prejudicial error by giving Instruction No. 20, which 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 downtime, the preferred interpretation of such action is that the plaintiff waived its claim against the defendant for those repairs and downtime not charged for rather than the interpretation that such action constitutes a course of performance which indicates an intent not to charge the defendant for any downtime or for any repairs. [R. 363]

Defendant argues two points in support of its contention of error; first, that it is, in effect, a directed verdict on the issue of waiver and, second, that it is an inaccurate statement of the law. Neither of Defendant's points is correct.

The first sentence, and the substance of Instruction No. 20, is a direct quote from Official Comment No. 3 to Section 70A-2-208 of Article II of the Utah Uniform Commercial Code, which the trial court found applicable to the present lease transaction. (Appellant's Brief at 38-9). The second sentence merely applies that rule of interpretation to the facts of the present case.

Despite the assertion of the Defendant in its Brief that the court instructed the jury that they "must find a waiver" (Appellant's Brief at 50), it is clear from reading the instruction that it merely sets forth a rule of interpretation, and in no way constitutes a directed verdict on the issue of waiver.

#### CONCLUSION

The lease agreement in this case was fairly negotiated between the parties and is clear as to its terms and conditions. The backhoe was selected by the Defendant and the Defendant was fully aware of the machine's capabilities, having leased this same backhoe twice previously. The backhoe was inspected by the Defendant prior to delivery. Following certain repairs at the first construction site, the Defendant elected to continue the use of the backhoe for approximately ten (10) months. While the backhoe required repairs during the term of the lease, the evidence is clear and the jury found that the responsibility for the payment of such repairs was the Defendant's. The evidence was not only substantial, but in some instances overwhelming and unrebutted that the repairs were necessitated by reason of lack of proper maintenance by the Defendant and negligence and abuse in the operation of the backhoe by the Defendant.

The lease agreement provides that following the expiration of the minimum term of thirty (30) days either party may terminate the Agreement upon five (5) days' written notice. The Defendant never exercised its right of termination at any time. Rather, the Defendant chose to use the machine from October, 1977 until January 20, 1978 without making any lease payments whatsoever and failed and refused to pay for repairs. Why the Defendant did not terminate the lease if the problems with the backhoe were as extensive as the Defendant urged at trial and now urges before this Court is a mystery yet unsolved.

This Court has repeatedly announced the rule that a jury verdict will not be disturbed in the absence of substantial prejudice. A necessary corollary to that rule is that there must be some solidarity in the jury verdict and that if it can be easily set aside, the right to trial by jury is weakened. The Defendant, by its appeal, claims this Court should now undertake a complete review of the evidence received and heard by the jury over a nine (9) day trial. The Defendant, in essence, seeks to have this Court substitute its judgment for that of the jury and the trial judge who denied Defendant's post-trial motions. Such violates the rule of appellate review as enunciated and followed by this Court. No argument can reasonably be made which would result in a conclusion other than that the Defendant received a fair and impartial trial, the jury considered, sorted and weighed all of the evidence presented and that the Defendant has in no way suffered any prejudice.

Based upon the foregoing, the Plaintiffs submit that the

Judgment on Verdict of Jury and the Order of the trial court denying the Defendant's Motion to Amend Judgment or in the Alternative for a New Trial be sustained and affirmed and that the Plaintiffs be awarded their costs on appeal.

DATED this 5<sup>th</sup> day of May, 1980.

RESPECTFULLY SUBMITTED,

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By 

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By 

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CERTIFICATE OF SERVICE

This is to certify that two copies of the above and foregoing Respondents' Brief was served upon the Defendant herein by hand delivering a copy thereof to its attorney James A. McIntosh, 36 South State Street, Suite 800, Salt Lake City, Utah this 5<sup>th</sup> day of May, 1980.

