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IN THE UTAH SUPREME COURT

UTAH LOCAL GOVERNMENT TRUST, Plaintiff / Respondent v. WHEELER MACHINERY CO. and ROES 1 through 50, inclusive, Defendants / Petitioner.	**REPLY BRIEF** Case No. 20070084 Court of Appeals No. 20050557-CA District Court Case No. 030501330

CERTIORARI APPEAL FROM A DECISION OF
THE UTAH COURT OF APPEALS

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RESPONSE TO CITY'S STATEMENT OF FACTS

When this Court granted certiorari, it limited the scope of the appeal to the issue of the applicable statute of limitations. It did not open the appeal to the other issues addressed by the Court of Appeals, such as the retained control doctrine. In light of that limitation, many of the City's stated facts have little or no applicability to this appeal. In addition, the City's Fact No. 6, which suggests that Wheeler participated in the decision to place 4X4 timbers on the roof as additional support for the mufflers, has no evidentiary basis in the Record. For its sole support, the City cites to its own Memorandum at the trial level, which in turn cites to a portion of the Robert Spears deposition (Record at 327-328), where the 4X4 timbers are not even discussed.

Wheeler also notes the City's admission by the City found in paragraph 19 of its Statement of Facts that "one of the generators overheated and caused [the] fire . . . ." To support this fact the City cites to a paragraph in its own Amended Complaint, which Wheeler essentially denied in its answer. Moreover, this fact appears to be at odds with the City's contention elsewhere in its Brief that the components of the generator system were defect free. An overheating generator is not defect free. The City does not even allege that defective installation work caused the generator to overheat.

SUMMARY OF THE ARGUMENT

The statute of limitations issue was a central part of the trial court's decision granting Wheeler summary judgment and thus has been properly preserved for appeal. In fact, that issue is the only subject for which certiorari was granted. Wheeler entered into a single

arrangement with the City, which was to deliver a working generator system. There was not a separate contract or arrangement for the installation of components of the system. Under any theory, the sale of the generator system was not completed until the system was fully operational and turned over to the City as a usable system. The usability and/or essence of the transaction tests suggested by Wheeler are supported in the case law and are appropriate tests for the Court to use. Under any analysis, the City's claims should be dismissed because they are beyond the two year statute of limitations for product liability cases.

ARGUMENT[1]

I. THE STATUTE OF LIMITATIONS ISSUE WAS PRESERVED FOR APPEAL

The City takes the unusual position that Wheeler cannot address its statute of limitations argument, for which issue certiorari was specifically granted, because Wheeler did not file a cross appeal of the denial of its motion to dismiss. This claim is made although Wheeler prevailed at the trial level on its motion for summary judgment, which ruling necessarily superceeded the earlier denial of Wheeler's motion to dismiss. Moreover, the City raised the same argument to the Court of Appeals (see the City's Reply Brief of Appellant in Appellate No. 20050557at p. 4), yet the Court of Appeals made the statute of limitations argument a focal point of its decision.

In addition, the City's parsing of the trial court's summary judgment ruling strains the language beyond its meaning. The trial court identified a number of alternatives for granting

[1]In Wheeler's Initial Brief, reference was made on page 4, footnote 3 to an Exhibit A. Although in the Record, the diagrams to be attached as Exhibit A were inadvertently not attached in the initial Brief but are now attached hereto as Exhibit A.

summary judgment, one of which was that the City's claims were barred by the product liability statute of limitations. The trial court clearly stated that, to the extent the City's claims fall under the Product Liability Act, they are time barred. (R. at 481.[2]). Such a ruling directly addressed the statute of limitations argument and was favorable to Wheeler. As noted, it also supplanted the district court's earlier ruling on Wheeler's motion to dismiss, which was argued at a point in the case where no evidence had yet been presented. Rather, at that point the trial court had to rule solely on the pleadings. On the other hand, in ruling on Wheeler's motion for summary judgment, the district court had a rather substantial record in front of it. For these reasons, Wheeler properly preserved its right to argue that the City's claims are barred by the product liability statute of limitations.

II. THE PARTIES DID NOT ENTER INTO TWO SEPARATE CONTRACTS

The City admits that "the components for the generator system constituted a 'single sale' or a 'single product.'" City's Brief, at 17. It also admits that all such components were "part of the generator sets accepted by the City and paid for by the City as a single item." *Id.* at Fact No. 10. The City then argues, for the first time, that Wheeler filled two separate and distinct roles – that of product seller on the one hand, and that of product installer on the other[3]. Such a claim is neither supported by the record nor by case law. If only one product

---

[2]After page 483 of the Record, it is renumbered starting with page 480. This reference is to the first page 481.

[3]Even though the City refers to installation work, the City's Brief makes clear several times that the claimed defective work was a "modification" of the rain caps. City's Brief at pp. 9, 14.

was sold, then only one transaction was completed, and the installation of that product cannot be viewed separately from its purchase.

The City argues that Wheeler's sale of the components was separate from its installation of those components because that installation occurred after the sale, and thus the City could have hired any "qualified person" to perform the installation. Of course, the City would have had to contract and pay for that qualified person's services. Thus, the only way the City's argument could work is if there were evidence that Wheeler was paid separately for its installation work. However, there is no evidence of such an agreement. Wheeler's initial bid included all the equipment and the totality of its installation. When the City modified the project plans, the City's agreement with Wheeler also changed. Specifically, the City agreed to install some of the components, such as the exhaust pipe and mufflers, while Wheeler would install other components, such as the generators. There is no evidence, however, that the City ever agreed to pay Wheeler additional consideration for whatever installation work Wheeler was to perform.

Richard Carlson's testimony further supports the fact that the City did not pay additional consideration for the installation work. After describing how he provided the pipe for the exhaust system, Mr. Carlson was asked about the charges for his work in welding the rain caps to the pipe as follows:

> Q. Is there any of these invoices that reflects your work on the cap–on the rain cap?
>
> A. Well, I didn't call it out separately.

R. at 382. In other words, Carlson only billed Wheeler for supplying exhaust pipe. Whatever work he did in installing the rain caps was either not billed or was included in the billing for the material supplied.

III. THE TERM "SALE" IS NOT DEFINED IN THE LAW

In its initial Brief, Wheeler pointed out that the Product Liability Act does not define the term "sale" or otherwise describe when a sale occurs. In response, the City has simply repeated some of the same language used by the Court of Appeals. However, because the generator system was not accepted by the City until it was fully functional and had been tested by Wheeler several months after the rain caps had been modified (R. at 321-322), it cannot be said that a sale took place prior to that time under any acceptable definition. The delivery of some components to the City's property prior to the start-up of the system does not constitute a completed sale. As a further example, assuming the City expected a warranty on the system, it would not reasonably expect that such a period would start when a few pieces of equipment had been delivered on site. Rather, it would consider the warranty period to have started only after all the equipment was fully operational.

IV. THE CITED CASES SUPPORT WHEELER'S POSITION

With one exception, all of the cases cited by the City in its Brief are cases cited in Wheeler's initial Brief. There is thus no point in rehashing Wheeler's analyses of the cases except to note that they speak in Wheeler's favor, as discussed in Wheeler's initial Brief. The only new citation by the City is to American Jurisprudence and a therein cited Texas

Court of Appeals case which purports to define the term "sale." Aside from the question of its precedential value, the Texas case is also inapposite, holding that a lessor or bailor of a defective product may be liable, even though not technically a seller, under the theory that it introduced the product into the stream of commerce. At a minimum, neither AmJur nor the Texas case contradicts Wheeler's position that the sale in the instant case was only complete after the generator system had been fully installed and tested and had been turned over to the City as an operating system.

V. THE USABILITY AND ESSENCE OF THE TRANSACTION TESTS PROPOSED BY WHEELER MACHINERY ARE APPROPRIATE

The City dismisses both of the tests proposed by Wheeler without citation to authority and without any real analysis. Nowhere does the City point to any cases which disapprove of either the usability or the essence of the transaction tests. Nor does the City address any of the cases cited by Wheeler in support of such tests. Ironically, under the City's recently advanced two contract theory, it would be to the City's advantage to utilize the essence of the transaction test. It could then argue that the essence of the first transaction was to simply sell equipment, and the essence of the second was to install it. But, as noted repeatedly, the true essence of the transaction at issue, as admitted by the City itself, was for Wheeler to deliver a fully functioning generator system.

VI. WHEELER HAS BEEN CONSISTENT IN ITS POSITION

On pages 16 and 17 of its Brief, the City is quite accusatory of Wheeler relative to Wheeler's explanation of who controlled the installation and modification work. The City

uses language such as "Wheeler falsely asserts," "argues unabashedly," and "misguided attempt." *Id.* Contrary to the City's assertions, Wheeler has been clear and forthright in explaining its position. However, in light of the City's attack, Wheeler reiterates that it has always claimed that the modification work, which the City says caused the fire, was performed by Richard Carlson under the direct supervision and at the direction of the City. This was the basis for the trial court finding the City responsible for all such work under the retained control doctrine. However, for purposes of the statute of limitations argument, to the extent Wheeler is held responsible for the modification work of Carlson, that work was part and parcel of the sale of the entire system.

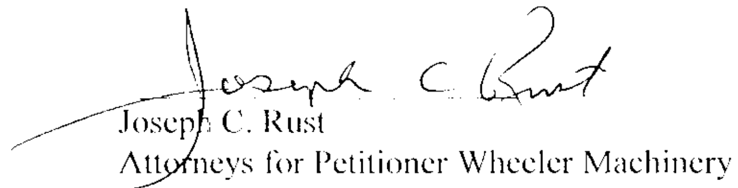
In other words, the City has strongly contended that Wheeler, not the City, is responsible for the actions of Richard Carlson. The Court of Appeals determined that there was at least enough of an issue of fact on that point to preclude summary judgment. However, this Court limited its grant of certiorari to the statute of limitations issue. Wheeler's position that, *to the extent* Wheeler is responsible for the conduct of Mr. Carlson, the product liability statute of limitations applies, is not an inconsistent position. Rather, that is a well-recognized way of pleading in the alternative. The trial court took much the same position in also ruling in the alternative. (R. at 481.) There is thus nothing deceitful or dishonest either on the part of Wheeler or the trial court in taking such an approach.

CONCLUSION

The modification work which is at issue was part and parcel of the sale of a generator system and did not constitute after sale work. Under any of the cases cited by the Court of Appeals, cases cited in the briefs, or under the specific language of the Utah Product Liability Act, the City's claim sounds in products liability and is barred by the two year statute of limitations. As part of ruling in favor of Wheeler, this Court should consider establishing a clear test to cover such matters. Wheeler recommends the usability or the essence of the transaction tests, or both of them.

DATED this 10 day of August, 2007.

KESLER & RUST



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Attorneys for Petitioner Wheeler Machinery

CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by the method indicated below two true and correct copies of the foregoing **REPLY BRIEF**, in postage prepaid, this 10 day of August, 2007, to:

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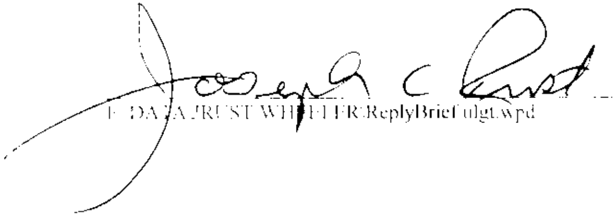

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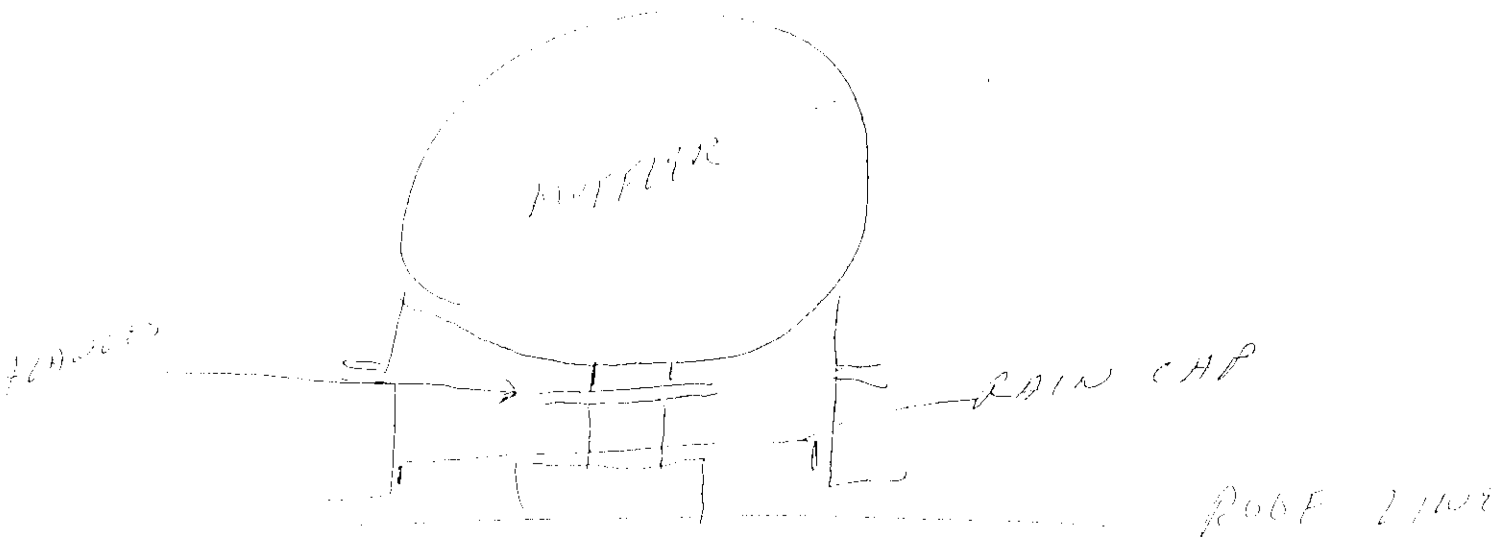
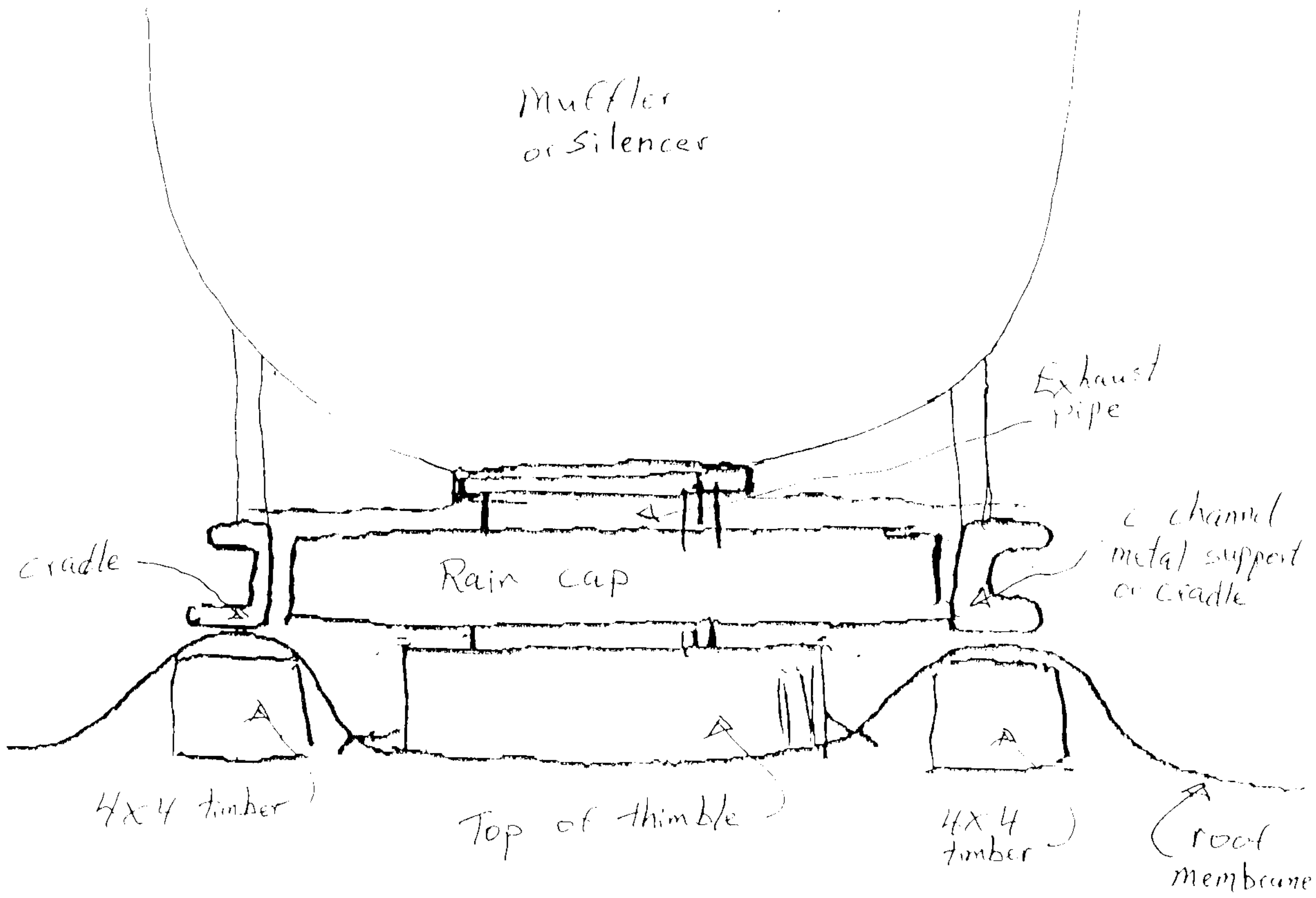
APPENDIX

Exhibit A

EXHIBIT
PENGAD-Bayonne, N.J.




Muffler
or Silencer
Exhaust
pipe
c channel
metal support
or cradle
cradle
Rain cap
4x4 timber
Top of thimble
4x4
timber
roof
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