

1988

Masonry Equipment and Supply Company v. Willco Associates : Brief of Appellant

Utah Supreme Court

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BRIEF

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DOCKET NO. **880072-CA** IN THE SUPREME COURT OF THE STATE OF UTAH

MASONRY EQUIPMENT & SUPPLY
COMPANY,

Plaintiff-Respondent,

vs.

WILLCO ASSOCIATES,

Defendant-Appellant.

880072-CA
Case No. ~~860324~~

BRIEF OF DEFENDANT-APPELLANT
WILLCO ASSOCIATES

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT FOR SALT LAKE COUNTY,
THE HONORABLE J. DENNIS FREDERICK, PRESIDING.

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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COMPANY,

Plaintiff-Respondent,

vs.

WILLCO ASSOCIATES,

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IN THE SUPREME COURT OF THE STATE OF UTAH

MASONRY EQUIPMENT & SUPPLY COMPANY,)	
)	
Plaintiff-Respondent,)	Case No. 860324
)	
vs.)	
)	
WILLCO ASSOCIATES,)	
)	
Defendant-Appellant.)	

BRIEF OF DEFENDANT-APPELLANT
WILLCO ASSOCIATES

ISSUES PRESENTED FOR REVIEW

1. Did the lower court commit reversible error in refusing to hold, as a matter of law, that an accord and satisfaction had been reached between plaintiff Masonry Equipment & Supply Company ("MESCO") and defendant Willco Associates, Inc., ("Willco")?
2. Was the claimed accord and satisfaction between MESCO and Willco supported by consideration?
3. By cashing Willco's paid-in-full check, did MESCO assent to the terms of the accord and satisfaction?
4. Was MESCO's claim against Willco for damages unliquidated at the time Willco tendered its check as payment in full?
5. Were the additional repair charges claimed by MESCO disputed by the parties in good faith?

6. Did Willco surrender a legally enforceable right in entering into the accord and satisfaction with MESCO?

7. Was the lower court's finding that there was no offsetting downtime suffered by Willco supported by sufficient evidence?

8. Did the trial court commit error in refusing to dismiss MESCO's complaint for failure to give the required written notice to Willco?

9. Is MESCO entitled to prejudgment interest at 12 percent per annum?

10. Was the court's ruling that MESCO is entitled to judgment against Willco in the amount of \$8,626.82 supported by sufficient evidence?

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from the Findings of Fact and Conclusions of Law entered by the court on May 8, 1986, and from the Judgment docketed on May 9, 1986, by the Third Judicial District Court for Salt Lake County, the Honorable J. Dennis Frederick presiding. The judgment against Willco is for the principal sum of \$8,626.82, together with interest, costs, and attorneys' fees.

B. Disposition of the Case Below

The action was commenced by MESCO on December 3, 1982. (R. 2.) Willco filed its Answer on April 4, 1983. (R. 5.) The case came on for trial before the Honorable J. Dennis Frederick on March 5, 1986. The court made its ruling from the bench following the trial. (Tr. 164.) The court entered its Findings of Fact Conclusions of Law (R. 136), over Willco's objections (R. 102.) and the Judgment was docketed on May 5, 1986. (R. 141.)

C. Statement of Facts.

This is a suit on a contract for damages allegedly caused to a LC-30 Gerlinger crawler that was rented by Willco Associates, Inc., ("Willco") from Plaintiff Masonry Equipment & Supply Company ("MESCO").

Willco is a licensed contractor and does business as a horizontal boring and tunneling contractor. Willco rented the machine from MESCO commencing on December 11, 1981, intending to use the machine in connection with a contract that Willco had with Kennecott Corporation by which Willco was to bore a seven foot diameter tunnel underneath a railroad track and insert a pipeline. The terms of the rental of the machine by Willco were negotiated between Frank Willden, Willco's president, and Lonnie Yeaman, an employee of MESCO. Mr. Willden explained to Mr. Yeaman the purposes for which Willco

needed the machine. Mr. Yeaman represented that the Gerlinger Crawler would serve all of Willco's needs in connection with the Kennecott job. (Tr. 141.)

During the time that Willco used the Gerlinger Crawler on the Kennecott job, Willco experienced significant difficulties and problems with the machine, which caused Willco to lose approximately 80 hours down time, during which its equipment and employees were idle. (Tr. 80, 129, 141-58.) Mr. Willden testified, that based on his experience in the heavy equipment industry, the machine was too heavy for the type of pad used on the tracks. (Tr. 141-42.) As a consequence, the pads continually broke off of the machine and had to be welded back on. Also, the machine had problems starting, caused by a short in the battery. (Tr. 143.) Further, the catalytic converter was too small for the machine and melted. (Tr. 56.) MESCO made a number of service calls to the Kennecott job to work on the machine. Willco was not charged for these calls. (Tr. 32, 149-50.) Willco incurred damages of \$10,630 as a result of the problems caused by the machine. (Tr. 148-49.)

The first rental agreement (Exhibit 1) was signed by Willco, and provided that the period of the rental would be four months. Willco returned the machine on March 30, 1982. When the machine was returned, MESCO inspected it and claimed the machine was damaged. MESCO told Willco at that time that

it would be charged for the additional repairs. The final rental agreement signed by Willco dated March 11, 1982, (Exhibit 3) provided: "Repairs to be made will be billed out on separate invoice." MESCO gave to Willco Repair Order No. 1426, dated March 2, 1982, (Exhibit 9) charging Willco the sum of \$2,390.06 for repairs to the machine for track and for a catalytic converter.

After receiving Repair Order No. 1426, Frank Willden had at least two conversations with Matthew Lyman, an officer of MESCO, in which Mr. Willden disputed that Willco was responsible for the damages claimed on Repair Order No. 1426 or for any other damages MESCO claimed had been caused to the machine. (Tr. 57-58, 75-76, 128-33, 153-54.) Mr. Willden testified that in his second conversation with Matt Lyman, he agreed that Willco would pay the \$2,390 indicated on Repair Order No. 1426 so long as MESCO agreed to accept that payment as payment in full for all charges that MESCO claimed that Willco owed, including charges on Repair Order 1426 and any other charges or damage to the machine. Id. Matthew Lyman testified at trial that he could not remember one way or the other whether such a conversation occurred. He did not deny that he had had such a conversation with Mr. Willden. (Tr. 94, 99.)

At the time Mr. Willden had the two conversations with Matthew Lyman regarding Repair Order No. 1426, Mr. Willden told Mr. Lyman that MESCO should reimburse him for his damages caused because the machine had caused so many problems and had not functioned in accordance with the representations and warranties made by Lonnie Yeaman, MESCO's employee. Frank Willden and Matthew Lyman agreed that on payment by Willco of the amount indicated on Repair Order No. 1426, Willco would release all its claims against MESCO for down time and MESCO would release all its claims against Willco for further damages to the machine. (Tr. 129-32.)

Following the second conversation with Matthew Lyman, Willco tendered its check (Exhibit 7) to MESCO in the amount of \$2,390, dated October 4, 1982. The check was tendered as payment in full of Willco's entire account with MESCO, and stated on the back:

Endorsement of this check constitutes payment in full of your account #: 2224 Willco Assoc.

2224 was the account number assigned by MESCO to Willco. (Tr. 93.) MESCO accepted and cashed the check.

Approximately three weeks after the check was cashed, MESCO disassembled the machine and inspected it. (Tr. 103, 108-09.) MESCO thereafter prepared Repair Order No. 1656 (Exhibit 4) which described damages totally in the amount of

\$8,626.82. (Tr. 108.) The machine was never actually repaired. (Tr. 113.) Farrell Lewis, an employee of MESCO, testified that the charges used on the Repair Order came from the manufacturer's suggested price list. (Tr. 103.) Exhibit 4 was admitted into evidence over Willco's objection. (Tr. 106-07.) Prior to Repair Order No. 1656, Willco had never been advised about the amount of damages claimed by MESCO.

After receiving Repair Order No. 1656, Willco refused to pay on the grounds that MESCO had cashed its check, which Willco had tendered as payment in full of its whole account. Willco further denied liability for any of the repairs indicated on the Repair Order. This suit followed.

SUMMARY OF ARGUMENT

1. Willco and MESCO reached an accord and satisfaction. In conversations following the return of the machine, the parties agreed that if Willco would make payment on Repair Order No. 1426, MESCO would drop its claims for any additional damage to the machine. Willco, in turn, agreed to drop its claims against MESCO for damages it incurred because the machine did not work properly or as represented. Willco tendered its check for \$2,390 with a statement on the back that endorsement would constitute payment in full of Willco's entire account. The check was accepted and cashed. At the time the check was tendered, the amount of damages to the machine was

unliquidated and disputed. The accord and satisfaction claimed by Willco was supported by consideration.

2. The evidence was uncontroverted that Willco incurred damage as a result of down time on the Kennecott job incurred because the machine did not work properly or as represented. The testimony was undisputed that the value of the down time was \$10,630.00.

3. MESCO was not entitled to maintain its action against Willco because it failed to give written notice to Willco as required by the Rental Agreement.

4. MESCO is not entitled to prejudgment interest at the rate of 12 percent per annum. The statutory prejudgment interest rate is 10 percent per annum.

5. The trial court's holding that MESCO was entitled to judgment against Willco in the amount of \$8,626.82 was unsupported by sufficient evidence. MESCO disassembled the machine after it was returned by Willco in order to determine what damage had been caused. There was no evidence that MESCO had done a similar type of inspection prior to Willco's taking possession of the machine. There was no evidence that the damage to the machine was caused while it was in the possession of Willco. Further, Repair Order 1656 (Exhibit 4), which sets forth the damage amount claimed by MESCO was admitted improperly because it was without foundation and constituted hearsay.

ARGUMENT

I.

MESCO AND WILLCO REACHED AN ACCORD AND SATISFACTION.

A. Elements of an Accord and Satisfaction.

Willco tendered its check for \$2,390 (Exhibit 7) to MESCO as payment in full of all amounts that it may have owed to plaintiff. In Finding of Fact No. 8, the lower court found:

That the defendant submitted to the plaintiff a check with restrictive endorsements claiming full settlement and claiming an oral accord and satisfaction, which check was cashed by plaintiff.

(R. 137.) The check was tendered, not as payment only of Repair Order No. 1426, but as satisfaction of Willco's entire account with MESCO. By endorsing and cashing the check with the condition on the back, MESCO entered into an accord and satisfaction with Willco that discharged any further liability.

This Court stated the elements of an accord and satisfaction in the context of a "paid in full" check in Marton Remodeling v. Jensen, 706 P.2d 607 (Utah 1985). There, as here, the defendant had tendered a check as payment in full of the entire contract. The defendant conceded that the amount of the check, \$5,000, was due and owing to the plaintiff. This Court held that the general rule applied "that an accord and satisfaction of a single claim is not avoided merely because the amount paid and accepted is only that which the debtor

conceded to be due." Id. at 609 (emphasis added). The Court held that an accord and satisfaction had been reached, stating the elements as follows:

An accord and satisfaction requires that there be an unliquidated claim or a bona fide dispute over the amount due. . . . Payment must be tendered in full settlement of the entire dispute and not in satisfaction of a separate undisputed obligation However, when a bona fide dispute arises (the existence of which Marton does not dispute in this appeal) and a check is tendered in full payment of an unliquidated claim as we have here, arising out of a "time and materials" contract, the creditor may not disregard the condition attached.

Id. at 609 (citations omitted).

In describing the elements of an accord and satisfaction in Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369 (Utah 1980), this Court indicated that consideration need be given for the accord. The Court stated:

Where the underlying claim is disputed or uncertain ("unliquidated"), the obligor's assent to the definite statement of performance in the accord amounts to sufficient consideration, as it constitutes a surrender of the right to dispute the initial obligation.

. . . In such cases, consideration is often found in the obligor's agreement to alter the means or method of payment of the obligation initially owed, or to surrender the assertion of a legally enforceable right.

Id. at 1372 (citations omitted). See 15 S. Williston, A Treatise on the Law of Contracts § 1854, at 542 (3d ed. 1972) (A creditor who has received a check tendered as full

satisfaction of a claim that is unliquidated or disputed in good faith must accept it as such or return it); Ralph A. Badger & Co. v. Fidelity Building & Loan Ass'n, 94 Utah 97, 75 P.2d 669, 676 (1938) ("Settlement of an unliquidated or disputed claim where the parties are apart in good faith presents such consideration"); Ashton v. Skeen, 85 Utah 489, 39 P.2d 1073, 1076 (1935) ("Before there can be an accord and satisfaction by acceptance of a less sum than claimed, there must be an unliquidated claim or a bona fide dispute as to the amount thereof.")

Thus, there was consideration for the accord and satisfaction between Willco and MESCO in the present case if the claim being settled by payment of Willco's \$2,390.00 check was either unliquidated or disputed in good faith, or, as the Court noted in Sugarhouse Finance, if Willco had agreed to surrender a legally enforceable right. 610 P.2d at 1372.

B. Payment of an undisputed portion of an unliquidated claim constitutes consideration.

Although Willco disputed that it owed anything to MESCO, it offered to settle for \$2,390, which was the amount of Repair Order No. 1426 (Exhibit 9). In Finding of Fact No. 15, the lower court found that there was no separate consideration for the claimed accord and satisfaction (R. 138). In Finding No. 10, the lower court stated further: "The Court does not

find that the defendant did anything more than the defendant was obligated to do as he paid the balance due and owing on that invoice." (R. 137.) These two findings are in error as a matter of law. The trial court apparently believed that if Willco did in fact owe the amount paid by the check, that it could not constitute consideration for an accord and satisfaction. Even if the amount of Repair order No. 1426 was legitimately owed by Willco, that there was consideration since the check was tendered as satisfaction of Willco's entire MESCO account, which was unliquidated when the check was tendered. The court should have held that consideration was sufficient even if only part of the account was disputed. Professor Williston states:

Not infrequently, though a claim is unliquidated or the subject of a bona fide and reasonable dispute, it is conceded that at least a certain amount is due. While it would appear that in paying this conceded part of the claim, the debtor was merely doing what he was previously bound to do, the law looks upon an unliquidated or disputed claim as a whole and does not attempt to set a value upon it, or to define the extent of the debtor's legal obligation. Accordingly, such a claim is dealt with as a chattel is dealt with, as something the adequacy of which as consideration will not be measured. By the weight of authority, the payment of the amount admittedly due will support a promise to discharge the whole claim.

1 S. Williston, supra § 129, at 528 (citations omitted; emphasis added).

In Marton Remodeling this Court held that the parties had reached an accord and satisfaction where the defendant had paid only what it conceded was due. The Court stated the rule that "an accord and satisfaction of a single claim is not avoided merely because the amount paid and accepted is only that which the debtor concedes to be due." 706 P.2d at 609 (emphasis added). The Marton Remodeling opinion cited the case of Air Van Lines, Inc. v. Buster, 673 P.2d 774 (Alaska 1983), in which the Alaska Supreme Court, faced with a similar issue, held:

Although the record would permit an inference supporting the ABL claim that Keystone paid only that part of the debt which was undisputed, a majority of the cases considering this issue hold that a valid accord and satisfaction nevertheless exists. . . . The authorities conclude that the entire claim, including both the disputed and undisputed elements, is unitary and not subject to division so long as the whole claim is unliquidated. . . . AVL's entire claim was unliquidated. Keystone's obligation to pay a part of AVL's invoice, even if conceded, did not serve to render the conceded amount liquidated.
. . .

We are persuaded to adopt the majority rule and hold that Keystone's conditional offer to pay only the undisputed part of the unliquidated debt in full satisfaction of that debt was supported by consideration.

Id. at 778 (emphasis added; citations omitted.) The Utah Supreme Court relied on the above-quoted statement from the Air Van Lines decision in Marton Remodeling. 706 P.2d at 609.

Thus, even though the trial court believed that Willco did in fact owe the \$2,390.06, as indicated on Repair Order No. 1426, because the check was tendered as payment in full of the entire account, which was unliquidated and disputed, the court committed error in holding that the accord and satisfaction was not supported by consideration.

The evidence at trial was undisputed that MESCO had knowledge of the damage to the machine when the machine was returned on March 30, 1982. Willco submitted its check in satisfaction of its entire amount. The back of the check recited that endorsement would constitute "payment in full on your account #: 2224 Willco Assoc." (Exhibit 7.) 2224 was the number assigned by MESCO to Willco's entire account. Willco does not dispute the lower court's Finding No. 8 that the check was tendered as "full settlement." MESCO accepted the check knowing that, although it was payment of Repair Order No. 1426 (Exhibit 9), it was tendered as payment in full of Willco's entire account with MESCO, which included claims for damage to the machine.

C. By cashing Willco's paid-in-full check, MESCO assented to the terms of the accord and satisfaction.

This Court's Sugarhouse Finance opinion specifies that there must be "an assent or meeting of the minds of the parties" in order to have an accord and satisfaction. 610 P.2d at 1372.

Frank Willden testified for Willco that he had two conversations with Matthew Lyman regarding the damage claimed by MESCO. Mr. Lyman was an officer of MESCO at the time. (Tr. 34, 81.) Mr. Willden testified that he and Mr. Lyman reached an agreement that MESCO would accept payment of Repair Order No. 1426 (Exhibit 9) as satisfaction of Willco's entire account, including damages that MESCO claimed Willco caused to the machine. Regarding those two conversations, Mr. Willden testified:

Q First of all, can you tell me with whom you spoke concerning these charges?

A I spoke with Matt Lyman. I spoke to someone else when I wrote the check out, but I don't remember who.

Q How many conversations did you have with Matt Lyman specifically about that particular charge and whether it was owed or not?

A Two definitely, maybe another one.

Q When was the first one?

A The first one would have been when I saw this work order, probably sometime in March or probably April, probably in April.

Q Was it after the machine had been returned?

A I'm pretty sure it was.

Q Can you tell us then what was said by yourself and what was said by Mr. Lyman? This was on the telephone, wasn't it?

A Yes, it was.

Q You just tell us what was said between the two of you then.

A I told him I didn't feel we owed it, the reason being that the catalytic converter had melted down which was not my fault, and that the tracks, I didn't feel the tracks had to be replaced.

Their own mechanic had told me, just weld plates on. So they should have been able to just weld the plates on and repair it that way. That's what they told me to do to make the machine go. He told me that it was a new machine, and nobody else had had those problems, and that he figured that I had done the damage, that I had damaged it.

Q Did he say anything about what kind of damage?

A He said the whole undercarriage was torn up.

Q What did you say about that?

A I told him I did not agree with that.

Q Did you say why?

A Well, yes, I told him we had been using the machine, we used it right up until the day we turned it in. We drove it on the truck to return it in. It was running as well as it had ever run, and I told him that he had no right to charge us for something that was his fault.

Also, you know, we discussed who was going to pay for my down time, because I had lost a lot of time, and I needed to be on other jobs. I was paying rental and expenses.

Q What did you say to him about the down time?

A I asked him if he would pay for it.

Q What else did you say to him about that?

A I told him that we had been shut down at least 80 hours. I remember that figure, because I had had -- I was concerned about it.

Q Did you tell him why you had been shut down for at least 80 hours?

A Yes, I did.

Q What did you say?

A Almost every morning the machine would not start. There was something wrong in the wiring, somewhere that the battery would continuously run down. They replaced the starter, but it still would not start, and the tracks kept falling off. Every day, just about, we had to weld three plates back on the tracks.

Q Was there anything else that you and he discussed in that first conversation?

A Well, we discussed the actual quality of the machine. I didn't feel it was a very good machine. I considered, which I told him --

Mr. Fullmer: I object to that, your Honor, as to what he feels the quality was. He's the one that rented the machine, and he's the one who was using it.

The Court: He's relating, as I understand it, Mr. Fullmer, what he said in the conversation. Overruled.

The Witness: I told him that I actually would consider getting another machine. When I originally looked at this, my intention was to keep the machine.

The Court: Well, just a minute. Limit your testimony to the question. That is, what was said in the conversation, not all of your feelings out of the conversation. What was said in the conversation.

Q (By Mr. Marshall) Was there anything else in that first conversation with Matthew Lyman then?

A That's mostly what I recall.

Q When was the second conversation you recall?

A It was sometime later. It was quite a while [sic] later.

Q Can you remember approximately when?

A It would have probably been in three or four months later, July or August.

Q Again, was this on the telephone?

A Yes, it was.

Q Tell the court what was said in that telephone conversation.

A In that telephone conversation, he again -- he had called and asked for payment or asked me to call him back, which I had returned his call, and he wanted to know when I was going to pay it, and I told him that I didn't feel we owed it.

Q This is the \$2390?

A This is the 2300. In the first conversation, he had also said that there was a lot of damage done on the undercarriage, and we discussed this damage on the undercarriage. Again, he says, it's strange that you are the only one that's had this problem. He said, you are -- nobody else had this problem.

I said, I can't help it. The machine is too light, and that's why I'm not going to buy it. I told him I would pay him \$2390 and nothing else, that would be for everything that Willco had that we had rented from him, any damages, anything, but on the same token, I didn't want any other

charges come in, because even if we did damage the machine, that we had \$8,000, \$9,000 worth of down time that they should pay us. He agreed to accept the \$2390.

Q What did he say?

A He told me, he says, if you will pay me the \$2390, he says, we will call it even. He says, that will be fair.

.

Q Did you say anything to him about the kind of check you were going to write to MESCO?

A I told him that, you know, we would put pain [sic] in full on the check.

Q What did he say?

A He said, that's fine. I think his exact words is, I see no problem with that.

Q What position did you understand Matt Lyman to have at the time you had those conversations?

A I don't know how I knew it. I always had the understanding that he was one of the owners.

(Tr. 127-33.) See also Tr. 57-62, 74-75, 153-54.

Mr. Willden further testified that before he sent the check to MESCO he called and asked for Matt Lyman, who was not there. He then spoke with someone else and said that Willco was sending in the check and that he was going to put the statement on the back that endorsement would constitute payment in full. (Tr. 133-34.) He sent the check in, which MESCO endorsed and cashed.

At trial, Mr. Lyman testified that he could not remember one way or the other having such a conversation with Mr. Willden regarding the charges or the settlement with Willco. (Tr. 94.) He also could not remember any conversation regarding Willco's sending a paid in full check. (Tr. 95.) Mr. Lyman did not deny that the conversations occurred. He only testified he couldn't remember. (Tr. 94, 95, 99.) He testified that he could not even remember conversations with Willco that he made handwritten notations about on the aging analyses (Exhibit 10). (Tr. 96.)

The lower court made no finding about whether the conversations between Frank Willden and Matthew Lyman occurred. Mr. Willden's testimony was uncontroverted and constituted ample evidence of an agreement between Willco and MESCO that the check would constitute payment in full. The lower court did find that Willco tendered the check "claiming full settlement and claiming an oral accord and satisfaction." (R. 137.) Thus, the court plainly found that when Willco submitted the check, it believed that an oral accord and satisfaction had been reached with MESCO.

Even if the lower court had found that Matthew Lyman did not assent to the accord and satisfaction on behalf of MESCO, as a matter of law the court should have implied an assent on the grounds that MESCO accepted and cashed Willco's

check which was tendered as payment in full. This rule was summarized as follows by Professor Williston:

If the parties are dealing orally with one another and the debtor offers the creditor a check in full satisfaction which the creditor takes, it must be inferred that he assents to the terms.

. . . .

So if the debtor laid down the check and departed, saying, "If this is taken, it is full satisfaction," (and similarly if the debtor sends the check with a like notice), and the creditor takes it, saying nothing, his taking will be equivalent to an expression of assent to the offer, whatever his mental intent.

If he shows by some act or word, not brought home to the debtor at the time that he takes the check, that his intention is not to treat the debt as satisfied, he should still be regarded as assenting to the terms of the debtor's offer, for under the circumstances the debtor has reason to suppose that the taking of the check is a manifestation of assent.

15 S. Williston, supra § 1855, at 549, 51 (citation omitted; emphasis added). See Restatement (Second) of Contracts § 281 comment d (1981) (Acceptance by creditor of a paid in full check, where there is consideration, may form the basis of an enforceable accord).

Consistent with this rule, courts have thus held that a creditor who accepts a check marked "payment in full" does so at his own risk. In Marton Remodeling v. Jensen, 706 P.2d 607 (Utah 1985), this Court held that there was an accord and

satisfaction where the defendant tendered a paid-in-full check for the undisputed amount even though the creditor marked "not full payment" on the check. The Court stated:

It is of no legal consequence that Marton told Jensen upon receipt of the \$5,000 check that he did not regard it as payment in full. Marton could not disregard with immunity the condition placed on the check by Jensen by writing "not full payment" under the condition.

706 P.2d at 609. See Air Van Lines, Inc. v. Buster, 673 P.2d 774, 778 (Alaska (1983)) ("AVL had the option either to tear up the check and sue for what it felt was due or to cash the check and consider the contract dispute resolved. When it cashed the check it effectively accepted Keystone's offer to compromise and satisfy the debt").

In the present case, MESCO accepted and cashed Willco's check which was tendered as full settlement, according to Finding of Fact No. 8. (R. 137.) That finding by itself contains all of the elements of an accord and satisfaction, and the lower court erred in not so finding. The necessary assent should be implied where MESCO accepted the check tendered as payment in full. Even if MESCO had written "not full payment" or "endorsed under protest" on the check, it would still be held to have assented, as shown by the Martin Remodeling case.

D. MESCO's claim against Willco was unliquidated at the time the check was tendered as payment in full.

Although the lower court did not make any finding regarding whether the debt sued on by MESCO was unliquidated, the evidence was uncontroverted that it was. Because Willco's alleged debt to MESCO was unliquidated at the time the check was tendered, the lower court committed error in not holding that there was a valid accord and satisfaction supported by consideration.

According to this Court's Marton Remodeling opinion, "[a]n accord and satisfaction requires that there be an unliquidated claim or bona fide dispute over the amount due." 706 P.2d at 609. In Sugarhouse Finance, this Court used the term "uncertain" in defining what was meant by "unliquidated." 610 P.2d at 1372. The evidence was clear that if anything was uncertain, it was the total cost of the repairs to the machine, which was not calculated until after MESCO had received and cashed Willco's check. Farrell Lewis testified that he did not prepare Exhibit 4 until October 28, 1982, when the machine was disassembled. (Tr. 102, 108-09.) Willco's check was received and cashed on or about October 4, 1982. (Exhibit 7.)

Professor Williston elaborated on what constitutes an unliquidated account, noting that "[a]n unliquidated claim is one, the amount of which has not been fixed by agreement or

cannot be exactly determined by the application of rules of arithmetic or of law." 1 S. Williston, A Treatise on the Law of Contracts § 128, at 526 (3d ed. 1957). It has been further stated:

A claim is "unliquidated," within the meaning of the rule relating to partial payment, or payment of a less amount than is claimed, as an accord and satisfaction, where the creditor would be compelled, but for the settlement, to bear some further burden in order to have the amount of the claim so fixed or established that the debtor would be bound thereby. Thus, a claim is unliquidated, even if it appears that something is due

1 C.J.S. Accord and Satisfaction § 47, at 528-29 (1985) (emphasis added).

Thus, in Sharpe v. Nationwide Mutual Fire Insurance Co., 62 N.C. App. 564, 302 S.E.2d 893 (1983), the court held that a claim for insurance coverage for damages from a fire was unliquidated where the actual cash value of the items destroyed "could not be resolved by a predetermined mathematical formula, and it was not agreed prior to the date of loss." Id. at 894. Similarly, a claim is unliquidated where the amount "could only be established by a jury." Georgia Ports Authority v. Mitsubishi International Corp., 156 Ga. App. 304, 274 S.E.2d 699, 702 (1980). An unliquidated claim "is one which one of the parties to the contract or transaction cannot alone render certain." Marathon Oil Co. v. Hollis, 167 Ga. App. 48, 305 S.E.2d 864, 868 (1983).

Professor McCormick defined an unliquidated claim as follows:

A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. Examples are claims upon promises to pay a fixed sum, claims for money had and received, claims for money paid out, and claims for goods or services to be paid for at an agreed rate.

C. McCormick, Handbook on the Law of Damages § 54, at 213 (1935). See Freemont National Bank and Trust Co. v. Collateral Control Corporation, 724 F.2d 1410, 1415 (8th Cir. 1983) (A claim is liquidated if it is fixed and determined or if it is readily determinable by computation or by reference to a recognized standard"); Robinson v. Loyola Foundation, Inc., 236 So. 2d 154, 157 (1970) ("A claim for debt or damages is held to be liquidated in character if the amount thereof is fixed, has been agreed upon, or is capable of ascertainment by mathematical computation or operation of law"); Hallett Construction Co. v. Iowa State Highway Commission, 258 Iowa 520, 139 N.W.2d 421, 426 (1966) ("A demand is not liquidated, even if it appears that something is due unless it appears how much is due"); Westamerica Securities, Inc. v. Cornelius, 214 Kan. 301, 520 P.2d 1262, 1270 (1974) ("A claim becomes liquidated when both the amount due and the date on which it is due are fixed and certain, or when the same becomes definitely ascertainable by mathematical computation").

The evidence in the present case was undisputed that MESCO's claim against Willco for repairs to the crawler was unliquidated at the time Willco tendered the payment in full check. MESCO did not send Willco the repair order for the additional repair charges until after Willco's check had been received and cashed. Willco tendered the check not just as payment of Repair Order No. 1426, but as payment in full of its entire MESCO account, No. 2224. At the time the check was tendered, the claim for additional repairs was unknown and uncertain. Being thus unliquidated, the accord and satisfaction was supported by consideration and must be upheld.

E. The claim for additional repair charges was disputed by the parties in good faith.

According to Marton Remodeling, an accord and satisfaction will also be supported by consideration if there is a "bona fide dispute over the amount due." 706 P.2d at 609. Thus, consideration for the accord and satisfaction claimed by Willco will also be found if the additional repair charges were disputed in good faith. It is not necessary that the court to find that Willco's dispute with MESCO over the charges was meritorious, so long as the dispute was made honestly and in good faith. The Supreme Court of Utah stated in Ashton v. Skeen, 85 Utah 489, 39 P.2d 1073 (1935), that there will be consideration for an accord and satisfaction

where there was "a bona fide dispute as to the amount thereof. It is not necessary for the claim to be well founded, but it must be made in good faith." Id. at 1076 (emphasis added.)

In its decision in Marton Remodeling this Court relied on the Alaska decision of Air Van Lines, Inc. v. Buster, 673 P.2d 774 (Alaska 1983), citing it four times. With respect to the issue whether there was a bona fide dispute sufficient to support the accord and satisfaction, the Alaska court stated:

For AVL [the creditor] to avoid summary judgment on the issue of whether the accord was supported by adequate consideration, it would have to establish either bad faith or the absence of a bona fide dispute. AVL could not establish Keystone's [the debtor] bad faith simply by showing that a jury might have found in its favor on the overtime claim. In the absence of some direct evidence of bad faith, AVL must establish that at the time it ignored the restrictive endorsement and cashed the check no bona fide dispute existed as a matter of law. Because reasonable people couple differ on the issue of whether Keystone's conduct constituted implied authorization to pay overtime, there was a bona fide dispute on this issue as a matter of law. We therefore hold that AVL negotiated the full payment check at its peril.

Id. at 778 (emphasis added; citations omitted).

It has also been stated:

It is not material which of the parties is right in his contention, or that either or both are mistaken; it also makes no difference whether the dispute arises over, or involves, a question of fact or one of law. Furthermore, it is not necessary that the contention of either party be

well founded in fact or in law, or rest upon sound reasons, or that the matter be really doubtful, for the court will not inquire into the merits of the dispute, so long as it is founded on some reasonably tenable or plausible grounds.

Basically, it is sufficient if the parties honestly believe in the correctness of their respective positions, and assert their claims in good faith, or consider the matter so far doubtful as to make it the subject of a mutual adjustment or settlement; even a full knowledge of all the facts is not a prerequisite to the existence of a good faith controversy.

1 C.J.S Accord and Satisfaction § 46, at 526-27 (1985) (citations omitted emphasis added). See 1 S. Williston, supra, § 128, at 526 (3d ed. 1957) ("The surrender of a disputed claim, whether unliquidated or liquidated, if the dispute is honest and not obviously frivolous, is consideration which the law will not attempt to evaluate.")

The testimony of Frank Willden at trial was uncontroverted that he disputed with MESCO both liability for and the amount of the additional repair charges contained on Repair Order No. 1426, and for any other damage MESCO claimed. (Tr. 57-58, 75-76, 128-33, 153-54.) MESCO's president, Del Lewis, testified that he had had a conversation with Frank Willden in which Mr. Willden stated "that he didn't feel that he was responsible for the damages." (Tr. 20.) Mr. Willden testified that Willco had had difficulties with the crawler that resulted in approximately 80 hours of downtime. (Tr.

143.) He testified further that, based on his experience, the machine was too heavy for its undercarriage and that the pads on the tracks were too thin. (Tr. 142.) Willco's dispute was in good faith. Mr. Willden testified that because of the problems Willco had with the machine on the Kennecott job, Willco lost approximately 80 hours. The machine has substantial problems with its starter (Tr. 143), with the catalytic converter (Tr. 56), and with the tracks, which kept falling off, (Tr. 142.). Mr. Willden testified at some length regarding the problems Willco had on the job, (Tr. 143-49, 161-62), which caused damages in the amount of \$10,630. (Tr. 148-49.) The damages incurred by Willco were in breach of specific warranties made by MESCO that the machine would be suitable for Willco to use on the Kennecott job. (Tr. 141.) Mr. Willden testified that Willco would not have rented the machine had he known how the machine would actually operate. (Tr. 141.) MESCO'S president, Del Lewis, testified that he was aware of the problems with the starter and with the plates. (Tr. 33-34.) Frank Willden testified that MESCO made some service calls to repair the machine on the job for which Willco was not charged. (Tr. 149-50.) Del Lewis also testified that he knew of six or seven service calls made by MESCO employees to the Kennecott job for which Willco was not charged. (Tr. 32-33.)

The evidence was uncontroverted that Willco disputed the repair charges in good faith. That fact, by itself, was sufficient to constitute consideration for the accord and satisfaction. The lower court committed reversible error in not so holding.

F. Willco surrendered a legally enforceable right.

According to the Sugarhouse Finance case, an accord and satisfaction will also be supported by consideration if the debtor has surrendered a legally enforceable right. 610 P.2d at 1372. The evidence in the present case was undisputed that Willco agreed to surrender its claims against MESCO for breach of contract and warranty if MESCO would accept the \$2,390 check as payment in full. MESCO did not rebut Frank Willden's testimony that the crawler did not work as had been represented by MESCO (Tr. 141) and that Willco suffered over \$10,630 in damages as a result of the delay. (Tr. 148-49.) The relinquishment of its claim for those damages by Willco also constituted valid consideration for the accord and satisfaction. The trial court held that Willco "failed to prove any offsetting down time." (R. 138.) this finding was contrary to the undisputed evidence concerning the difficulties that Willco suffered because the machine didn't work.

G. The policy of the law favors the finding of an accord and satisfaction.

According to the Utah Supreme Court in the Sugarhouse Finance case, "the modern trend among the courts" is to uphold agreements for an accord and satisfaction "wherever possible." 610 P.2d at 1372. In its Marton Remodeling opinion the Court observed further that "[t]he law favors compromise in order to limit litigation. Accord and satisfaction serves this goal." 706 P.2d at 610. This Court should further these policies and hold that the trial court erred in not holding that there was an accord and satisfaction between the parties.

II.

THE LOWER COURT'S FINDING THAT THERE WAS NO
OFF-SETTING DOWN TIME SUFFERED BY WILLCO IS
NOT SUPPORTED BY SUFFICIENT EVIDENCE.

In Finding of Fact No. 14, the lower court found:
"That the defendant failed to prove any offsetting down time." Accordingly, the court not only refused to hold that there was no accord and satisfaction but that Willco was not entitled to any set off as a result of damages Willco incurred because the machine did not work as had been represented by MESCO. At the trial, Frank Willden testified regarding the problems and difficulties that Willco experienced because the machine did not work. He stated that one of MESCO's employees, Lonnie Yeaman, represented to Mr. Willden during their initial

negotiations that the Gerlinger crawler would be well suited to Willco's needs on the Kennecott job. Mr. Willden relied on Mr. Yeaman's representations. (Tr. 70, 141.) Mr. Willden testified that had he known how the machine would actually operate, he would never have rented it. (Tr. 141.) He testified that the machine was ill-suited for the kind of work necessary on the Kennecott job. Moreover, the battery had a short in it, which caused continual problems to the machine trying to start it. MESCO's president, Del Lewis, testified that he was aware of the problems with the battery and he was aware that MESCO made a number of service calls to the Kennecott job to try to fix the machine. Willco was not charged for any of these calls. (Tr. 32-33.)

As a result of the difficulties experienced with the machine, Willco experienced a significant down time on the Kennecott job where men and equipment were idle. (Tr. 143-49.) Mr. Willden testified that the damages suffered by Willco as a result of the problems with the machine equaled \$10,630.00. (Tr. 148-49.)

There was no evidence to the contrary regarding the difficulties experienced by Willco. MESCO's president acknowledged that there were problems with the starter and with the tracks. The trial court committed error in finding that Willco had not proved any off setting down time and in holding

that Willco is not entitled to any off sets against the judgment. Because the evidence was uncontroverted, the lower court committed error in so holding.

III.

DID THE LOWER COURT ERR IN REFUSING TO HOLD THAT MESCO WAS NOT ENTITLED TO MAINTAIN THIS ACTION FOR FAILURE TO GIVE THE REQUIRED WRITTEN NOTICE TO WILLCO.

Each of the Rental Agreements signed by Willco (Exhibits 1, 2, and 3) provided:

DEFAULT: An event of default under this agreement shall be any one of the following: (i) a failure of Lessee to pay when due any rent provided for herein; (ii) any failure of the Lessee to perform any other obligation hereunder and to remedy such default within ten days after written notice thereof from Lessor; (iii) the appointment of a Trustee for Lessee or its properties; (iv) an assignment by Lessee for the benefit of creditors; (v) the filing of a voluntary petition and bankruptcy by Lessee or an adjudication of Lessee's bankruptcy in an involuntary proceedings; or (vi) any attempt by Lessee to remove, sell, encumber, or sublet any of the equipment. Upon the occurrence of an event of default, Lessor may proceed by appropriate legal action to enforce performance by Lessee of the terms of this agreement and to recover damages for breach of any term hereof

(Emphasis added.)

According to this provision, MESCO was entitled to commence legal action against Willco only on "the occurrence of an event of default." The only event of default upon which MESCO is preceding is the failure to pay for repairs necessary

to the equipment, which falls under subparagraph (ii) as "any failure of the Lessee to perform any other obligation hereunder and to remedy such default within ten days after written notice thereof from Lessor." There was no evidence at trial that any such written notice was given by MESCO to Willco. Having failed to give the required written notice under the Rental Agreement, MESCO was not entitled to bring legal action against Willco.

On the same grounds, MESCO was not entitled to recover any attorneys' fees. The form Rental Agreement states: "Lessee shall pay a reasonable sum to reimburse Lessor for its costs and expenses (including attorneys' fees, unless prohibited by law)." Thus, if MESCO was not entitled to bring this action, having failed to give the required notice under the Rental Agreement, it is also not entitled to attorneys' fees.

IV.

MESCO IS NOT ENTITLED TO PREJUDGMENT INTEREST AT 12 PERCENT PER ANNUM.

The law of the State of Utah is that prejudgment interest is only available on liquidated claims. As this Court stated in Jorgensen v. John Clay & Co., 660 P.2d 229 (Utah 1983), "prejudgment interest may be awarded in the case where the loss is fixed as of a particular time and the amount of the

loss can be calculated with mathematical accuracy." Id. at 233. The present case does not fall into this category.

Additionally, the lower court failed to take into account the long delay on the part of MESCO in taking this case to trial. The Complaint was filed on or about December 1, 1982. In order to prepare its case, Willco served interrogatories and document requests (R. 37) on MESCO, which MESCO failed to answer within the time provided by Rules 33 and 34. Willco was required to file a Motion to Compel Discovery (R. 49), which was granted by Judge Daniels in an Order dated April 25, 1984 (R. 62). Thereafter, MESCO continued to delay in prosecuting the case and, on November 14, 1985, the trial Court, on its own motion issued an Order to Show Cause ordering MESCO to appear and show cause why the case should not be dismissed. (R. 75.) MESCO did not appear at the hearing on the Order to Show Cause, and the Court dismissed the case. (R. 76.) MESCO subsequently moved the Court to vacate the judgment of dismissal, which the Court granted at a hearing on December 30, 1985. (R. 81.)

Because of the long delay on the part of MESCO in bringing this case to trial, Willco should not be penalized by having to pay prejudgment interest. A similar situation arose in the case of Nielson v. Droubay, 652 P.2d 1293 (Utah 1982). There, this Court affirmed the trial court's denial of

prejudgment interest on the grounds that the conduct of the parties seeking interest precluded such an award. The Court stated that "a substantial number of the delays, in this long-pending case were at the instance of or agreed to by the defendants." Id. at 1297. Similarly, MESCO was responsible for significant delays in the present case, which constituted a valid ground for the Lower court to deny an award of prejudgment interest. The court abused its discretion by assessing prejudgment interest at 12 percent per annum.

In addition, the lower court awarded prejudgment interest against defendant at the rate of 12 percent per annum "from the date of the return of the equipment." (R. 138.) This holding was contrary to the provisions of Utah Code Ann. § 15-1-1(1), which provides that, except where the parties have entered into a contract for a specific rate of interest, "the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum." The Rental Agreement signed by Willco did not provide for the accrual of interest at a specific rate on outstanding charges for repairs. Since the parties did not have a contract, the prejudgment interest rate of 10 percent per annum must govern. Accordingly, the lower court committed error in awarding prejudgment interest at the rate of 12 percent per annum.

V.

THE COURT'S RULING THAT MESCO IS ENTITLED
TO JUDGMENT AGAINST WILLCO IN THE AMOUNT OF
\$8,626.82 WAS UNSUPPORTED BY SUFFICIENT EVIDENCE.

- A. The lower courts did not find that Willco caused any damage to MESCO's machine.

In Finding of Fact No. 2, the lower court found:

"That the said leased Gerlinger Crawler was returned by defendant to plaintiff on or about March 30, 1982, in a damaged condition." The court does not find that the damage was caused by Willco. Without such a finding, the court was not justified in awarding damages for the value of the repairs against Willco. Even if the court were to have found that Willco caused the damage, such a finding would not have been supported by the evidence. Although there was testimony adduced at the trial that the machine was in a damaged condition when it was returned by Willco on March 30, 1982. When the machine was returned, according to the testimony of Farrell Lewis, who testified for MESCO, when the machine was returned, it was disassembled and inspected. He testified that it was necessary for him to disassemble the machine in order to determine which parts needed to be replaced. (Tr. 103, 113.) For example, he testified that one of the items that he believed needed to be replaced was a track roller, which he testified had been subjected to excessive wear. In order to determine the condition of the track roller, he needed to disassemble it.

(Tr. 110-11.)

Although there was evidence about the condition of the machine when it was returned, there was very little evidence about its condition before Willco rented the machine, and there was no evidence about the condition of parts that required disassembly to inspect. Del Lewis was the only witness who testified regarding the condition of the machine before Willco took possession of it. Although he testified that he did not personally inspect the machine (Tr. 16), he did state that he had seen the machine before it went to Willco and that it was "[b]basically a new machine." (Tr. 18.)

Del Lewis testified that he had no knowledge of any examination of the machine before it went to Willco. (Tr. 37.) MESCO introduced no evidence at trial regarding any such examination. The only evidence regarding the condition of the machine was made by Mr. Lewis. He testified that MESCO had two crawlers and that he looked at them by walking around them. It is clear from his testimony that he did not perform any sort of substantive inspection of the machine that went to Willco. He stated:

Q Now, you indicated that you had seen the machine prior to its going to Willco; Is that right?

A Yes.

Q Do you remember the date?

A I don't.

Q Where was it that you saw it?

A Well, it was just out in our yard.

Q Was this before or after you had done the demonstrations on it?

A It would have been after.

Q But before it went to Willco?

A Yes.

Q But you don't know how much time went by between the time you looked at it and the time it went to Willco?

A No.

Q How long did you spend looking at the machine at that time?

A I probably walked by the machine, looked at it, and we had two of them, one with rippers, and one without rippers. That's really the only reason I can remember one machine versus the other machine. The one had rippers. The one with rippers, we did much more demonstration because of the rippers.

Q The one that went to Willco was the one without rippers?

A That's correct.

Q You say you walked by it. Did you look at both machines?

A I don't recall whether I paid much attention to this one versus this one. All I know is the machines were in good repair.

Q I'm asking you about the basis for that estimate. You can't remember if you actually looked at the one that went to Willco as opposed to the one with rippers?

A No. I don't think I paid any more attention to one than the other one. I would have walked around and looked at them, possibly looked to see how many hours were accumulated on the machines, do that every time a machine comes in the yard. I would just walk around and kind of look at them. I would look to know hours I'm getting on my inventory.

Q At the time that you looked at these machines, did you turn them on?

A No.

Q Did you look at the undercarriage of either of the machines?

A I would not have climbed underneath to look at it, no.

Q Did you look at the rollers?

A Not specifically.

Q Did you look at the bearings?

A No, I would not have gone out and wiggled the tracks or, I mean, I didn't drive them.

Q Was there a muffler system on the machine at that time?

A Yes.

Q Did you notice whether there were any track plates missing?

A Yes, and there were none.

Q But you didn't turn the machine on, so you don't know what the condition of the track was that was underneath?

A You can look at it from the side and see if the track plates are missing.

Q Did you look that close?

A Yes.

Q You'd look at the bottom to see if there were track plates missing?

A Yes.

Q You didn't make any notes or documents that would reflect what you observed at that time, did you?

A All I was doing was a site [sic] inspection.

(Tr. 41-44; emphasis added.)

Mr. Lewis further testified that there were between 75 and 90 hours that had been logged on that machine prior to its going to Willco. (Tr. 39.) Matthew Lyman told Frank Willden that the machine had been used by other customers. (Tr. 151-52.)

Thus, there was no evidence about the state of the machine, particularly the state of parts that required disassembly before they could be inspected, prior to Willco's taking the machine. As a consequence, even though MESCO discovered damage to the machine after disassembling it, there was no evidence that the damage was in fact caused by Willco. Thus, the court committed error in holding that Willco was liable for the cost of repairs.

B. The trial court committed error in admitting Exhibit 4 as evidence of the cost to repair the machine.

The only evidence adduced at trial regarding the value of the damages claimed by MESCO was set forth in Repair Order No. 1656 (Exhibit 4.) The first and the fourth pages of Repair Order No. 1656 were prepared by Farrell Lewis. (Tr. 102-103.) He testified that he obtained the prices for the parts listed on the first page from a "suggested list price from the Gerlinger manufacturing company." (Tr. 103.) No foundation was laid for his use of those prices in calculating the value of the damage claimed. Counsel for Willco objected to the admission of Exhibit 4 on the grounds that it lacked foundation and because it violated the hearsay rule. Objection was also made on the grounds of lack of relevance because there was no evidence that the particular document accurately reflected the condition of the machine when it was returned and because there was no evidence that there was any inspection done prior to Willco's taking the machine so that it could be certain that the inspection done after its return actually reflected damage caused by Willco. (Tr. 106.) The exhibit was admitted over the objection. (Tr. 107.)

Moreover, Del Lewis, the president of MESCO, testified that Repair Order 1656 was prepared, not by Ferrell Lewis, but by another MESCO employee named Randy Hamblin, who inspected

the machine after it was returned and prepared notes itemizing the damage. The Repair Order 1656 was prepared from Randy Hamblin's notes, the original of which was thrown away. (Tr. 122-24.) Accordingly, Repair Order 1656 constituted hearsay, relying on other documents not admitted into evidence, namely Randy Hamblin's notes and the manufacturers suggested list price. No foundation was laid allowing the admissibility of Exhibit 1656 under any exception to the hearsay rule. Accordingly, the trial court committed error in admitting the exhibit over Willco's objections.

CONCLUSION

Based upon the foregoing arguments, Willco respectfully urges this Court to reverse the Judgment on the grounds that there was an accord and satisfaction reached between Willco and MESCO when MESCO accepted and cashed Willco's paid-in-full check. The accord and satisfaction was supported by consideration and is not barred even though Willco may have paid what was legitimately owed for the repairs of the track and the catalytic converter. Moreover, the necessary assent to the accord and satisfaction is implied from MESCO's conduct in accepting Willco's conditional check. According to the law as set forth in this Court's prior decisions, nothing more is needed to show the necessary assent.

The lower court also committed reversible error in not dismissing MESCO's complaint for failure to give the necessary written notice to Willco. The court further erred in admitting Exhibit 4 and in holding that Willco was liable for \$8,626.12, when there was insufficient evidence regarding the condition of the machine before it went to Willco.

ADDENDUM

Defendant-appellant Willco Associates, Inc., has appended hereto copies of the following documents:

1. Rental Agreement No. 0607 dated December 11, 1981, signed by MESCO and by Willco. (Exhibit 1.)
2. Rental Agreement, No. 0699 dated March 11, 1982, signed by MESCO and by Willco. (Exhibit 3.)
3. Repair Order No. 1656 and accompanying documents. (Exhibit 4.)
4. Check No. 14614 payable by Willco Associates to MESCO in the amount of \$2,390.00 dated October 4, 1982. (Exhibit 7.)
5. Repair Order No. 1426 dated March 2, 1982. (Exhibit 9.)
6. Extract from the trial transcript representing the Court's ruling from the bench. (Tr. 164-67.)
7. Findings of Fact and Conclusions of Law, filed May 8, 1986. (R. 136.)

8. Judgment, docketed May 9, 1986. (R. 141.)

DATED this 26th day of November, 1986.

VAN COTT, BAGLEY, CORNWALL & McCARTHY
John A. Snow
R. Stephen Marshall

By R Stephen Marshall
Attorneys for Defendant-Appellant
Willco Associates
50 South Main, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

CERTIFICATE OF SERVICE

I hereby certify that I caused four true and correct
copies of the within and foregoing Brief to be hand-delivered
this 1st day of ^{December}~~November~~, 1986, to the following:

Boyd M. Fullmer
2188 Highland Drive
Suite 201
Salt Lake City, Utah 84106

RS Marshall

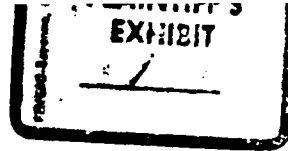
3521m
112686

LOED
KOMATSU
TAKEUCHI

2884 2224
New Mount

MESCO

295 So. Redwood Road
North Salt Lake, Utah 84054
Phone 364-3571



SWINGER
OWATONNA
TRAILING
HUDSON

RENTAL AGREEMENT

INVOICE NO. **Nº 0607**

Date Dec 11th 81

LEASED TO: 11/11 LCO
14675 South 87.5 West
Draper, Utah, 84020
Phone No. 572-1940

JOB LOCATION: Link KCC Job

EQUIPMENT RENTED: Lessor hereby leases to Lessee, and Lessee hereby hires from Lessor the equipment described below, upon the rentals and the terms and conditions contained herein including conditions printed on the reverse side of this agreement

BILLING PERIOD: From Dec 11th 81 To Jan 11th 82

QUANTITY	DESCRIPTION	
1	GERLINGER LC-30 crawler	Rental Charge: \$1,200.00
		Delivery:
		Pick-up:
4 months	Rental at \$1200.00 per month	Fuel:
10.7% disc 174.70 net total	Archise	Cleaning:
disc	\$18,000 plus tax	Misc:
		Sales Tax:
		Total to Pay: 1360.00 \$60.00

Date Out Dec 11th 81 Hours on meter _____ Checked Out By _____
Date In _____ Hours on meter _____ Checked In By _____

NOTE: EQUIPMENT MUST BE CHECKED IN BEFORE LESSEE IS TERMINATED.

TERM: This lease is for a term of _____

RENTAL PAYMENTS: For said term or any portion thereof, Lessee shall pay to Lessor on the following schedule of Rental Rates which do not include drayage, fuel, sales tax, cleaning, or repairs needed due to abuse.

Rental Period:	Basic Truck	Additional Rental Per Hour	Attachments
(a) Minimum Rate - 2 Hrs.	\$ _____	\$ _____	\$ _____
(b) Daily Rate - 8 Hrs.	\$ <u>100.00</u>	\$ _____	\$ _____
(c) Weekly Rate - 40 Hrs.	\$ <u>375.00</u>	\$ _____	\$ _____
(d) Monthly Rate - 175 Hrs.	\$ <u>1,200.00</u>	\$ _____	\$ _____
2 WKS	<u>1690.00</u>		

RENTAL PAYMENTS: Rental Payments are due and payable in advance for the rental period, except when otherwise arranged for against approved credit, in which case payment will be due at end of rental period increment.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement this 11 day of Dec, 1981.

If Lessee is a corporation, this Agreement is executed by authority of its Board of Directors.

ACCEPTED: MESCO

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(Lessee)

MAIN OFFICE
295 SO. REDWOOD ROAD
NORTH SALT LAKE, UTAH 84054
PHONE 364-3571

OGDEN OFFICE
1760 WALL AVE.
OGDEN, UTAH 84404
PHONE 621-7851

HUSTLER & ESS OF MIXERS
TARGET LANE & GRADES
AAWWH PROJECTS &
ACCESSORIES
HOODS, TRAILERS
DUMP HOPERS
DAILY RENTALS
SCAFFOLDING
CAMPER & HEATING OILS &
FIREPLACE MATERIALS
WRIGHT VAN CORP. FOLDS
TAXI, HIRING, BR. LACK HCE
GELINCHMAN, BR. LACK HCE

No.

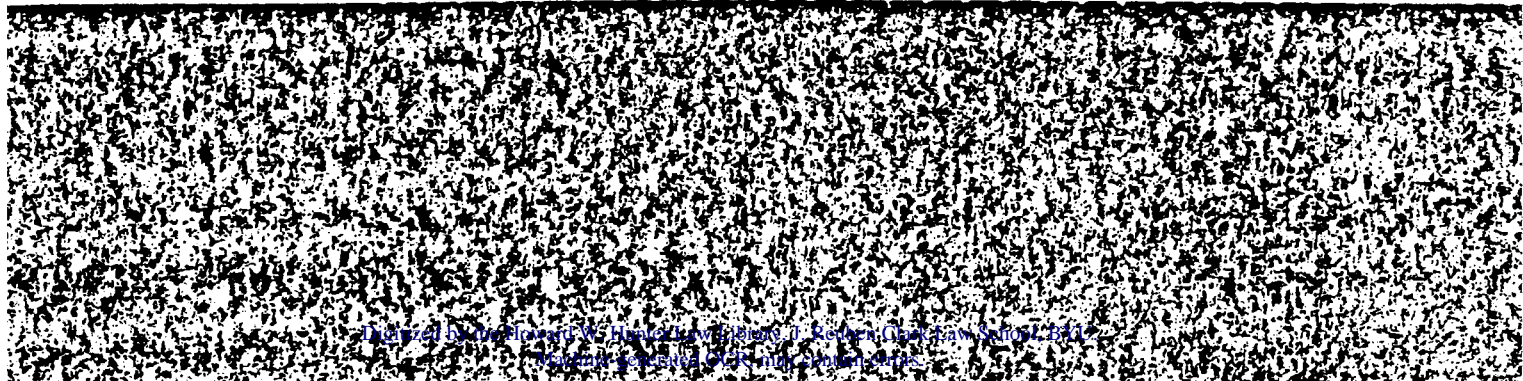
SOLD

SHIP TO ▶

CUSTOMER ORDER NO.		DATE SHIPPED	OUR ORDER NO.	SHIPPED VIA	SALESMAN	DATE
QTY. ORDERED	DESCRIPTION				PRICE	AMOUNT
					TAX	
					TOTAL	

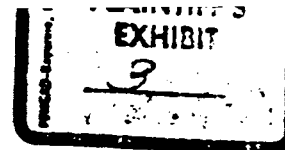
AS ALL ORDERS ARE SUBJECT TO CREDIT APPROVAL. CASH DISCOUNT OF 2% IF PAID BY THE 10TH OF THE MONTH FOLLOWING PURCHASE. ALL ACCOUNTS NOT PAID WITHIN THIRTY (30) DAYS FROM DUE DATE WILL BE SUBJECT TO A FINANCE CHARGE OF 1% PER MONTH WHICH IS AN ANNUAL PERCENTAGE RATE OF 12%. ALL FEDERAL, STATE OR LOCAL TAXES IN EFFECT AT TIME OF SHIPMENT SHALL BE BORNE BY THE PURCHASER. SELLER RETAINS OWNERSHIP OF ALL MATERIALS AND EQUIPMENT UNTIL FINAL PAYMENT IS MADE. BUYER AGREES TO PAY ALL COSTS OF COLLECTION INCLUDING A REASONABLE ATTORNEY'S FEE. 10% LING CHARGE ON ALL RETURNED MERCHANDISE.

WE RECEIVED BY **X**



LOED
KOMATSU
TAKEUCHI

MESCO
295 So. Redwood Road
North Salt Lake, Utah 84054
Phone 364-3571



SWINGER
OWATONNA
TRAILING
HUDSON
No 0699

RENTAL AGREEMENT

INVOICE NO. _____

Date 3/11/82

LEASED TO:

WILLCO

JOB LOCATION:

KCC job

572-1940

Phone No. _____

Dry Land

EQUIPMENT RENTED: Lessor hereby leases to Lessee, and Lessee hereby hires from Lessor the equipment described below, upon the rentals and the terms and conditions contained herein including conditions printed on the reverse side of this agreement.

BILLING PERIOD: From 3/11/82

To: 3/30/82

QUANTITY	DESCRIPTION	
1ea	LC-30 Aerlinga Crane	Rental Charge: \$125.00 \$ 915.00
		Delivery: 1255
		Pick-up:
	This billing is for 20 weeks and 3 days.	Fuel:
		Cleaning:
		Misc:
	Repairs to be made will be billed out on separate invoice.	Sales Tax: 25.00 45.75
		Total to Pay: 125.00 \$ 960.75

Date Out 12/11/81 Hours on meter _____ Checked Out By _____
Date In 3/30/82 Hours on meter 0758.3 Checked In By MS

2:15 p.m.

NOTE: EQUIPMENT MUST BE CHECKED IN BEFORE LESSEE IS TERMINATED.

TERM: This lease is for a term of _____.

RENTAL PAYMENTS: For said term or any portion thereof, Lessee shall pay to Lessor on the following schedule of Rental Rates which do not include drayage, fuel, sales tax, cleaning, or repairs needed due to abuse.

Rental Period	Basic Truck	Additional Rental Per Hour	Attachments
(a) Minimum Rate - 2 Hrs.	\$ _____	\$ _____	\$ _____
(b) Daily Rate - 8 Hrs.	\$ _____	\$ _____	\$ _____
(c) Weekly Rate - 40 Hrs.	\$ <u>375.00</u>	\$ _____	\$ _____
(d) Monthly Rate - 175 Hrs.	\$ <u>1200.00</u>	\$ _____	\$ _____
	<u>20 hrs</u> <u>690.00</u>		

RENTAL PAYMENTS: Rental Payments are due and payable in advance for the rental period, except when otherwise arranged for against approved credit, in which case payment will be due at end of rental period increment.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement this _____ day of _____, 19 _____.

If Lessee is a corporation, this Agreement is executed by authority of its Board of Directors.

ACCEPTED: MESCO

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Machine-generated OCR, may contain errors.

(Lessee)

295 SO. REDWOOD ROAD
NORTH SALT LAKE, UTAH 84054
PHONE 364-3571

EQUIPMENT	WEISSINGER
MODEL	LC-30
SERIAL NUMBER	9075
FIGURES	

ישיבת חתם סופר

№ 1656

NAME WILCO INC.

ADDRESS _____

PHONE _____ WANTED _____ BY _____

OPER NO	INSTRUCTIONS	AMOUNT
---------	--------------	--------

LUBRICATE ☐ CHANGE OIL ☐

Repair under carriage damaged
by LESSEE

**PLAINTIFF'S
EXHIBIT**

34hr LABOR @ 28.00/hr.

752

CONDITIONS

WE PROPOSE TO MAKE THE ABOVE REPAIRS TO YOUR EQUIPMENT UNDER THE
TERMS AND CONDITIONS HEREINAFTER SPECIFIED

THE PRICES QUOTED ARE FOR LABOR ONLY. ADDITIONAL CHARGES WILL BE MADE FOR ALL MATERIAL AND PARTS SUPPLIED. WE WILL NOT BE RESPONSIBLE FOR LOSS OR DAMAGE TO YOUR EQUIPMENT OR ITS CONTENTS CAUSED BY FIRE, THEFT, ACCIDENT OR ANY CAUSE BEYOND OUR CONTROL. YOUR SIGNATURE HERE UNDER WILL CONSTITUTE ACCEPTANCE OF THIS PROPOSAL.

WORK
AUTHORIZED BY

Signature of the City acknowledge the satisfactory completion of the above contract work.

TOTAL LABOR

ACCESSORIES

TOTAL ACCESSORIES

TIRES & TUBES

JAMES

COAL GAS OIL 1.28.00

TOTAL MATERIAL

LABOR

ACCESSORIES

TIRES & TURFS

1 GAS IN DISEASE

100-000000

Sub 17124

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TOTAL

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File

8216.0

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9/10/18

TAFLOMI
HUDSON
SOW
TARGET
GERLINGER

No.

STOLFO

SHIP TONNAGE

[illegible]

ALL ORDERS ARE SUBJECT TO CREDIT APPROVAL. CASH DISCOUNT OF 2% IF PAID BY THE 10TH OF THE MONTH FOLLOWING PURCHASE. ALL ACCOUNTS NOT PAID WITHIN THIRTY (30) DAYS FROM DUE DATE WILL BE SUBJECT TO A FINANCE CHARGE OF 1 1/2% PER MONTH WHICH IS AN ANNUAL PERCENTAGE RATE OF 18%. ALL FEDERAL, STATE OR LOCAL TAXES IN EFFECT AT TIME OF SHIPMENT SHALL BE BORNE BY THE PURCHASER. SELLER RETAINS OWNERSHIP OF ALL MATERIALS AND EQUIPMENT UNTIL FINAL PAYMENT IS MADE. BUYER AGREES TO PAY ALL COSTS OF COLLECTION INCLUDING A REASONABLE ATTORNEY'S FEE. 10% FINANCE CHARGE ON ALL RETURNED MERCHANDISE.

RECEIVED BY

TAFLOCH
HUDSON
STOW
TARGET
GERLINGER

No.

CUSTOMER ORDER NO.	DATE SHIPPED	OUR ORDER NO.	SHIPPED VIA	SALESMAN	DATE
QTY. ORD'D	DESCRIPTION			PRICE	AMOUNT
				TAX	
				TOTAL	

ALL ORDERS ARE SUBJECT TO CREDIT APPROVAL. CASH DISCOUNT OF 2% IF PAID BY THE 10TH OF THE MONTH FOLLOWING PURCHASE. ALL ACCOUNTS PAID WITHIN THIRTY (30) DAYS FROM DUE DATE WILL BE SUBJECT TO A FINANCE CHARGE OF 1 1/2% PER MONTH WHICH IS AN ANNUAL PERCENTAGE RATE OF 18%. ALL FEDERAL, STATE OR LOCAL TAXES IN EFFECT AT TIME OF SHIPMENT SHALL BE BORNE BY THE PURCHASER. SELLER RETAINS OWNERSHIP OF ALL MATERIALS AND EQUIPMENT UNTIL FINAL PAYMENT IS MADE. BUYER AGREES TO PAY ALL COSTS OF COLLECTION INCLUDING A REASONABLE ATTORNEY'S FEE. FINANCING CHARGE ON ALL RETURNED MERCHANDISE.

COVE RECEIVED BY

BERLINGER PARTS Description

- 580678-21 - TRACK ROLLER
- 580680-21 - TRACK IDLER.
- 580268-22 - TRACK Assembly
- 580051 - Idler Retainer Plate.
- 035230-1 - TRACK CHAIN RIVET
- 627118-3 - LOCK NUT $\frac{3}{4}$ -16 NPT H.D.
- 58679-21 - Idler Assembly.
- 580395-23 - L.H. TRACK Suspension bracket.
- 580395-24 - R.H. TRACK Suspension bracket.
- 580395-22 - R.H. TRACK Suspension bracket (Out)
- 580395-21 - L.H. TRACK Suspension bracket (Out)
- 580395-21 - Rubber Bushing & BELLEVILLE WASHER
- 585179 - AIR Cleaner Pre cleaner.

No 14614

WILLCO ASSOCIATES

14675 SOUTH 8¹/₂ WEST P. O. BOX 698 572-1940
DRAPER, UTAH 84020

SANDY STATE BANK
140 WEST 9000 SOUTH
SANDY, UTAH 84070
97-247/1243

PAY

WILLCO ASSOCIATES 2390 000000

DATE

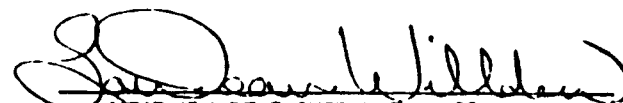
AMOUNT

10-4-82

\$ 2390.00

TO
THE
ORDER
OF

MASONRY EQUIPMENT AND SUPPLY CO., INC.
295 South Redwood Road
North Salt Lake, Utah 84054


VOID IF NOT CASHED WITHIN 90 DAYS

⑈0014614⑈ ⑆124302477⑆ 91000935⑈

⑈0000239000⑈

VPR Rock, Mountain Bank Note

ENDORSEMENT OF THIS CHECK
CONSTITUTES PAYMENT IN FULL ON
YOUR ACCOUNT #: 2224 WILLCO ASSOC.

PAY TO THE ORDER OF
1st INTERSTATE BANK
FOR DEPOSIT ONLY

MESCO

05-00797-6

181000

000 0 4 3

31-2

OCT -8 62

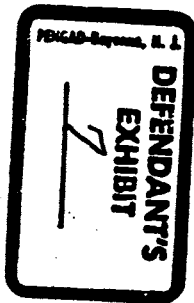
31-2

UT. 07

1st INTERSTATE BANK P.E.S.
1st INTERSTATE BNL. OF UT.
1 LAKE CITY, UTAH

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TAREUCH.
HUDSON
STON
TARDE
GERLINGER

No. 111

SOLD TO

SHIP TALK

ALL ORDERS ARE SUBJECT TO CREDIT APPROVAL. CASH DISCOUNT OF 2% IF PAID BY THE 10TH OF THE MONTH FOLLOWING PURCHASE. ALL ACCOUNTS NOT PAID WITHIN THIRTY (30) DAYS FROM DUE DATE WILL BE SUBJECT TO A FINANCE CHARGE OF 1% PER MONTH WHICH IS AN ANNUAL PERCENTAGE RATE OF 18%. ALL FEDERAL, STATE OR LOCAL TAXES IN EFFECT AT TIME OF SHIPMENT SHALL BE BORNE BY THE PURCHASER. SELLER RETAINS OWNERSHIP OF ALL MACHINERY AND EQUIPMENT UNTIL FINAL PAYMENT IS MADE. BUYER AGREES TO PAY ALL COSTS OF COLLECTION INCLUDING A REASONABLE ATTORNEY'S FEE. 10% FINANCE CHARGE ON ALL RETURNED MERCHANDISE.

RECEIVED BY

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1 SUBMIT THEM TO THE COURT.

2 THE COURT: IF YOU WILL DO THAT.

3 MR. MARSHALL: OR IN THE ALTERNATIVE MAYBE
4 FILE A BRIEF, AS THE COURT LIKES.

5 THE COURT: I WOULD LIKE TO HAVE YOU GIVE
6 ME THE COPIES OF THE CASES IF YOU HAVE THEM NOW.

7 MR. MARSHALL: I HAVE A COPY FOR COUNSEL
8 AS WELL.

9 THE COURT: ALL RIGHT, GENTLEMEN, STAY IN
10 THE AREA.

11 COURT WILL BE IN RECESS, AND THEN I WILL
12 HAVE MY RULING.

13 (A RECESS WAS TAKEN.)

14 THE COURT: I HAVE NOW, GENTLEMEN, REVIEWED
15 THE FILE, THE EXHIBITS, AS WELL AS THE AUTHORITIES
16 PROVIDED ME BY MR. MARSHALL, AND MY JUDGMENT IS AS
17 FOLLOWS: IN THIS CASE, THE PLAINTIFF SUED FOR
18 MONIES CLAIMED OWING FOR REPAIRS TO RENTAL EQUIPMENT.
19 THE DEFENDANT ALLEGES THE EQUIPMENT FAILED, AND
20 FURTHER THAT AN ACCORD AND SATISFACTION WAS REACHED,
21 AND FURTHER THAT IF NO ACCORD AND SATISFACTION WAS
22 REACHED, THE DEFENDANT HAD OFFSETS FOR DOWN TIME
23 WHICH EXCEEDED THE CLAIMS OF THE PLAINTIFF.

24 THE DEFENDANT RENTED CONSTRUCTION EQUIPMENT
25 FROM THE PLAINTIFF COMMENCING ON THE 11TH OF

1 DECEMBER OF 1981 THROUGH THE 11TH OF MARCH OF 1982
2 PER THE RENTAL AGREEMENTS, EXHIBITS 1, 2, 3, AND 8.
3 THE FORM RENTAL AGREEMENTS PROVIDE THE LESSEE WILL BE
4 RESPONSIBLE FOR REPAIRS TO THE RENTAL EQUIPMENT.

5 THE LEASED EQUIPMENT WAS RETURNED ON THE
6 30TH OF MARCH OF 1982 WITH CLAIMED DAMAGES AS SET
7 FORTH IN EXHIBIT 4 TOTALING \$8,626.82.

8 EXHIBIT 3, THE RENTAL AGREEMENT OF MARCH 11,
9 1982, THE LAST RENTAL AGREEMENT HAD THE ADDITIONAL
10 HANDWRITTEN NOTATION AS FOLLOWS: "REPAIRS TO BE MADE
11 WILL BE BILLED OUT ON SEPARATE INVOICE," WHICH
12 DOCUMENT WAS SIGNED BY FRANK WILDEN ON BEHALF OF THE
13 DEFENDANT.

14 EXHIBIT 9, INVOICE 1426 OF MARCH 2, 1982,
15 CHARGES THE SUM OF \$2390.06 FOR REPAIRS TO THE
16 EQUIPMENT FOR TRACK AND CATALYTIC CONVERTER. THIS
17 INVOICE WENT UNPAID UNTIL THE 4TH OF OCTOBER OF 1982
18 AT WHICH TIME IT WAS PAID BY CHECK WITH LIMITING OR
19 CONDITIONAL LANGUAGE, WHICH IS EXHIBIT 7. THIS SUM
20 BORE INTEREST AT THE SPECIFIED RATE, AND BY THE DATE
21 OF PAYMENT, HAD ACCUMULATED INTEREST AS EVIDENCED BY
22 EXHIBIT 10.

23 AS COUNSEL ARE AWARE, TO ESTABLISH ACCORD
24 AND SATISFACTION, FOUR CONDITIONS MUST BE MET.
25 NUMBER ONE, THERE MUST BE A PROPER SUBJECT MATTER.

1 NUMBER TWO, THERE MUST BE COMPETENT PARTIES. NUMBER
2 THREE, AN ASSENT OR MEETING OF THE MINDS IS REQUIRED.
3 NUMBER FOUR, CONSIDERATION MUST BE GIVEN FOR THE
4 ACCORD. IF, HOWEVER, THE UNDERLYING CLAIM IS
5 LIQUIDATED OR SPECIFIC IN AMOUNT, SEPARATE
6 CONSIDERATION OTHER THAN PAYING THE AMOUNT OWED MUST
7 BE FOUND. OTHERWISE, THE OBLIGOR BINDS HIMSELF TO
8 DO NOTHING HE IS NOT ALREADY OBLIGATED TO DO.

9 THIS IS SET FORTH BY THE SUPREME COURT IN
10 THE CASE OF SUGARHOUSE FINANCE VERSUS ANDERSON,
11 610 P.2D 1369, A 1980 CASE.

12 THE EVIDENCE IN THIS CASE, IN MY JUDGMENT,
13 HAS ESTABLISHED BY A PREPONDERANCE THAT THE
14 EQUIPMENT WAS DAMAGED AND THAT THE DEFENDANT IS
15 RESPONSIBLE TO PAY SAID SUMS. THERE IS NO SEPARATE
16 CONSIDERATION FOR AN ACCORD AND SATISFACTION WITH
17 REGARD TO THE FINAL REPAIR BILL, EXHIBIT 4. NEITHER
18 AM I PERSUADED THERE WAS A MEETING OF THE MINDS.

19 THEREFORE, I FIND THAT NO ACCORD AND
20 SATISFACTION WAS EXTANT. NEITHER AM I PERSUADED THAT
21 THERE WAS OFFSETTING DOWN TIME. THE DEFENDANT
22 CONTINUED TO RENT THE MACHINE EVEN AS OF THE 2ND OF
23 MARCH OF 1982, AT WHICH TIME HE SIGNED ANOTHER FORM
24 RENTAL AGREEMENT AND ACCEPTED THE EQUIPMENT. THAT'S
25 EXHIBIT 3.

1 JUDGMENT, THEREFORE, IS AWARDED TO THE
2 PLAINTIFF FOR THE SUM OF \$8,626.82 PLUS INTEREST AT
3 18 PERCENT PER ANNUM AND A REASONABLE ATTORNEY'S FEE
4 IN THE AMOUNT OF \$1875 PLUS COSTS OF THIS ACTION.

5 MR. FULLMER, YOU PREPARE THE FINDINGS OF
6 FACT, CONCLUSIONS OF LAW, AND JUDGMENT. SUBMIT THEM
7 TO MR. MARSHALL FOR HIS APPROVAL AS TO FORM.

8 MR. FULLMER: THANK YOU.

9 THE COURT: COURT WILL BE IN RECESS.

10 (PROCEEDINGS CONCLUDED.)
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BOYD M. FULLMER, #1138
Attorney for Plaintiff
2188 Highland Drive
201 Dixon Building
Salt Lake City, Utah 84106
(801) 486-0805

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

MASONRY EQUIPMENT & SUPPLY,

Plaintiff,

vs.

WILLCO ASSOCIATES, INC.,

Defendants.

:
:
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:
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FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Civil No. C82-9803

Judge Frederick

The foregoing matter having come on regularly before the Court for trial on the 5th day of March, 1986, with the Honorable J. Dennis Frederick, Judge presiding, and Boyd M. Fullmer appearing for the plaintiff and R. Steven Marshall appearing for the defendant and Frank Wilden, the president of the defendant appearing and testifying and Del Lewis, the president of the plaintiff appearing and testifying and Farrell Lewis and Matt Lyman respectively an employee and former employee of the plaintiff also having testified, and the exhibits having been testified on and introduced into evidence and the court having fully heard the evidence and being fully advised of the facts, and defendant having objected to the Findings of Fact and the form the Findings, Conclusions and Judgment, and said objections having been resolved before the Court under hearing date of April 28, 1986, the Court now makes and enters the following:

1. That defendant leased a Gerlinger LC-30 Crawler from the plaintiff for a term from December 11, 1981 to March 30, 1982.

2. That the said leased Gerlinger Crawler was returned by defendant to plaintiff on or about March 30, 1982, in a damaged condition.

3. That additional information was written on or about March 30, 1982, on the last line of a lease document. That the billing was for two weeks and three days and that repairs to be made would be billed out on a separate invoice.

4. That the reason for the filling out of repairs to be made to be on a separate invoice was that the equipment was inspected upon its return and determined to be in a damaged condition.

5. That each of said lease contracts was signed by an authorized officer of the defendant.

6. That the standard printed terminology on each form makes the defendant/lessee responsible for repairs to the equipment.

7. That the defendant had the plaintiff make certain repairs to the equipment of a value of \$2,390.06 for repairs necessary while the equipment was in use during one of the least times.

8. That the defendant submitted to the plaintiff a check with restrictive endorsements claiming full settlement and claiming an oral accord and satisfaction, which check was cashed by the plaintiff.

9. That the Court does not find an accord and satisfaction.

10. The Court does not find that the defendant did anything more than the defendant was obligated to do as he paid the balance due and owing on that invoice.

11. That the cost to repair the equipment was \$8,626.82.

12. That in accordance with the Stipulation of the parties a reasonable attorney's fee is \$1,875.00, and the contract has provision for the reasonable attorney's fee.

13. That interest is awarded at the rate of 12% per annum.

14. That the defendant failed to prove any offsetting down time.

15. That there was no separate consideration for the claimed accord and satisfaction.

From the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. That plaintiff is entitled to judgment against the defendant in the sum of \$8,626.82.

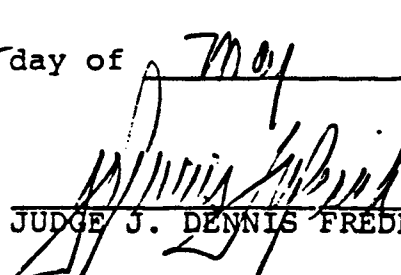
2. That plaintiff is entitled to judgment for attorney's fees against the defendant in the sum of \$1,875.00.

3. That the plaintiff is entitled to judgment against the defendant for his costs and plaintiff shall file his separate cost bill.

4. That plaintiff is entitled to judgment against the defendant for interest in the sum of 12% per annum from the date of the return of the equipment.

5. That the defendant is not entitled to any offsets against said judgment.


DATED in open Court this 8th day of May, 1986.


JUDGE J. DENNIS FREDERICK

APPROVED AS TO FORM:

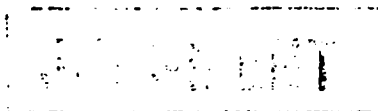
R. STEPHEN MARSHALL

ATTEST
H. DIXON HINDLEY
Clerk

By  _____
Deputy Clerk

BOYD M. FULLMER

BOYD M. FULLMER, #1138
Attorney for Plaintiff
201 Dixon Building
2188 Highland Drive
Salt Lake City, Utah 84106
(801) 486-0805



IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

BR, 206 ND, 3424

MASONRY EQUIPMENT & SUPPLY,

Plaintiff,

vs.

WILLCO ASSOCIATES, INC.,

Defendant.

JUDGMENT

Civil No. C82-9803

Judge Frederick

5-9-86 - 8:10 a.m.

The foregoing matter having come on regularly for trial before the Honorable J. Dennis Frederick, one of the Judges of the above-entitled Court on the 5th day of March, 1986, and Boyd M. Fullmer appearing for the plaintiff, and R. Steven Marshall appearing for the defendant, and the witnesses having appeared and testified and the exhibits having been admitted and testified on and the Court having been fully advised in the facts and the law and made Findings of Fact and Conclusions thereon, and defendant having filed his objections and those objections having been resolved before the Court on a hearing of April 28, 1986, and it being a proper matter, it is hereby,

ORDERED, ADJUDGED AND DECREED:

1. That plaintiff have judgment against the defendant in the sum of \$8,626.82.

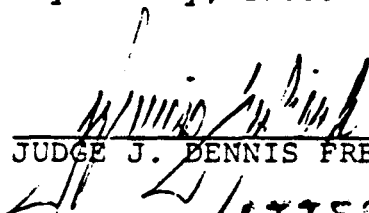
2. That plaintiff have judgment against defendant for interest in the sum of 12% per annum from the date of return of the equipment of March 30, 1982, in the sum of \$4,226.74.

3. That plaintiff is entitled to interest on this judgment at the rate of 12% per annum.

4. That plaintiff is entitled to judgment against the defendant for a reasonable attorney's fee in the sum of \$1,875.00, and for costs.

5. That defendant is not entitled to any offsetting amounts.

DATED in open Court this 8th day of May, 1986.


JUDGE J. DENNIS FREDERICK

ATTEST

H. DIXON HUNT

Clerk

By 

Deputy Clerk

APPROVED AS TO FORM:

BOYD M. FULLMER
Attorney for Plaintiff

R. STEPHEN MARSHALL
Attorney for Defendant