

No. 67539-7-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

FINANCIAL PACIFIC LEASING, LLC,
a Washington limited liability company,

Respondent

v.

LAW OFFICES OF DAVE A. SHARP, P.A., a Florida corporation,
DAVID A. SHARP, individually, and MARIANNE SHARP

Appellants,

On Appeal from the Superior Court of King county
The Honorable J. Wesley Saint Clair
Cause No. 10-2-30494-1 KNT

BRIEF OF RESPONDENT

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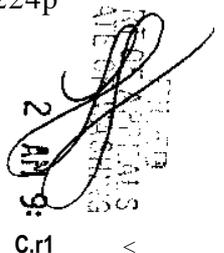
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I. INTRODUCTION

The material facts of this case are not in dispute. Financial Pacific Leasing, LLC ("FPL") and the Law Offices of David A. Sharp, PA ("Mr. Sharp") entered into a statutory equipment finance lease for a copy machine supplied by a third-party vendor. Mr. Sharp selected the copy machine and the vendor. FPL's only role was to finance the transaction for Mr. Sharp. Mr. Sharp's obligations under a statutory equipment finance lease are irrevocable. RCW 62A.2A-407(1).

When FPL contacted Mr. Sharp by telephone to confirm that Mr. Sharp had received the copy machine from the vendor, Mr. Sharp lied to FPL. Mr. Sharp told FPL that he had received the copy machine, that it was in good working order, and that FPL could pay the vendor. The vendor did not deliver the copy machine. Mr. Sharp admits that his statements were not true. Relying upon Mr. Sharp's misrepresentations, FPL paid the vendor for the copy machine. Mr. Sharp then waited nearly thirty days before informing FPL that the copy machine was not delivered. Mr. Sharp further sought to terminate the Lease Agreement prior to the end of its sixty month term.

Mr. Sharp's actions breached his agreement with FPL as a matter of law. Mr. Sharp has no defense because he failed to do what he promised to do, resulting in FPL's damages. FPL respectfully requests

this Court affirm the Superior Court's Order Granting Plaintiff's Motion for Summary Judgment against The Law Offices of David A. Sharp, P.A., David A. Sharp, and Marianne Sharp, jointly and severally. FPL further requests this Court affirm the Superior Court's Order Granting Plaintiff's Motion for Attorney's Fees and Costs against The Law Offices of David A. Sharp, P.A., David A. Sharp, and Marianne Sharp, jointly and severally.

II. ASSIGNMENTS OF ERROR

A. Errors Assigned by Appellant.

1. Mr. Sharp assigns error to the Superior Court's Order Granting Plaintiff's Motion for Summary Judgment.
2. Mr. Sharp assigns error to the Superior Court's Order Granting Plaintiff's Motion for Attorney's Fees and Costs.

B. Issue pertaining to Assignments of Error assigned by Appellant.

Mr. Sharp argues that summary judgment was not appropriate because the vendor failed to deliver the copy machine.

III. STATEMENT OF THE CASE

A. The Parties Entered an Enforceable Equipment Finance Lease.

On April 7, 2010 the Law Offices of David A. Sharp, P.A. and David Sharp (hereafter collectively referred to as "Mr. Sharp") signed an equipment finance lease (the "Lease Agreement") with Direct Credit

Funding, Inc. to lease a Ricoh copy machine (the "Equipment") supplied by ImageSource, Inc. ("ImageSource"), the vendor. (CP 41). Mr. Sharp initialed each page of the Lease Agreement. (CP 42 — 44). Mr. Sharp is an attorney at his law firm, the Law Offices of David A. Sharp, P.A. (CP 80). Mr. Sharp has been practicing law since 1990 in the State of Florida. (CP 80). Direct Credit Funding, Inc. acted as the broker and original lessor by coordinating the transaction between FPL, Mr. Sharp, and ImageSource. (CP 36 at ¶ 5). Mr. Sharp chose the vendor and Mr. Sharp chose the Equipment, a copy machine. (CP 36 at ¶ 5). Mr. Sharp also arranged for delivery of the Equipment to his office. (CP 56; CP 58). On April 22, 2010, Direct Credit Funding, Inc. assigned its interest in the Lease Agreement to FPL. (CP 37 at ¶ 8; CP 53-54).

David Sharp and Marianne Sharp personally guaranteed the Lease Agreement on April 7, 2010 and April 17, 2010, respectively.' (CP 45; CP 51). In addition to the Lease Agreement and the personal guarantee, Mr. Sharp separately signed the "**DELIVERY AND ACCEPTANCE AUTHORIZATION**" which provides how Mr. Sharp may accept the Equipment upon delivery. (CP 45) [emphasis in original]. It states:

Lessee's signature authorizes Lessor to verify by phone with a representative of Lessee the date the Equipment was accepted by the Lessee; the Equipment description,

David Sharp executed the personal guarantee for a second time on April 17, 2010. The terms are identical.

including the serial numbers; the schedule of lease payments; that all necessary installation has been completed; that the Equipment has been examined by Lessee and is in good operating order and condition and is in all respects satisfactory to Lessee and that Equipment is accepted by Lessee for all purposes under the Lease.

(CP 45). The Lease Agreement defines acceptance because the parties agreed to waive the Uniform Commercial Code's acceptance provision — UCC 2A-515.² The Lease Agreement provides, "[L]essee waives any and all rights and remedies conferred by UCC 2A-508 through 2A-522[.]" (CP 42 at ¶ 6).

The transaction between FPL and Mr. Sharp is a statutory equipment finance lease. (CP 42 at ¶ 3). Equipment finance leases are three-party transactions in which the customer leases equipment that is not manufactured or supplied by the lessor. (CP 36 at ¶ 4). A third-party vendor provides the equipment to the customer. (CP 36 at ¶ 4). The customer chooses the equipment and the third-party vendor. (CP 36 at ¶ 4). The lessor's only role is to finance the transaction. Generally, a broker will coordinate the transaction between the lessor, lessee, and vendor. (CP 36 at ¶ 4). In such transactions, the vendor delivers the equipment directly to the lessee and the lessor never takes possession of the equipment. (CP 36 at ¶ 4).

² RCW 62A.2A-515

The lease agreement requires the lessor to purchase the equipment from the vendor and lease the equipment to the lessee, here Mr. Sharp. (CP 36 at ¶ 4). In exchange, the lessee agrees to make monthly payments according to the lease for the right to use and possess the equipment. (CP 36 at ¶ 4).

B. Mr. Sharp Failed to Perform When Performance was Due Under the Lease Agreement.

1. *Mr. Sharp made material misrepresentations to FPL which induced FPL to pay ImageSource \$25,145.*

In order for FPL to pay the vendor, ImageSource, an FPL employee, Cindy Grover, contacted Mr. Sharp at 12:30 pm on Thursday, April 22, 2010 to confirm that he received the Equipment in satisfactory condition. (CP 59-62; CP 38 at ¶ 9). Ms. Grover contemporaneously completed a verification form which reflects the details of her telephone conversation with Mr. Sharp. (CP 59 at ¶ 2).

Mr. Sharp confirmed in his telephone conversation with Ms. Grover that he received the Equipment. (CP 62; CP 56; CP 58). Mr. Sharp confirmed that the Equipment was in satisfactory condition. (CP 62). Mr. Sharp actually took the affirmative step of authorizing FPL to pay ImageSource for the Equipment. (CP 62). By doing so, Mr. Sharp accepted the Equipment. (CP 45). Relying upon Mr. Sharp's representations, FPL paid ImageSource \$25,145. (CP 63 - 66).

Mr. Sharp admits to making material misrepresentations to FPL by stating that he received, tested, and accepted the Equipment. (CP 56; CP 58). In Mr. Sharp's letter dated May 21 2010, he states, "I was 'duped' into signing off on the contract, and **telling your organization that I had received the equipment** by a promise from Mr. Merrill that it would be delivered that same day." (CP 56) [emphasis added]. In Mr. Sharp's second letter dated June 11, 2010, he again states, "**I did verify that I had received the equipment**, because I had been assured that the machine was 'on the truck' and would be delivered 'within a couple hours'." (CP 58) [emphasis added]. When FPL received Mr. Sharp's letters FPL had already paid ImageSource for the Equipment as a direct result of Mr. Sharp's misrepresentations. (CP 66).

2. *Mr. Sharp failed to pay a single installment payment and Mr. Sharp terminated the Lease Agreement prior to its expiration.*

Mr. Sharp's first installment payment was due May 1, 2010. (CP 41). Mr. Sharp failed to pay the first installment. (CP 38 at ¶ 11). On or about May 21, 2010, nearly thirty days after confirming receipt of the Equipment, Mr. Sharp demanded that FPL return his prepayment and Mr. Sharp demanded to terminate the Lease Agreement. (CP 56). FPL did not

receive any indication prior to receiving Mr. Sharp's letter that the Equipment was not in Mr. Sharp's possession.³ (CP 38 at ¶ 10).

Mr. Sharp's second installment payment was due June 1, 2010. (CP 41). Mr. Sharp failed to pay the second installment. (CP 38 at ¶ 11). On or about June 11, 2010, Mr. Sharp sent a second letter demanding that FPL terminate the Lease Agreement and demanding that FPL return his prepayment. (CP 58). FPL has not received a single installment payment for the Equipment. (CP 38 at ¶ 11). Mr. Sharp failed to perform when performance was due under the plain terms of the Lease Agreement.

C. FPL is Damaged as a Result of Mr. Sharp's Conduct.

Mr. Sharp agreed that upon breach FPL may "declare the entire unpaid lease payments and other sums payable by Lessee hereunder to be immediately due and payable." (CP 43 at ¶ 18(b)(1)). Mr. Sharp breached the agreement by lying to FPL about receiving the Equipment. Mr. Sharp's misrepresentations caused FPL to pay ImageSource over \$25,000. Mr. Sharp further breached by failing to pay a single installment payment and terminating the Lease Agreement before the expiration of its sixty month term. FPL elected to accelerate Mr. Sharp's obligations under the Lease Agreement. (CP 3 at ¶ 3.2). In accord with the parties' Lease

³ The facts are recited in a light most favorable to the nonmoving party as required on summary judgment because FPL is entitled to judgment as a matter of law on these facts alone. Notably, FPL has no evidence other than Mr. Sharp's contradictory, after-the-fact statements that the Equipment did not arrive.

Agreement FPL declared all sums due and payable. (Id.). The Superior Court's decision must be affirmed because the material facts are not in dispute and FPL was entitled to judgment as a matter of law.

D. Procedural History

FPL filed its Complaint for Damages on August 25, 2010 to pursue unpaid lease payments and other costs recoverable under the Lease Agreement. (CP 1). Mr. Sharp filed his Answer and Affirmative Defenses on November 8, 2010 denying liability. (CP 17). FPL filed Plaintiffs' Motion for Summary Judgment on June 16, 2011. (CP 22). Following oral argument, the Superior Court granted Plaintiff's Motion for Summary Judgment on July 14, 2011. (CP 100). On July 29, 2011, the Superior Court entered an Order Granting Plaintiff's Motion for Attorney's Fees and Costs and Entering Judgment Against Defendants. (CP 121). This appeal followed.

IV. ARGUMENT

The standard of review from a motion for summary judgment is de novo. *Go2Net, Inc. v. C.I. Host, Inc.*, 115 Wn. App. 73, 83, 60 P.3d 1245 (2003). The appellate court engages in the same inquiry as the trial court — whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Id.* The purpose of summary judgment is to avoid useless trials. *Almy v. Kvamme*, 63 Wn.2d

326, 329, 387 P.2d 372 (1963). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law." CR 56(c); *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985).

The material facts here are not in dispute. Mr. Sharp admits to conduct amounting to breach of the Lease Agreement. FPL is entitled to judgment as a matter of law.

A. The Superior Court's Order Granting Plaintiff's Motion for Summary Judgment should be Affirmed because the Parties Entered an Enforceable Contract Supported by Adequate Consideration.

The contract between Mr. Sharp and FPL is enforceable as it is supported by adequate consideration — a promise for a promise. Consideration, in a bilateral contract, is the bargained for exchange of promises. *St. John Med. Ctr. v. Dept. of Social and Health Services*, 110 Wn. App. 51, 65, 38 P.3d 383 (2002). "It is elementary, of course, that a promise for a promise is sufficient consideration to support an executory contract[.]" *Mowbray Pearson Co. v. E.H. Stanton Co.*, 109 Wash. 601, 603, 187 P. 370 (1920).⁴ FPL promised to purchase the Equipment by

See also Omni Group, Inc. v. National Bank, 32 Wn. App. 22, 24, 645 P.2d 727 (1982) ("A promise for a promise is sufficient consideration to support a contract.").

paying ImageSource \$25,000 and lease the Equipment to Mr. Sharp. (CP 41; *see also* CP 37 at ¶ 8). Mr. Sharp promised to lease the Equipment from FPL for sixty months according to the terms of the Lease Agreement. (CP 41). To receive the benefit of its \$25,000 bargain, FPL is entitled to receive sixty months of lease payments.

The parties' exchange of promises here is fundamental to the operation of an equipment finance lease where the finance lessor only agrees to finance the transaction.⁵ A finance lease is defined as "a lease with respect to which . . . the lessor does not select, manufacture, or supply the goods; [and] [t]he lessor acquires the goods or the right to possession and use of the goods in connection with the lease[.]" RCW 62A.2A-103(g). FPL only promised to acquire the Equipment for Mr. Sharp. (CP37 at ¶ 8; CP 41). FPL cannot, and did not, agree to deliver the Equipment as Mr. Sharp contends because FPL cannot take part in selecting, manufacturing or supplying the Equipment. RCW 62A.2A-103(g). If FPL promised to supply the Equipment, then FPL would lose its status under the UCC as a finance lessor. Mr. Sharp's argument is contrary to the parties' expressly stated intention to create a statutory

⁵ The parties do not dispute and the lease confirms that "it is the intent of both parties to this lease that it qualify as a statutory finance Lease under Article 2A of the Uniform Commercial Code." (CP 42 at ¶ 3).

finance lease. (CP 42 at ¶ 3) ("it is the intention of both parties to this lease that it qualify as a statutory finance Lease").

The Lease Agreement is supported by adequate consideration - a promise for a promise. Mr. Sharp received the benefit of his bargain with FPL when FPL performed its promise by paying ImageSource. ImageSource promised to deliver the Equipment. Mr. Sharp states, "I have not received the copier that was promised [by] my vendor, ImageSource[.]" (CP 56; *see also* CP 58). ImageSource's promise to deliver is independent of Mr. Sharp's promise to pay FPL. ImageSource failed to perform, not FPL.

Mr. Sharp cites *Wilkinson v. Sample*, for the proposition that Mr. Sharp may rescind the Lease Agreement with FPL because ImageSource did not deliver the Equipment. 366 Wn. App. 266, 674 P.2d 187 (1983). The principal stated in *Wilkinson* does not apply. The Court in *Wilkinson* addressed a situation where sellers of a business agreed to assist in transferring the business's goodwill in consideration for buyers' payment of the purchase price. *Id.* at 273. The Court held that buyer may rescind for sellers' failure to perform the essential purpose of the contract whether by excusable neglect or breach. *Id.* Mr. Sharp's argument assumes that FPL, as finance lessor, failed to perform. Here, unlike *Wilkinson*, FPL performed under the Lease by paying the purchase price to ImageSource.

Mr. Sharp, not FPL, failed to perform. Mr. Sharp cannot rescind for failure of consideration because FPL performed.

Mr. Sharp's reliance on *Huberdeau v. Desmarais* is similarly misplaced. 79 Wn.2d 432, 486 P.2d 1074 (1971). In *Huberdeau*, the Court addressed whether an agreement to forebear was supported by independent consideration where the plaintiff previously agreed to forebear any claim in a prior agreement. M. at 437-438. The Court held that a gratuitous promise to forebear is not adequate consideration. Id. at 440. Here, FPL and Mr. Sharp entered one agreement — FPL's promise to purchase the Equipment and Mr. Sharp's promise to make lease payments for sixty months. Neither FPL nor Mr. Sharp entered a subsequent agreement requiring independent consideration as the Court found in *Huberdeau*. FPL's promise to pay is therefore not gratuitous.

The Lease Agreement between FPL and Mr. Sharp is supported by adequate consideration. The Superior Court's Order Granting Plaintiff's Motion for Summary Judgment should be affirmed.

B. The Superior Court's Order Granting Plaintiff's Motion for Summary Judgment should be Affirmed because Mr. Sharp Breached the Lease Agreement by Failing to Perform When Performance was Due.

FPL performed its obligations under the Lease Agreement by confirming receipt of the Equipment and paying the vendor for Mr. Sharp.

Any unjustified failure to perform when performance is due is a breach of contract. *Colorado Structures, Inc. v. Insurance Co. of the West*, 161 Wn.2d 577, 589, 167 P.3d 1125 (2007) (*citing* SIMPSON ON CONTRACTS, § 187 at 377). Mr. Sharp materially breached the Lease Agreement by failing to perform when Mr. Sharp's performance was due.

The Lease Agreement provides:

(a) An event of default shall occur if:

(1) Lessee **fails to pay** any Lease installment and such failure continues for a period of ten (10) days;

(2) Lessee shall **fail to perform** or observe any covenant, condition, or obligation to be performed or observed by it hereunder and such failure continues uncured for fifteen (15) days;

(3) Lessee or any guarantor has made any **misleading or false statement**, or representation in connection with application for performance of this Lease[.]

(CP 43 at ¶ (18)(a)(1)-(3)) [emphasis added].

1. Default No. 1— Failure to Pay

Pursuant to the Lease Agreement, Mr. Sharp owed monthly installment payments on the 1st of every month beginning May 1, 2010. Mr. Sharp has never paid a single monthly installment payment. (CP 38 at ¶ 11). This fact is not in dispute. Mr. Sharp's failure to make an installment payment and failure to cure the delinquency in ten days is an

independent default under the Lease Agreement. Summary judgment was appropriate on this basis alone.

2. *Default No. 2 — Failure to Perform*

Mr. Sharp failed to perform for the entire sixty month term. The Lease Agreement states: "**THIS IS A NON-CANCELABLE LEASE FOR THE TERM INDICATED[.]**" (CP 41) [emphasis in original]. Mr. Sharp failed to pay and sought to terminate the agreement well before the Lease Agreement expired. (CP 56 - 58). These facts are not in dispute. Consequently, Mr. Sharp's refusal to perform for the sixty month term is an independent default under the Lease Agreement. Summary judgment was appropriate on this basis alone.

3. *Default No. 3 — Misleading or False Statements*

Mr. Sharp made materially false and misleading statements to FPL. (CP 62). Mr. Sharp agreed to **not** make any false or misleading statements to FPL in the course of performance. (CP 43 at ¶ (18)(a)(3)). FPL relied upon the truthfulness of Mr. Sharp's statements to pay the vendor. (CP 37 at ¶ 6). Mr. Sharp's obligation to act in good faith is imposed as a matter of law under the Lease Agreement and the UCC. RCW 62A.1-203 ("Every contract or duty within this Title imposes an obligation of good faith in its performance or enforcement."). The Washington Supreme Court stated in *Liebergessell v. Evans*,

The law cannot allow contracting parties to deceive one another when there is a duty to act in good faith. The law of contracts reflects an evolving trend towards an interpretation of 'freedom of contract' acknowledging the parties' duty to deal in good faith with one another. Seventy years ago, this court noted that 'the tendency of the more recent cases has been to restrict rather than extend the doctrine of caveat emptor.'

Liebergesell v. Evans, 93 Wn.2d 881, 892, 613 P.2d 1170 (1980) (usury defense is not available to a borrower that breached duty of good faith) [internal citations omitted].

Mr. Sharp knew or should have known that FPL would rely on his statements when he signed the "**DELIVERY AND ACCEPTANCE AUTHORIZATION**" in the Lease Agreement, which provides that "[1]essee hereby authorizes Lessor to make payment to the Vendor upon completion of the Inspection/Verification Certificate." (CP 45; *see also* CP 62) [emphasis in original].

Viewing the facts in light most favorable to Mr. Sharp, Mr. Sharp did not receive the Equipment. Nonetheless, Mr. Sharp breached his duty by representing to FPL that he received the Equipment and that the Equipment was in satisfactory condition. (CP 38 at ¶ 9; *see also* CP 62). Mr. Sharp admits to making false statements to FPL. (CP 56; CP 58). Mr. Sharp further authorized FPL to pay the vendor. (CP 62). Mr. Sharp then failed to notify FPL of his misrepresentation for nearly thirty days. (CP

38; CP 56). These facts are not in dispute. Consequently, Mr. Sharp is in default for making misrepresentations to FPL during the course of performance. Summary judgment was appropriate on this basis alone.

C. The Superior Court's Order Granting Plaintiff's Motion for Summary Judgment should be Affirmed because Mr. Sharp's Promise to make Lease Payments for Sixty Months is Irrevocable.

Finance leases have been called "the most important single source of funds to support business expenditures for capital equipment." Amelia H. Boss, *The History of Article 2A: A Lesson for Practitioner and Scholar*, 39 Ala. L. Rev. 575, 577 (1988). To promote this policy, the UCC protects finance lessors because the lessee is the party that chooses the vendor, chooses the equipment, and arranges for delivery. (CP 36 at ¶ 4). The lessor's only role is to finance the transaction. Accordingly, the UCC provides that "[i]n the case of a finance lease, the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods." RCW 62A.2A-407(1). Mr. Sharp's promises under the Lease Agreement are irrevocable.

1. *The parties freely agreed to the "Delivery and Acceptance Authorization" procedure rather than the UCC's acceptance provision.*

Mr. Sharp cannot rely on UCC 2A-515 to argue that he did not accept the Equipment. RCW 62A.2A-515. The parties' intent is clearly expressed in the Lease Agreement where Mr. Sharp agreed to waive any

rights or obligations under UCC 2A-515; "[1]essee waives any and all rights and remedies conferred by UCC 2A-508 through 2A-522[1]" (CP 42 at ¶ 6). The "Delivery and Acceptance Authorization" provision was Mr. Sharp's sole means of acceptance. (CP 42). Mr. Sharp accepted the Equipment rendering his obligations under the Lease Agreement irrevocable. RCW 62A.2A-407(1).

Freedom of contract is a fundamental principal of contract law. This principal is affirmed under the UCC where the parties are free to alter or exclude provisions of the UCC by agreement. RCW 62A.1-102(3) ("The effect of provisions of this title may be varied by agreement"). In *Frank LeRoux, Inc. v. Burns*, the Court upheld the parties' decision to alter the UCC's remedies. 4 Wn. App. 165, 169, 480 P.2d 213 (1971). The Court observed that, "the Uniform Commercial Code leaves the parties free to shape their remedies according to their particular needs, within certain limits." *Id.* at 169. Accordingly, the parties in *Frank LeRoux, Inc.* were free to provide a remedy that was not provided by the UCC.

The parties here, similar to the parties in *Frank LeRoux, Inc.*, altered the provisions of the UCC by agreeing on how Mr. Sharp could accept the Equipment. Mr. Sharp accepted the goods according to the Lease Agreement by complying with the "**DELIVERY AND**

ACCEPTANCE AUTHORIZATION" provision. (CP 45) [emphasis in original]. The provision states:

Lessee's signature authorizes Lessor to verify by phone with a representative of Lessee **the date the Equipment was accepted by the Lessee;** the Equipment description, including the serial numbers; the schedule of lease payments; that all necessary installation has been completed; that the Equipment has been examined by Lessee and is in good operating order and condition and is in all respects satisfactory to Lessee and **that Equipment is accepted by Lessee for all purposes under the Lease.**

(CP 45) [emphasis added]. In accord with this provision, Mr. Sharp unequivocally accepted the Equipment in his telephone conversation with Ms. Grover. (CP 62). Mr. Sharp confirms that he accepted the Equipment in his letters to FPL. (CP 56; CP 58).

There is absolutely no reason to disregard the parties' agreement in a commercial transaction between two sophisticated entities - a law firm and a leasing company. Mr. Sharp accepted the Equipment rendering his promise to make lease payments for the entire sixty month term irrevocable. RCW 62A.2A-407(1). The Superior Court properly concluded that FPL was entitled to judgment as a matter of law.

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2. *The decisions from foreign jurisdictions cited by Mr. Sharp are not binding and do not apply here where Mr. Sharp breached his duty of good faith by making material misrepresentations to FPL.*

Mr. Sharp's only defense to a straightforward application of RCW 62A.2A-407(1) is that he did not have an opportunity to inspect the Equipment and therefore did not accept the Equipment. Mr. Sharp's defense does not apply because it is fundamental that the law "cannot allow contracting parties to deceive one another when there is a duty to act in good faith." *Liebergesell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980). To hold otherwise will provide a legal basis for Mr. Sharp, and other lessees, to engage in bad faith conduct during the course of performance.

In *Liebergesell*, a borrower convinced a lender to extend a loan at a usurious rate of interest. *Id.* at 885. Lender relied on borrower's false statements about the interest rate. *Id.* When lender sued borrower, borrower asserted the defense of usury. *Id.* at 886. The Court held that borrower may be estopped from asserting the usury defense if borrower breached the obligation of good faith by failing to disclose to lender that the interest was usurious. *Id.* at 894. The Court reasoned that the principal of freedom of contract imposes on the parties to a contract a duty of good faith in dealing with each other. *Id.* at 892. The Court held that

borrower was estopped from asserting a defense based upon borrower's bad faith conduct.

Similarly, in *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.*, the Court rejected a buyer's revocation of acceptance defense regarding a defective fishing boat engine. 17 Wn. App. 761, 770, 565 P.2d 819 (1977). Buyer knew of the defect for six months without giving seller notice of the defect where seller had the right to cure. *Id.* at 770. In fact, the buyer knew the first day the engine was installed that the engine was defective yet buyer remained silent. *Id.* at 770. Buyer then sought to revoke acceptance based on the defect. *Id.* at 764. The Court rejected buyer's defense finding a breach of good faith. It held that buyer's late notice did not comply with buyer's obligation to perform in good faith, which deprived seller the opportunity to cure. *Id.* at 770. Buyer's conduct precluded buyer's right to revoke acceptance. *Id.* at 771 (*citing* RCW 62A.1-203).

Mr. Sharp's promise to pay for sixty months is not revocable because his bad faith conduct precludes application of Mr. Sharp's defense to acceptance. *Liebergessell*, 93 Wn.2d at 894; *Peter Pan Seafoods, Inc.* 17 Wn. App. at 771. To adopt Mr. Sharp's defense to RCW 62A.2A-407(1), the Court must ignore Mr. Sharp's material misrepresentations and thirty day delay before notifying FPL. In fact, Mr. Sharp's conduct here is far

more egregious than buyer's silence in *Peter Pan Seafoods* because Mr. Sharp took an affirmative step to deceive FPL and then remained silent as contrasted with buyer's mere silence in *Peter Pan Seafoods*. Mr. Sharp's deceptive conduct resulted in FPL's payment of over \$25,000 to ImageSource.

The Court here should reject Mr. Sharp's defense for deceiving FPL, as the Court rejected borrower's usury defense for deceiving the lender in *Liebergesell*, because Mr. Sharp had a duty to act in good faith. To permit Mr. Sharp to avoid liability would render the duty of good faith between contracting parties, imposed by the UCC, the Lease Agreement and the common law of contracts, meaningless. The principal announced in *Liebergesell* and *Peter Pan Seafoods* should be applied here because Mr. Sharp cannot invoke a defense in light of his bad faith conduct.

Decisions from other jurisdictions are factually and legally inapplicable in light of Mr. Sharp's breach of his duty of good faith. The Court's analysis in *Colonial Pacific Leasing Corp. v. J.W.C.J.R. Corporation* is factually distinguishable because it addresses a **written** verification form, signed before the delivery date, in circumstances raising issues of procedural unconscionability. 977 P.2d 541, 543 (1999). Moreover, in *Colonial Pacific*, the lessee gave notice to lessor that the

equipment was defective immediately upon inspection rather than making verbal misrepresentations to the lessor as Mr. Sharp did here. *Id.* at 543.

The Court's analysis in *JAZ, Inc. v. Foley* is similarly unpersuasive because the lessee was required to sign a **written** verification form before delivery rather than confirm delivery by telephone as occurred between FPL and Mr. Sharp. 104 Hawai'i 148, 150, 85 P.3d 1099 (2004). During the telephone conversation with FPL, Mr. Sharp had every opportunity to explain that he did not receive the Equipment, yet he deceived FPL and then remained silent when he knew the Equipment did not arrive.

In fact, Mr. Sharp's reliance on decisions similar to *Colonial Pacific* and *JAZ, Inc.* from other states' courts ignores the undisputed fact here that FPL relied upon Mr. Sharp's affirmative material misrepresentation. *See, e.g., Info Leasing Corporation v. GDR Investments, Inc.*, 152 Ohio App.3d 260, 787 N.E.2d 652 (2003) (summary judgment in favor of finance lessor reversed and remanded on issue of lessor's unconscionable conduct); *Capitol Dodge Sales, Inc. v. Northern Concrete Pipe, Inc.*, 131 Mich. App. 149, 346 N.W.2d 535 (1983) (buyer of motor vehicle took no affirmative act to accept equipment); *Tri-Continental Leasing Corp. v. Law Office of Richard W. Burns*, 710 S.W.2d 604 (1985) (pre UCC case affirmed in favor of lessee for lessor's procedurally unconscionable conduct).

Mr. Sharp is not an innocent party. Mr. Sharp was capable of avoiding his own damages. To follow the reasoning of *Colonial Pacific* and *JAZ, Inc.* under these facts would permit contracting parties to deceive each other and then avoid the consequences of such deceit. The law in Washington and the duty of good faith are clearly to the contrary — a party to a contract cannot invoke a defense in light of the party's own bad faith conduct. *Liebergesell*, 93 Wn.2d at 894; *Peter Pan Seafoods, Inc.*, 17 Wn. App. at 771. Accordingly, FPL respectfully requests the Superior Court's decision be affirmed because Mr. Sharp's promise to make lease payments for the entire sixty month term is irrevocable. RCW 62A.2A-407(1).

D. FPL is Entitled to Its Attorneys Fees and Costs for Enforcing its Rights in Superior Court and on Appeal Pursuant to the Lease Agreement.

FPL requests its attorney's fees and costs as permitted by RAP 18.1(b) because the Lease Agreement provides for attorney's fees and costs on appeal. The Lease Agreement states:

In the event Lessor is required to retain an attorney to assist in the enforcement of its rights under this Lease, it shall be entitled to a reasonable attorney's fee, however incurred in addition to costs and necessary disbursements, whether or not suit becomes necessary, **including fees incurred on appeal** or in connection with a bankruptcy proceeding.

(CP 44 at ¶ 19) [emphasis added].

FPL incurred attorney's fees to enforce its rights at the Superior Court and now on appeal. FPL is entitled to collect its attorney's fees and costs pursuant to the Lease Agreement and RAP 18.1. FPL also requests its costs pursuant to RAP 14.2 as the prevailing party. Accordingly, FPL respectfully requests the Court affirm the Superior Court's award of attorney's fees and costs and award FPL its attorney's fees and costs incurred on appeal as provided by the Lease Agreement.

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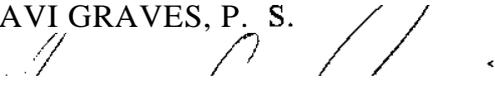
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V. CONCLUSION

The Superior Court's Order Granting Plaintiff's Motion for Summary Judgment should be affirmed because Mr. Sharp breached the Lease Agreement by failing to make timely lease payments, terminating the Lease Agreement prior to its expiration, and making material misrepresentations to FPL. The Superior Court's Order Granting Plaintiff's Motion for Attorney's Fees and Costs should be affirmed. FPL further requests attorney's fees and costs on appeal as provided by the Lease Agreement.

DATED this 1 day of December, 2011.

McGAVI GRAVES, P. S.

By:  / **AL k. 41141** / _____

min GREIN, W 7-1118036

N L. GODWIN, WSBA #40806

Attorneys for Respondent

APPENDIX OF OPINIONS FROM FOREIGN JURISDICTIONS

34⁶ N.W.2d 535
Court of Appeals of Michigan.

CAPITOL DODGE SALES, INC., d/b/
a Capitol Dodge, Inc., Plaintiff-Appellee,

v.

NORTHERN CONCRETE PIPE,
INC., Defendant-Appellant,

and

Chrysler Corporation and John Fuller, Defendants.

Docket No. 65254. I Submitted Oct.
11, 1983. I Decided Dec. 19, 1983. I
Released for Publication March 16, 1984.

Seller of new pickup truck brought action against buyer for damages it suffered as a result of buyer's alleged breach of the contract for sale of the truck. Buyer brought third-party actions against truck manufacturer and seller's sales representative. The 56th District Court, Kenneth A. Hansen, J., entered judgment in favor of seller on its claim and in favor of manufacturer and sales representative on the third-party claims, and buyer appealed. The Eaton Circuit Court, Hudson E. Deming, J., affirmed, and buyer appealed by leave granted. The Court of Appeals, Peterson, J., held that: (1) buyer which, one day after sale, had notified seller that truck was overheating and that seller could come and pick up the truck did not accept the truck and did not indicate that it would retain the truck in spite of its nonconformity, and (2) buyer had the absolute right to reject the truck for nonconformity within reasonable time and to seasonably notify seller thereof, which it did.

Reversed and remanded.

Attorneys and Law Firms

****536 *152** Scodeller, Wilson, DeLuca & Vogel by R. David Wilson, Lansing, for plaintiff-appellee.

James G. Haverson & Associates, P.C. by James G. Halverson, East Lansing, for defendant-appellant.

Daudert & Basch, P.C. by Charles J. Daudert, Kalamazoo, for Chrysler Corp.

Before DANHOF, C.J., and BRONSON, and PETERSON, * JJ.

* William R. Peterson, 28th Judicial Circuit Judge, sitting on Court of Appeals by assignment pursuant to Const. 1963, Art. 6, Sec. 23, as amended 1968.

Opinion

PETERSON, Judge.

Defendant appeals by leave granted from a district court judgment, affirmed on appeal to the circuit court, awarding plaintiff damages ¹ for breach of contract for sale of a new 1979 Dodge pickup truck. ²

- 1 After a considerable delay, the parties stipulated to the sale of the truck prior to trial, and damages were awarded for the difference between the contract price and the proceeds of the sale.
- 2 Defendant's third-party complaint against Chrysler Corporation and John Fuller resulted in a judgment for the third-party defendants which was not appealed.

****537** Defendant claims that the trial court erred in finding that it had accepted the truck and in concluding that it had thereafter wrongfully attempted a revocation of the sale. We agree, finding that the evidence shows no acceptance within the meaning of the Uniform Commercial Code, MCL § 440.2606, MSA 19.2606, and that defendant had an absolute right to reject the truck, MCL § 440.2601, MSA 19.2601.

The evidence shows that on November 8 or 9, 1978, ³ an officer of defendant, William Washabaugh, *153 called at plaintiffs place of business to discuss the possible purchase of a pickup truck with a snowplow attachment. The truck in question was of the type desired and plaintiffs salesman, John Fuller, took Mr. Washabaugh for a test drive in the vehicle. Washabaugh liked the truck. However, before the test drive was completed, the engine overheated. There was a conflict in the testimony of Fuller and Washabaugh which was not addressed by the opinion of the trial judge: Washabaugh testified that the temperature gauge was "all the way over" and that there was steam coming from under'the hood; Fuller testified that the truck was just running warm, that there was no overheating, and that he saw no steam coming from the engine compartment.

- 3 It is possible that, when the matter was tried in 1981, some of the witnesses who put events on November 9-10-11, were confused as to dates. It may well be that the events in question occurred on Wednesday, Thursday and Friday, the 8th, 9th and 10th rather

than on Thursday, Friday and Saturday, the 9th, 10th and 11th. It may be doubted, for instance, that both businesses were open on a Saturday afternoon, as all witnesses agree that they were on the third day of the sequence, or that plaintiff sent men to defendant's place of business on a Saturday night to pick up the truck. Plaintiff's president, Neil Mason, for instance, says that he saw the truck on his lot on Friday night, November 10th, *after it had been brought back by wrecker*, an event which happened on the third day.

Whichever version is correct, the significant fact is that the topic of engine overheating was specifically addressed by Fuller and Washabaugh. Washabaugh expressed concern about the matter, and indicated past experience with other vehicles suffering engine damage from overheating. Fuller said that overheating resulted from incorrect positioning of the snowplow blade in front of the radiator.⁴ Washabaugh was willing to buy the truck if Fuller's statement was correct. Fuller assured him that that was in fact the case, documents of purchase were executed, and Washabaugh gave Fuller a check for the full payment of the purchase price. They agreed that employees of ***154 defendant** would pick up the truck the following day and that they would be instructed on the proper positioning of the plow blade.

- 4 He also indicated that the risk of overheating from incorrect positioning of the blade would be increased when driving the truck at slow speeds; and, it was suggested at trial, that the weather was then somewhat warmer than would be usual for November.

On the following day, Stanley Reid and Leon LaFave came to plaintiff's place of business to pick up the truck for defendant. Fuller personally showed them how to properly position the blade, and it was so positioned in Fuller's presence before Reid and LaFave left for defendant's place of business near Potterville. When they arrived there, the engine was overheating and steaming. A mechanic employed by defendant could find no apparent defects from a visual inspection, so a telephone call was made to plaintiff's office. An employee in plaintiff's service department advised rechecking the blade position, refilling the radiator, and taking the truck out for another drive. This was done. Reid and LaFave drove to Potterville, about two miles from defendant's place of business, and back. The engine again overheated, the temperature gauge rose to the maximum, and there was an eruption of water and steam.

LaFave again called plaintiff's office and was told to bring the truck into plaintiff's ****538** service department. He did

so, and when he arrived the engine was again overheating and steaming. He was told that the problem might be with a thermostat but that the truck would be ready and could be picked up the following afternoon.

On the next afternoon (the third day, be it November 10 or 11), LaFave went to Lansing and picked up the truck. He was told that a radiator cap had been replaced. By the time he got back to defendant's place of business, the engine was again overheating. On Washabaugh's orders, LaFave immediately notified plaintiff by telephone that defendant was not taking the truck, that payment ***155** was being stopped on the check,⁵ and that plaintiff should come get the truck. Plaintiff sent a wrecker and crew that evening and towed the truck back to its lot.⁶

- 5 A stop payment order was made by defendant that day.

- 6 LaFave could not recall the identity of the person with whom he spoke. Plaintiff's brief implies that there was no such call, and states that defendant had no knowledge that plaintiff was rejecting the truck and stopping payment on the check until it was notified of the stop payment order by its bank on November 15 or 16. Plaintiff also claims that the truck was returned to its lot by defendant; the trial judge so found, but the only evidence on the point is to the contrary.

In the following days, plaintiff did nothing to the truck by way of inspection or repair. It was left sitting on plaintiff's lot. On November 15 or 16, the purchase and registration documents were taken by plaintiff to a branch office of the Secretary of State. On November 15 or 16, plaintiff received notice from its bank that defendant had stopped payment on the check.

Title to the truck was issued in defendant's name by the Secretary of State on December 1, 1978. Both parties retained counsel, and defendant made an effort to tender title to plaintiff so the truck could be resold. Plaintiff rejected the tender, taking the position that the transaction was complete and that it could not resell the truck because defendant held title, and commenced this suit.

The opinion of the trial judge is sparse in its findings of fact. As noted in footnote 6, the opinion contains the erroneous finding that defendant returned the truck to plaintiff's lot, implying that this was done without notice to plaintiff. There are no findings as to when plaintiff submitted the registration documents to the Secretary of State, nor were there findings or discussion of the events bearing on notice of rejection. Rather, the opinion merely states a conclusion that plaintiff

received no notice of rejection until after title had been *156 transferred to defendant, a conclusion which seems to be clearly erroneous. Moreover, the opinion of the trial judge contains no findings of fact, discussion, or conclusion as to an acceptance of the truck by defendant within the meaning of the Uniform Commercial Code, although the conclusion that acceptance had occurred can be implied from the opinion's statement of the issues as being: (1) whether the defendant had sustained the burden of proving the truck defective so as to justify a revocation after acceptance;⁷ (2) if the truck was defective, whether plaintiff was given an opportunity to seasonably cure the defect;⁸ and (3) whether plaintiff had a duty to resell the truck.⁹

7 MCL § 440.2607(4), MSA 19.2607(4).

8 MCL § 440.2607(2), MSA 19.2607(2).

9 Given our conclusions, we do not reach the question of the seller's duty to resell goods wrongfully rejected or returned on revocation of sale. Neither is it necessary to consider the holding of the majority in *Colonial Dodge, Inc. v. Miller (On Rehearing)*, 121 Mich.App. 466, 328 N.W.2d 678 (1982), that the Michigan Vehicle Code pre-empts the Uniform Commercial Code as to transfer of ownership of vehicles, a conclusion which we question at least as to the parties *inter se*. We note in passing that plaintiff herein could hardly claim the Vehicle Code as a shield, having taken steps to cause the issuance of title in the buyer's name after, and notwithstanding notice of, rejection by the buyer.

1 We find the trial judge's decision on such issues inapposite, holding that on these facts the implied finding that there **539 had been an acceptance of the truck by defendant is erroneous.

The Uniform Commercial Code, § 2-606 (MCL § 440.2606, MSA 19.2606), provides:

"(1) Acceptance of goods occurs when the buyer

"(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity;

or

"(b) fails to make an effective rejection (subsection (1) of section 2602), but such acceptance does not occur *157 until the buyer has had a reasonable opportunity to inspect them; or

"(c) does any act inconsistent with the seller's ownership; but if such an act is wrongful as against the seller it is an acceptance only if ratified by him.

"(2) Acceptance of a part of any commercial unit is acceptance of that entire unit."

2 3 This language, in defining what constitutes an acceptance, clearly contemplates an act of the buyer beyond taking delivery or possession of the goods. Possession during the time necessary for the "reasonable opportunity" to inspect is contemplated prior to acceptance. Similarly, § 2-602 of the code¹⁰ allows a rejection of goods for nonconformance "within a reasonable time *after their delivery*". Thus, while transfer of possession or title may be acts bearing on the question of acceptance, they are not in themselves determinative thereof. White & Summers, Handbook of the Law under the Uniform Commercial Code (2d ed), § 8-2, p 296.

10 MCL § 440.2602, MSA 19.2602.

4 In *Colonial Dodge, Inc. v. Miller*, 116 Mich.App. 78, 322 N.W.2d 549 (1982), a majority of the Court adopted the holding in *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J.Super. 441, 240 A.2d 195 (1968), a case in which a newly purchased automobile became inoperable as the purchaser was driving it home from the dealer's showroom.¹¹

11 Without consideration of the technical reasons why the car was inoperable, the fact of inoperability established its failure to conform to the contract of sale. We so view the overheating of the engine herein. The overheating is of such significance as to constitute a nonconformity without evidence as to the specific technical cause thereof.

5 6 *Zabriskie* is pertinent for two reasons. In the first place, when dealing with acceptance under the UCC, it speaks to the relationship between the manufacturer and seller of complex machines or *158 devices on the one hand and the dependent buyer on the other hand. The buyer may be expert in the use of the machine or device but he generally has no expertise as to the mechanical, electronic, chemical, and engineering components that combine to produce the intended performance. *Zabriskie* recognized this buyer dependency on the seller's expertise in holding that something more than a mere visual inspection is appropriate before the buyer can be held to have accepted the machine. We agree. A "reasonable time to inspect" under the UCC must

allow an opportunity to put the product to its intended use, or for testing to verify its capability to perform as intended.

7 *Zabriskie* is also important for its holding that the adoption of the Uniform Commercial Code, § 2-601,¹² which provides that the buyer may reject goods which "fail in any respect to conform to the contract", creates a "perfect tender" rule replacing pre-code cases defining performance of a sales contract in terms of substantial compliance. We agree with that construction of the code.

12 MCL § 440.2601, MSA 29.2601.

In *Colonial Dodge*, the majority held that lack of a spare tire for a passenger car constituted nonconformity warranting rejection. On rehearing, 121 Mich.App. 466, 328 N.W.2d 678 (1982), a majority reversed the original decision on the ground that **540 there was evidence to support the finding of an acceptance by the buyer, so that the question was not one of rejection but whether the nonconformity substantially impaired the vehicle's value to the buyer so as to justify revocation. The trial judge's determination that, in fact, the vehicle's value was not substantially impaired was affirmed, requiring reversal of the result arrived at by *Colonial Dodge I*. That reversal was not an abandonment *159 of the construction of the Uniform Code expounded in *Colonial Dodge I*, and this Court in *Colonial Dodge (On*

Rehearing) expressly distinguished its holding from the result reached in *Zabriskie* where there had been no acceptance.

8 In the instant case, there was no acceptance.¹³ Nothing that defendant did can be construed under § 2-606(1)(a), as signifying, after a reasonable opportunity to inspect, that the truck conformed or that defendant would retain the truck in spite of its nonconformity. Defendant had the absolute right to reject the truck for nonconformity within a reasonable time, and to seasonably notify the plaintiff thereof. MCL § 440.2602, MSA 19.2602. It did so.

13 The facts of *Colonial Dodge* differ also from those of *Zabriskie* in another respect which was noted indirectly in *Colonial Dodge (On Rehearing)* in the discussion of substantial impairment of value as justification for the revocation of an acceptance. Unlike *Zabriskie*, or the instant case, the missing spare tire of *Colonial Dodge* was not a latent defect such as could be discovered only by an expert or by testing. In determining whether there has been an acceptance in a given case, what constitutes a reasonable opportunity to inspect will depend upon the nature of the defect.

Reversed and remanded for entry of judgment in favor of defendant. Costs to defendant.

Parallel Citations

346 N.W.2d 535, 38 UCC Rep.Serv. 114

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977 P.2d 541

Court of Appeals of Utah.

COLONIAL PACIFIC LEASING
CORP., Plaintiff and Appellee,

v.

J.W.C.J.R. CORPORATION dba Jack's
Southwest Collision Repair; and John W.
Cumberledge, Jr., Defendants and Appellants.

No. 980062-CA. I March 25, 1999.

Lessor of computer equipment brought action against lessee, alleging breach of finance lease agreement. The District Court, Salt Lake Department, William W. Barrett, J., entered judgment in favor of lessor, and lessee appealed. The Court of Appeals, Billings, J., held that: (1) failure to expressly find whether lessee had a reasonable opportunity to inspect the equipment, and whether it accepted the equipment by its actions, was not harmless, requiring remand; (2) determination as to whether lessee had a reasonable opportunity to inspect the equipment was required on remand before it could be determined whether lessee properly rejected the equipment; (3) failure to find whether lessor consented to cancellation of the lease was not harmless; and (4) 30-day inspection period offered by supplier was not a condition precedent to enforcing the lease.

Reversed and remanded.

Attorneys and Law Firms

*543 Grant W.P. Morrison and William Patrick Morrison, Morrison & Morrison LC, Salt Lake City, for Appellants. J. Bruce Reading and Wesley D. Hutchins, Scalley & Reading, Salt Lake City, for Appellee.

Before WILKINS, P.J., and GREENWOOD and BILLINGS, JJ.

Opinion

OPINION

BILLINGS, Judge:

¶ 1 Appellants J.W.C.J.R. Corp. (JWCJR) and John W. Cumberledge, Jr. (Cumberledge) appeal a judgment in favor of appellee Colonial Pacific Leasing Corp. (Colonial Pacific), awarding Colonial Pacific the amount due under its finance

lease agreement with JWCJR. Because we conclude the trial court's findings of fact are insufficient to support its judgment enforcing the finance lease agreement, we reverse and remand.

FACTS

¶ 2 JWCJR, an autobody shop, sought a computer and software package that would facilitate the generation of estimates for insurance companies and improve internal shop management. JWCJR was approached by Bottomline Systems, Inc. (Bottomline), who demonstrated a computer and software system. To obtain the demonstrated system, JWCJR entered into a finance lease agreement with Colonial Pacific, the lessor. JWCJR's owner, Cumberledge, signed the lease both as an agent of JWCJR and as a personal guarantor. Colonial Pacific purchased the equipment from Bottomline. Under the finance lease agreement, JWCJR was to make monthly payments to Colonial Pacific.

¶ 3 A few days before JWCJR received the computer and software package from Bottomline, Colonial Pacific required Cumberledge to sign an "acceptance and acknowledgment" form that stated the equipment had been received from Bottomline and was satisfactory. Cumberledge signed the acceptance and acknowledgment form and made an initial lease payment. On the day JWCJR received the equipment, Colonial Pacific contacted Cumberledge seeking a verbal verification that the equipment was acceptable. Cumberledge told Colonial Pacific's representative that JWCJR had received the equipment, but it was not yet operational.

¶ 4 Cumberledge had difficulty getting the computer system to function properly and repeatedly contacted Bottomline with his concerns. On the second day JWCJR had the computer equipment, Colonial Pacific again contacted Cumberledge to inquire whether the system was operational; Cumberledge responded that the system was working. Colonial Pacific then paid Bottomline for the equipment. Later that day the system crashed, and despite repeated calls to Bottomline and many attempts to get it functioning, Cumberledge could not get the system to work.

¶ 5 Soon after, Cumberledge phoned Colonial Pacific and informed it the computer equipment was not functioning and never had functioned properly. Cumberledge boxed up the equipment and contacted Bottomline to pick it up. Within the next few weeks, Cumberledge again phoned Colonial Pacific to tell it of his problems with the computer system and to cancel the lease. From his conversation with a Colonial

Pacific representative, Cumberlandge believed the lease was canceled and that he was no longer obligated to make lease payments. Colonial Pacific had no record of the telephone calls.

¶ 6 More than two years later, Colonial Pacific sought to recover the unpaid lease payments. JWCJR, and Cumberlandge as guarantor of the lease, refused to pay. Colonial Pacific brought this action to recover the full lease amount. The trial judge concluded JWCJR had breached the lease agreement by failing to make the required lease payments and awarded Colonial Pacific a judgment for \$21,275.30. JWCJR and Cumberlandge now appeal.

*544 ANALYSIS

I. Acceptance

1 ¶ 7 On appeal JWCJR argues the trial court erred in enforcing the lease agreement because JWCJR never accepted the goods covered by the lease. JWCJR contends any alleged acceptance took place before it had a reasonable opportunity to inspect the computer equipment.

¶ 8 Under Article 2A of the Uniform Commercial Code (UCC), which governs enforcement of financing leases, we must determine if a lessee has accepted the goods, and therefore, has agreed to the lease. Once a lessee has accepted the goods, the lessee's promises are deemed irrevocable. See Utah Code Ann. § 70A-2a407(1) and (2) (1997). Subsections 407(1) and (2), commonly referred to jointly as "the hell or high water provision," state:

(1) In the case of a finance lease that is not a consumer lease, *the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods.*

(2) A promise that has become irrevocable and independent under Subsection (1):

(a) is effective and enforceable between the parties, and by or against third parties including assignees of the parties; and

(b) is not subject to cancellation, termination, modification, repudiation, excuse, or substitution without the consent of the party to whom the promise runs.

Id. (emphasis added.).

119 Utah Code Ann. § 70A-2a-515 (1) (1997) explains when a lessee has accepted leased goods:

(1) Acceptance of goods occurs after:

(a) *the lessee has had a reasonable opportunity to inspect the goods and the lessee signifies or acts with respect to the goods in a manner that signifies to the lessor or the supplier that the goods are conforming or that the lessee will take or retain them in spite of their nonconformity;* or

(b) *the lessee fails to make an effective rejection of the goods as provided in Subsection 70A-2a-509(2).*

Utah Code Ann. § 70A-2a-515 (1) (1997) (emphasis added).

¶ 10 One commentator further explains acceptance in financing leases:

Section 2A-515(1) provides that acceptance occurs when the lessee does any of three things *after a reasonable opportunity to inspect the goods*: (a) signifies acceptance; (b) fails to make an effective rejection; or (c) does any act that signifies acceptance. Normally, acceptance occurs under the first test where the lessee, *after inspection*, indicates that the lessee is satisfied with the goods and will take them, or signifies that the lessee will take or retain them notwithstanding their defects.

2A William D. Hawkland & Frederick H. Miller, *Uniform Commercial Code Series* § 2A-515, at 839 (1993) (emphasis added).

¶ 11 Because it is generally accepted that UCC sections 2-606 and 2A-515 are analogous,¹ we look to case law interpreting both provisions to help us determine whether JWCJR had a reasonable opportunity to inspect the computer equipment, and thus by its acts accepted the equipment.

1 Though this is a financing lease agreement, most commentators agree that UCC § 2A-515 parallels UCC § 2-606, its analogous provision in the sales article. "UCC § 2A-515 parallels the comparable provision of the sales Article [UCC § 2-606] and will be given the same interpretation as that provision." 5 Ronald A. Anderson, *Anderson on the Uniform Commercial Code* § 2A-515:3, at 684 (3d ed.1994); see also 2 James J. White & Robert S. Summers, *Uniform Commercial Code, Practitioners Treatise Series*, §§ 14-1 and -2, at 24-28 (4th ed. 1995) ("Sections 2A-508 through 2A-517 are relatively straightforward modifications of the Article 2 rules on rejection, cure, revocation,

acceptance and the like."). Because there is little authority explaining when acceptance occurs under § 2A-515, we also rely on cases discussing section 2-606.

2 ¶ 12 Whether a party has had a "reasonable opportunity to inspect," and thus whether an acceptance has occurred, is a question of fact. *See Figueroa v. Kit-San Co.*, 123 Idaho 149, 845 P.2d 567, 576 (Ct.App.1992) ("What is a reasonable time is primarily a question of fact."); *Sjogren v. Maybrooks, Inc.*, 214 Ill.App.3d 888, 158 Ill.Dec. 182, 573 N.E.2d 1367, 1369 (1991) ("The *545 UCC definition of a reasonable time suggests that the question of reasonableness is particularly fact sensitive. It follows that whether conduct has amounted to an acceptance or a rejection of goods is a question of fact "to be determined within the framework of each particular case." (Citations omitted.); *Capitol Dodge Sales v. Northern Concrete Pipe*, 131 Mich.App. 149, 346 N.W.2d 535, 538-39 (1983) (holding trial court's findings of fact were inadequate to establish whether acceptance had occurred); *Ho v. Wolfe*, 688 S.W.2d 693, 696 (Tex.App.1985) ("[T]he determination of what actions amount to an acceptance or rejection in a particular case is generally made by the trier of fact."); *cf. Lish v. Compton*, 547 P.2d 223, 226-27 (Utah 1976) (stating that determination of what constitutes "reasonable time" for confirmation of sale is usually question of fact).

3 ¶ 13 Taking possession of the goods is not determinative of acceptance, nor is the signing of a form acceptance before receipt of the goods, nor the making of a lease payment. "A 'reasonable time to inspect' under the UCC must allow an opportunity to put the product to its intended use, or for testing to verify its capability to perform as intended." *Capitol Dodge Sales*, 346 N.W.2d at 539; *see also* James J. White & Robert S. Summers, *Hornbook of the Law Under the UCC* § 8-2, at 296 (4th ed. 1995) ("[T]he prevailing view is that one who buys complex goods ... and signs a contract for purchase after only a short [period] should not be held to have had a 'reasonable opportunity to inspect' and therefore not be held to have accepted the goods."). In *Capitol Dodge Sales*, the Michigan Court of Appeals found a trial court's determination that a buyer accepted a new vehicle to be clearly erroneous when the vehicle overheated repeatedly and the buyer later returned the vehicle. *See Capitol Dodge Sales*, 346 N.W.2d at 537-38. The court noted that acceptance under the UCC assumes an act beyond merely taking possession of goods: "Possession during the time necessary for the 'reasonable opportunity' to inspect is contemplated prior to acceptance." *Id.* at 539.

¶ 14 Similarly, in *Moses v. Newman*, 658 S.W.2d 119, 121-22 (Tenn.Ct.App.1983), the Tennessee Court of Appeals held that the buyer of a mobile home had not had a "reasonable opportunity to inspect," and thus, although the buyer had possession of the goods, no acceptance had occurred. "What is a reasonable opportunity varies, depending upon the type of goods involved.... [T]he statute, by affording the purchaser a reasonable opportunity to inspect, implies possession or some possible use by the purchaser without acceptance of the goods." *Id.* at 121 (citations omitted); *see also Jacob Hartz Seed Co., Inc. v. Coleman*, 271 Ark. 756, 612 S.W.2d 91, 92 (1981) ("It is clear that under the [Uniform Commercial] Code, delivery does not in and of itself constitute acceptance."); *Jakowski v. Carole Chevrolet, Inc.*, 180 N.J.Super. 122, 433 A.2d 841, 843 (1981) ("[T]he mere taking of possession by the purchaser is not equivalent to acceptance. Before he can be held to have accepted, a buyer must be afforded a 'reasonable opportunity to inspect' the goods.") (citations omitted).

¶ 15 Additionally, in *Tri-Continental Leasing Corp. v. Law Office of Richard W. Burns*, 710 S.W.2d 604 (Tex.App.1985), the Texas Court of Appeals held there was no acceptance even when a lessee signed an acceptance form acknowledging the equipment was satisfactory and in working order. *See id.* at 608. In reaching its conclusion, the court focused on the lessee's lack of opportunity "to test the working order of the machine" before he was compelled to sign the acknowledgment in finding that there was no "reasonable opportunity to inspect the goods." *Id.*; *cf. Horrocks v. Westfalia Systemat*, 892 P.2d 14, 16 (Utah Ct.App.1995) (concluding a signed acceptance and acknowledgment form not binding on buyer when form signed before delivery of goods).

¶ 16 Also, in *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723 (Minn.1985), the Minnesota Supreme Court held that a buyer had not accepted goods when he was compelled to provide payment before actual receipt of the goods. *See id.* at 727. "When a contract requires payment prior to inspection, payment 'does not constitute an acceptance of goods or impair the buyer's right to inspect *546 or any of his remedies.'" *Id.* (quoting Minn.Stat. § 336.2-512(2) (1984)).

4 **5 ¶ 17** In this case, the trial judge failed to make findings of fact on the pivotal issue of whether JWCJR had a reasonable opportunity to inspect the computer and software package, or even on the ultimate issue of whether JWCJR accepted the goods. "It is well settled that the trial

court should make findings on all material issues tried by the parties, and a failure to do so is generally considered reversible error and requires a remand." *Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983). However, a trial court's decision may "be affirmed if the failure to make the missing findings can be viewed as harmless error." *Hall v. Hall*, 858 P.2d 1018, 1025 (Utah Ct.App.1993). Harmless error can occur two ways: (1) if " 'the undisputed evidence clearly establishes the factor or factors on which the findings are missing,' " or (2) "even given controverted evidence ... if the absent findings can reasonably be implied." *Id* (quoting *Allred v. Allred*, 797 P.2d 1108, 1111 (Utah Ct.App.1990)).

¶ 18 "Unstated findings can be implied if it is reasonable to assume that the trial court actually considered the controverted evidence and necessarily made a finding to resolve the controversy, but simply failed to record the factual determination it made." *Hall*, 858 P.2d at 1025. "Findings [of fact] may *not* be implied, however, when the 'ambiguity of the facts' makes such an assumption unreasonable. This court [has] held that we will not imply any missing finding where there is a 'matrix of possible factual findings' and we cannot ascertain the trial court's actual findings." *Id.* at 1025-26 (citations omitted).

¶ 19 In this case, the trial court's failure to make findings on whether JWCJR had a reasonable opportunity to inspect the goods, and thus by its acts accepted the goods, is not harmless error. The first alternative fails because the facts are disputed and are "not capable of supporting only a finding" of acceptance. Cumberledge, on the second day after he received the computer equipment, told Colonial Pacific that the equipment was operational. However, soon after, Cumberledge made repeated telephone calls to Colonial Pacific telling it that the equipment was inoperative. Cumberledge also testified he was unfamiliar with the computer system and needed assistance in installing the programs and learning how to use the system. Finally, Cumberledge spoke with a representative of Colonial Pacific and understood from this conversation that the lease was canceled.

¶ 20 In contrast, Colonial Pacific relies on the "acceptance and acknowledgment" form, signed by Cumberledge before the equipment was delivered, to establish acceptance. Further, it claims that to the best of its knowledge the computer and software package were operational, and that Cumberledge never contacted Colonial Pacific in the initial weeks of the lease. The trial court was thus faced with disputed evidence but never made the critical finding that JWCJR, after having a

"reasonable opportunity to inspect" the computer equipment, had "accepted it."

¶ 21 Similarly, because it cannot reasonably be implied that JWCJR had a "reasonable time for inspection," and thus accepted the computer and software system, the second alternative for affirming the trial court's ruling also fails. The trial court heard conflicting testimony as to Cumberledge's ability to get the computer and software equipment to function properly. Colonial Pacific contended that only two to three days after the computer equipment's delivery, it contacted Cumberledge to determine if the equipment was operational. Based upon his affirmative answer, Colonial Pacific funded the lease. However, Cumberledge testified the computer system crashed that same day, and that he telephoned Colonial Pacific twice, once soon after the system crashed and again within about ten days of its failure. Both times Cumberledge told Colonial Pacific the equipment was not operating and had never operated properly. Indeed, the trial court's findings of fact suggest that JWCJR did not have a reasonable opportunity to inspect the leased equipment and did not signify acceptance by its acts:

4. The equipment was delivered and installed at Defendant [JWCJR's] place of business by Bottomline Systems, Inc., but it did not function properly.

*547 5. Defendant John Cumberledge informed [Colonial Pacific] on two occasions that the equipment was not operational.

6. The equipment was returned to Bottomline Systems, Inc. subsequent to the signing and execution of the finance lease.

7. [Cumberledge and JWCJR] were not contacted by [Colonial Pacific] until approximately two years thereafter, at which time [Colonial Pacific] sought payment in full from [JWCJR].

¶ 22 In sum, a finding that JWCJR had a reasonable opportunity to inspect the computer equipment, and thus by its actions accepted the equipment, cannot be reasonably implied "where there is a 'matrix of possible factual findings' and we cannot ascertain the trial court's actual findings." *Hall*, 858 P.2d at 1025-26. We conclude the trial court's failure to expressly make the findings of fact whether JWCJR had a reasonable opportunity to inspect the equipment, and whether it signified acceptance of the equipment by its actions, is not harmless error. We therefore reverse and remand for the trial

court to consider these critical issues in light of our opinion, and to make the necessary findings to support its conclusion.

II. Rejection

6 ¶ 23 JWCJR also argues the trial court erred in concluding it breached the lease agreement because JWCJR contends it rejected the computer equipment. The concept of rejection is intertwined with acceptance. "Acceptance of goods occurs after: the lessee fails to make an effective rejection of the goods as provided in Subsection 70A-2a-509(2)." Utah Code Ann. § 70A-2a-515(1)(b) (1997). Section 70A-2a-509(2) explains when a lessee has rejected leased goods: "Rejection of goods is ineffective unless it is within a reasonable time after tender or delivery of the goods and the lessee seasonably notifies the lessor." Utah Code Ann. § 70A-2a-509(2) (1997).²

2 "UCC § 2A-509 restates the substance of UCC § 2-601 and § 2-602(1). The lease provision will be given the same interpretation as the provisions of Article 2." 5 Anderson § 2A-509:3, at 664.

Assuming the goods do not conform to the lease contract, section 2A-509(2) places the lessee under an affirmative duty to reject them on pain of being deemed to have accepted them.... Because failure to make a proper rejection amounts to an acceptance, section 2A-509(2) is closely related to section 2A-515(1)(b), which deals with acceptance and cross-references section 2A-509(2).

To make an effective rejection, the rejection must occur within a reasonable time after the tender or delivery of the goods. The duration of the reasonable time in which the lessee has the right to reject will vary with the circumstances.... It should be remembered that the lessee has a reasonable opportunity to inspect the goods before the lessee is deemed to have accepted them under section 2A-515(1). *The affirmative duty to reject on pain of being deemed to have accepted does not arise until the time given the lessee to inspect has ended*

2A Hawkland and Miller § 2A-509:08, at 780-81 (citations and footnotes omitted) (emphasis added).

7 1124 Accordingly, the factual determination as to whether JWCJR had a reasonable opportunity to inspect the computer equipment must be made before the question of whether JWCJR properly rejected the goods can be answered.³ Having concluded that the trial court failed to make this

critical factual determination, we remand to the trial court to make appropriate findings as to *548 whether JWCJR had a reasonable opportunity to inspect the goods, and thus whether JWCJR timely rejected them.⁴

3 Whether a party has rejected goods is a question of fact. *See, e.g., SPS Indus., Inc. v. Atlantic Steel Co.*, 186 Ga.App. 94, 366 S.E.2d 410, 414 (1988) ("Whether a buyer rejected goods within a 'reasonable time after their delivery' and seasonably notified the seller of the rejection is ordinarily a question of fact for determination by a jury under all the facts and circumstances of the case."); *Continental Concrete Pipe Corp. v. Century Road Builders, Inc.*, 195 Ill.App.3d 1, 142 Ill.Dec. 291, 552 N.E.2d 1032, 1041 (1990) ("It is for the trier of fact to determine whether conduct amounts to acceptance or rejection and whether notice of rejection is reasonable and sufficient"); *Badger Produce Co., Inc. v. Prelude Foods Ina, Inc.*, 130 Wis.2d 230, 387 N.W.2d 98, 105 (Ct.App.1986) (determining whether party notified seller of rejection "within a reasonable time" is largely question of fact).

4 The determination of whether a rejection occurred also, necessarily, involves the question of whether the computer and software package were nonconforming goods. *See* Utah Code Ann. § 70A-2a-509 (1)(1997).

III. Cancellation

8 ¶ 25 Additionally, JWCJR argues, even assuming the trial court determines it accepted the leased goods, the trial court's conclusion that JWCJR breached the finance lease agreement is nevertheless in error because Colonial Pacific consented to cancel the lease. We note that even the "hell or high water" provision provides a mechanism by which a lessee can escape its harsh strictures. "A promise that has become irrevocable and independent under Subsection (1): is not subject to cancellation, termination, modification, repudiation, excuse, or substitution *without the consent of the party to whom the promise runs.*" Utah Code Ann. § 70A-2a-407(2)(b) (1997) (emphasis added). One commentator has explained what constitutes consent under this section:

The waiver that is inherent in the independence-irrevocability concept of UCC § 2A-407 is itself declared to be irrevocable. The Code declares that the lessee cannot be released from the consequence of the lessee's acceptance of goods "without the consent of the party to whom the promise (that has become irrevocable and independent) runs." It is specifically stated that it "is not subject

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to cancellation, termination, modification, repudiation, excuse, or substitution" without such consent.

Nothing is stated as to the form or content of the consent. It is to be concluded that the consent may be oral and may be established by conduct that reasonably manifests an intent to consent. With respect to the content of the consent, it is not necessary that reference be specifically made to UCC § 2A-407. Any manifestations that the obligation of the lessee will not be enforced independently of the obligation that runs to the consenting party is sufficient.

5 Anderson § 2A-407:7, at 607 (footnote omitted).

¶ 26 Though we have not found any case law to help us determine when a lessor consents to the cancellation of a

lease,⁵ this question is comparable to whether parties have agreed to an oral modification of a lease. In *Richard Barton Enterprises, Inc. v. Tsern*, 928 P.2d 368 (Utah 1996), our supreme court explained a prerequisite for a contract or lease modification. "A valid modification of a contract or lease requires 'a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness.'" *Id.* at 373 (quoting *Valcarce v. Bitters*, 12 Utah 2d 61, 63, 362 P.2d 427, 428-29 (1961)) (additional citation omitted); *accord Fisher v. Fisher*, 907 P.2d 1172, 1177 (Utah Ct.App.1995) (same); *see also Dennett v. Kuenzli*, 130 Idaho 21, 936 P.2d 219, 224 (Ct.App.1997) (stating modification of an agreement " 'may be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in accordance with the terms of the change proposed by the other' " (citation omitted)).

5 UCC § 2A-407 does not have an analogous provision in the sales article, thus we cannot look to the sales article for guidance.

9 ¶ 27 Further, the question of whether an "oral modification has been proven is one for the trier of fact." *Kuenzli*, 936 P.2d at 224; *see also Fair v. Red Lion Inn*, 920 P.2d 820, 825 (Colo.Ct.App.1995) ("Whether the parties have modified or amended a previously existing contract is ... question of fact"); *Wolin v. Walker*, 830 P.2d 429, 432 (Wyo.1992) ("The question of whether the alleged modification of the written agreement has been proved by the required quantum of evidence is one to be decided by the trier of fact.").

¶ 28 In this case, the trial court made findings of fact regarding Cumberledge's two telephone calls to Colonial Pacific:

5. Defendant John Cumberledge informed [Colonial Pacific] on two occasions that the equipment was not operational.

*549 7. The Defendants were not contacted by [Colonial Pacific] until approximately two years thereafter, at which time [Colonial Pacific] sought payment in full from Defendants.

Additionally, the trial court's ruling from the bench⁶ acknowledges Cumberledge's understanding that the lease was canceled after the second conversation:

6 "In assessing the sufficiency of the findings ... we are not confined to the contents of a particular document entitled 'Findings;' rather, the findings may be expressed orally from the bench or contained in other documents." *Erwin v. Erwin*, 773 P.2d 847, 849 (Utah Ct.App.1989) (footnote omitted). Though we refer to the trial court's ruling from the bench for clarification, we note that "[f]indings of fact filed subsequent to the judgment are controlling if any conflict exists with the recitation of the judgment. When an inconsistency exists, express written findings will supersede informal remarks made from the bench." 75B Am.Jur.2d *Trial* § 1982 (1992).

Five: Mr. Cumberledge contacted Colonial Pacific Leasing and advised them of the problem. Two to three weeks later, he contacted Colonial again and advised them of the problem. *He was under the impression that i fhe didn't hear from Colonial, everything was okay regarding the lease.*

Six: Mr. Cumberledge did not hear from Colonial for about two years when it initiated this case against the corporation and himself for failing to make the payments on the lease.

(Emphasis added.)

¶ 29 The trial court's findings of fact and conclusions of law fail to make the critical determination as to whether Colonial Pacific consented to cancel the finance lease agreement. As we have noted above, absent adequate factual findings, the question is whether "the failure to make the missing findings can be viewed as harmless error." *Hall*, 858 P.2d at 1025.

30 We conclude the trial court's failure to determine whether Colonial Pacific consented to cancel the lease is not harmless error. Though the trial court found that

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Cumberledge made two telephone calls to Colonial Pacific concerning the problems he was having with the equipment, and that Cumberledge believed the lease was effectively canceled after the second telephone conversation, it made no findings concerning Colonial Pacific's refusal to cancel the lease. Cumberledge testified that he expected to be invoiced or to receive payment books on a monthly basis, and that he took the absence of such invoices and contact from Colonial Pacific as further evidence the lease was canceled.

¶ 31 In opposition, a Colonial Pacific representative testified to the following: that Colonial Pacific had no record of Cumberledge's telephone calls; that Colonial Pacific was under no obligation to send Cumberledge payment books or invoices; and that because Colonial Pacific switched computer systems, JWCJR's lease "fell through the cracks," and this accounted for the two year lapse in its pursuit of lease payments. The trial court was thus faced with disputed evidence on whether Colonial Pacific consented to cancel its finance lease, but never made the critical finding on consent.

¶ 32 Also, because it cannot be reasonably implied that Colonial Pacific did not consent to the cancellation of the lease, the second alternative for affirming the trial court's ruling as harmless error also fails. We thus remand for the trial court to make the necessary finding of fact on whether Colonial Pacific consented to cancel the finance lease.

IV. Condition Precedent

10 ¶ 33 Finally, JWCJR contends the trial court should not have enforced the finance lease because a condition precedent to the legal effectiveness of the lease, a thirty-day inspection period for the computer and software package, was not satisfied. We disagree. Although not necessary to our disposition, we reach this issue to aid the trial court on remand.

¶ 34 The official code comment to UCC § 2A-103(1)(g) explains the relationship between a lessor and lessee in a finance lease agreement:

A finance lease is the product of a three party transaction. The supplier manufactures or supplies the goods pursuant to the lessee's specification, perhaps even pursuant to a purchase order, sales agreement *550 or lease agreement between the supplier and the lessee.... *Due to the limited function usually performed by the lessor, the lessee looks almost entirely to the supplier for representations, covenants and warranties.*

5 Anderson § 2A-103:1(g), at 327 (emphasis added). Further, a New York court recently commented on the relationship between lessors, suppliers, and lessees:

In a finance lease, the lessee negotiates directly with the supplier or manufacturer and then arranges for the lessor to buy the goods to lease them to the lessee. The lessor is not really an ordinary buyer from the supplier or manufacturer, since it had no part in the selection of the goods. The transaction between the lessor and lessee is therefore first and last a financial transaction. *In such a situation it makes no sense to treat the lessor as a seller with warranty liability to the lessee, nor to free the supplier or manufacturer from the promises that it would have made in an outright sale to the lessee.*

General Elec. Capital Corp. v. National Tractor Trailer Sch., Inc., 175 Misc.2d 20, 667 N.Y.S.2d 614, 618-19 (N.Y.Sup.Ct.1997) (emphasis added) (citing James J. White & Robert S. Summers, *Uniform Commercial Code* § 13.3 (4th ed.1995)); *see also Emlee Equip. Leasing Corp. v. Waterbury Transmission Inc.*, 31 Conn.App. 455, 626 A.2d 307, 313 (1993) ("Because the finance lessor is strictly a financing entity, the lessee ordinarily must look to [the supplier] for warranty liability.").

35 On cross-examination, Cumberledge testified that it was Bottomline which promised a thirty-day trial period. There was no representation of a thirty-day inspection period in the finance lease agreement.

¶ 36 We conclude Colonial Pacific is not bound by Bottomline's offer of a thirty-day inspection period. Thus, JWCJR's argument that Colonial Pacific failed to satisfy a condition precedent to the enforcement of the finance lease fails.⁷

7 We do not award attorney fees to Colonial Pacific on appeal as it is not the prevailing party.

CONCLUSION

¶ 37 In sum, we direct the trial court to consider the legal authority we have discussed, review the record, and determine if it can make additional findings of fact in three critical areas: (1) Did JWCJR have a reasonable time to inspect the computer and software package and thus by its acts accept the leased goods; (2) did JWCJR timely reject the computer equipment; and (3) even if JWCJR accepted the leased goods, did Colonial Pacific consent to cancel the finance lease? The

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trial court may, at its discretion, take additional evidence to determine these highly fact-sensitive issues. Finally, we also conclude that the thirty-day inspection period offered by Bottomline did not bind Colonial Pacific, and thus was not a condition precedent to enforcing the finance lease. We reverse and remand for proceedings consistent with this opinion. Judith M. Billings, Judge

¶ 38 WE CONCUR: MICHAEL J. WILKINS, Presiding Judge, and PAMELA T. GREENWOOD, Associate Presiding Judge.

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787 N.E.2d 652
Court of Appeals of Ohio,
First District, Hamilton County.

INFORMATION LEASING
CORPORATION, Appellant,

v.

GDR INVESTMENTS, INC., d.b.a.
Pinnacle Exxon, et al., Appellees.

No. C-020290. I Decided March 21, 2003.

Equipment lessor brought action against lessee to recover money due on a commercial lease for an automated teller machine (ATM). The Court of Common Pleas, Hamilton County, No. A-0103821, entered judgment for lessee, and lessor appealed. The Court of Appeals, Gorman, J., held that lessee was liable under lease.

Reversed and remanded.

Attorneys and Law Firms

**652 *260 William P. Coley II, Cincinnati, for appellant.
*261 Avtar Arora, pro se.

Opinion

GORMAN, Judge.

1} The plaintiff-appellant, Information Leasing Corporation ("ILC"), appeals from the order of the trial court rendering judgment in favor of the defendants-appellees, GDR Investments, d.b.a. Pinnacle Exxon, and Avtar S. Arora, in an action to recover \$15,877.37 on a five-year commercial lease of an Automated Teller Machine ("ATM"). In its sole assignment of error, ILC argues that the trial court's judgment constituted "an abuse of discretion" because it failed to address the effect of R.C. 1301.01 on the issue of GDR's liability under the lease. For the following reasons, we reverse and remand this cause to the trial court.

{¶ 2} This is one of many cases involving ILC that have been recently before this court. ILC is an Ohio corporation wholly owned by the Provident Bank. ILC is in the business of leasing ATMs through a third party, or vendor. In all of these cases, the vendor has been a third-party corporation, JRA 222, Inc., d.b.a. Credit Card Center ("CCC"). CCC was in the business of finding lessees for the machines and then providing the services necessary to operate them, offering

the lessees attractive commissions. Essentially, **653 CCC would find a customer, usually a small business interested in having an ATM available on its premises, arrange for its customer to sign a lease with ILC, and then agree to service the machine, keeping it stocked with cash and paying the customer a certain monthly commission. Usually, as in the case of GDR, the owner of the business was required to sign as a personal guarantor of the lease. The twist in this story is that CCC soon went bankrupt, leaving its customers stuck with ATMs under the terms of leases with ILC but with no service provider. Rather than seeking to find another company to service the ATMs, many of CCC's former customers, like GDR, simply decided that they no longer wanted the ATMs and were no longer going to make lease payments to ILC.

{II 3} The terms of each lease, however, prohibited cancellation. The pertinent section read, "LEASE NON—CANCELABLE AND NO WARRANTY. THIS LEASE CANNOT BE CANCELED BY YOU FOR ANY REASON, INCLUDING EQUIPMENT FAILURE, LOSS OR DAMAGE. YOU MAY NOT REVOKE ACCEPTANCE OF THE EQUIPMENT. YOU, NOT WE, SELECTED THE EQUIPMENT AND THE VENDOR. WE ARE NOT RESPONSIBLE FOR EQUIPMENT FAILURE OR THE VENDOR'S ACTS. YOU ARE LEASING THE EQUIPMENT 'AS IS', [sic] AND WE DISCLAIM ALL WARRANTIES, EXPRESS OR IMPLIED. WE ARE NOT RESPONSIBLE FOR SERVICE OR REPAIRS."

*262 {II 4} Either out of a sense of fair play or a further desire to make enforcement of the lease ironclad, ILC put a notice on the top of the lease that stated, "NOTICE: THIS IS A NON—CANCELABLE, BINDING CONTRACT. THIS CONTRACT WAS WRITTEN IN PLAIN LANGUAGE FOR YOUR BENEFIT. IT CONTAINS IMPORTANT TERMS AND CONDITIONS AND HAS LEGAL AND FINANCIAL CONSEQUENCES TO YOU. PLEASE READ IT CAREFULLY; FEEL FREE TO ASK QUESTIONS BEFORE SIGNING BY CALLING THE LEASING COMPANY AT 1-513-421-9191."

Of 5} Arora, the owner of GDR, was a resident alien with degrees in commerce and economics from the University of Delhi, India. Arora wished to have an ATM on the premises of his Exxon station in the hope of increasing business. He made the mistake of arranging acquisition of the ATM through CCC. According to his testimony, a representative of CCC showed up at the station one day and gave him "formality papers" to sign before the ATM could be delivered. Arora stated that he was busy with other customers when the CCC

representative asked him to sign the papers. He testified that when he informed the CCC representative that he needed time to read the documents before signing them, he was told not to worry and, in effect, given the CCC representative's word that the papers did not need his attention and that his signature was a mere formality. Arora signed the ILC lease, having never read it.

{111 6} Within days, CCC went into bankruptcy. Arora found himself with an ATM that he no longer wanted. Although the testimony was spotty, it appears that he never attempted to look for another service provider. According to his testimony, he tried unsuccessfully to contact ILC to take back the ATM. Soon Arora suffered a mild heart attack, the gas station went out of business, and the ATM, which had been in place for approximately eighteen days, was left sitting in the garage, no longer in use until ILC came and removed it several months later.

**654 {111 7} Unfortunately for Arora, the lease also had an acceleration clause that read, "DEFAULT. If you fail to pay us or perform as agreed, we will have the right to (i) terminate this lease, (ii) sue you for all past due payment AND ALL FUTURE PAYMENTS UNDER THIS LEASE, plus the Residual Value we have placed on the equipment and other charges you owe us, (iii) repossess the equipment at your expense and (iv) exercise any other right or remedy which may be available under applicable law or proceed by court act."

{111 8} The trial court listened to the evidence in this case, which was awkwardly presented due in large part to Arora's decision to act as his own trial counsel. Obviously impressed with Arora's honesty and sympathetic to his situation, the trial court found that Arora owed ILC nothing. In so ruling, the court stated that ILC "ha[d] not complied with any of its contractual obligations and that [Arora] appropriately canceled any obligations by him, if there really *263 were any." The court also found that ILC, "if they did have a contract, failed to mitigate any damages by timely picking up the machine after [Arora] gave them notice to pick up the machine."

{¶9} In its assignment of error, ILC asserts that the trial court "abused its discretion" by not applying R.C. 1301.01(A). Initially we note that the assignment is miscast, as it actually challenges the judgment as being contrary to law, not an abuse of discretion. The decision whether to apply the correct law to the case is, thankfully, not a matter of judicial discretion.

This aside, we turn our attention to the Uniform Commercial Code and the world of lease financing.

{¶ 10} ILC contends, and we do not disagree, that the lease in question satisfied the definition of a "finance lease" under the UCC. See R.C. 1310.01(A)(7). A finance lease is considerably different from an ordinary lease in that it adds a third party, the equipment supplier or manufacturer (in this case, the now defunct CCC). As noted by White and Summers, "In effect, the finance lessee * * * is relying upon the manufacturer * * * to provide the promised goods and stand by its promises and warranties; the [lessee] does not look to the [lessor] for these. The [lessor] is only a finance lessor and deals largely in paper, rather than goods." 1 White & Summers, Uniform Commercial Code (3d Ed.1988) 20.

{¶11} One notorious feature of a finance lease is its typically noncancelable nature, which is specifically authorized by statute. R.C. 1310.46(A) provides in the case of a finance lease that is not a consumer lease, "[T]he lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods." The same statutory section also makes clear that the finance lease is "not subject to cancellation, termination, modification, repudiation, excuse, or substitution without the consent of the party to whom it runs." R.C. 1310.46(B)(2).

{111 12} Because of their noncancelable nature, finance leases enjoy somewhat of a reputation. The titles of law review articles written about them reveal more than a little cynicism regarding their fairness: Strauss, Equipment Leases Under U.C.C. Article 2A—Analysis and Practice Suggestions. U.C.C. Revisions: Promises and Pitfalls (1992), 43 Mercer L.Rev. 853; King, Major Problems with Article 2A: Unfairness, Cutting Off Consumer Defenses, Unfiled Interest and Uneven Adoption (1992), 43 Mercer L.Rev. 869; Breslauer, Finance Lease, Hell or High Water Clause and Third Party Beneficiary Theory in Article 2A of the Uniform Commercial Code (1992), 77 Cornell L.Rev. 318; Heckman, **655 Article 2A of the Uniform Commercial Code: Government of the Lessor, by the Lessor, and for the Lessor (1992), 36 S. & L.U.L.J. 303.

{111 13} The "hell or high water clause" referred to in one of these titles makes the lessee's obligations to the lessor survive no matter what—come hell or high *264 water. As described by Professors White and Summers, "The parties can draft a lease agreement that carefully excludes warranty and promissory liability of the finance lessor to the lessee, and that sets out what is known in the trade as a 'hell or high water

clause,' namely, a clause that requires the lessee to continue to make rent payments to the finance lessor even though the [equipment] is unsuitable, defective, or destroyed." 1 White & Summers, supra, at 20. To offset this one-sidedness, the lessee is generally considered a third-party beneficiary of any warranties between the manufacturer and the lessor. Id. In short, the lessor is merely a disinterested provider of financing. As White and Summers describe the relationship, "The lessor's responsibility is merely to provide the money, not to instruct the lessee like a wayward child concerning a suitable purchase * * *. Absent contrary agreement, even if [, for example, a finance-leased] Boeing 747 explodes into small pieces in flight and is completely uninsured, lessee's obligation to pay continues." Id. at 25.

{ff 14} Although fortunately not finding himself in the same situation as the hypothetical, Arora did find himself with an ATM that he did not want, and for which he felt he had no use after CCC dropped out of the picture. Some people complain about being stuck with the bill; Arora's complaint was that he was stuck with the ATM.

1 eff 151 Initially, we reject the trial court's analysis, which was that ILC did not satisfy its contractual obligations. This was an obvious error. ILC's only contractual obligation was to provide the ATM, which it did. Clearly ILC had an expectancy interest of \$15,877.73 that it would lose if the lease were not enforced. We must reject also the trial court's doubts about whether Arora had any obligations under the lease—clearly he did—as well as the court's assertion that he "appropriately cancelled any obligations by him"—a statement that seems to willingly ignore the noncancelable nature of the lease.

16} To begin the proper legal analysis, we note first that this was not a "consumer lease" expressly excepted from R.C. 1310.46(A). A "consumer lease" is defined in R.C. 1310.01(A)(5) as one in which the lessee is "an individual and who takes under the lease primarily for a personal, family, or household purpose." This would definitely not apply here, where the ATM was placed on the business premises of the Exxon station, and where the lessee was GDR Investments and not Arora individually. (Arora was liable individually as the personal guarantor of GDR's obligations under the lease.)

2 3 { 17} Even commercial finance leases, however, are subject to certain defenses, including lack of acceptance and unconscionability. It is noteworthy that ILC argues that Arora irrevocably accepted the ATM by merely signing a certificate of acceptance. (ILC also indicates in its brief

that five payments were *265 made on the lease, but it is unclear from the record who made these payments and when.) According to the UCC, however, in the case of finance leases, acceptance occurs only after the lessee has been given a reasonable time to inspect the goods and either (1) signifies acceptance, (2) fails to make an effective rejection, or (3) does any act that signifies acceptance. **656 R.C. 1310.61(A). The requirement that the lessee be given a reasonable time cannot be circumvented. "Taking possession of the goods is not determinative of acceptance, nor is the signing of a form of acceptance before receipt of the goods, nor the making of a lease payment." *Colonial Pacific Leasing Corp. v. J.W.C.J.R. Corp.* (Utah App.1999), 977 P.2d 541, 545. "A 'reasonable time to inspect' under the UCC must allow an opportunity to put the product to its intended use, or for testing to verify its capability to perform as intended." *Capitol Dodge Sales v. Northern Concrete Pipe* (1983), 131 Mich.App. 149, 158, 346 N.W.2d 535. See, also, *Tri—Continental Leasing Corp. v. Law Office of Richard W. Burns* (Tex.App.1985), 710 S.W.2d 604, and *Horrocks v. Wesffalia Systemat* (Utah App.1995), 892 P.2d 14.

18} Although it was available as a defense, it does not appear that Arora was entitled to claim a valid rejection of the goods in this case. R.C. 1310.55(A) applies the UCC's "perfect tender" rule to finance leases, allowing the lessee to reject any goods that "fail in any respect to conform to the lease contract." Nothing in the record, however, indicates that Arora rejected the ATM because of its nonconformity, i.e., its failure to work mechanically as intended. Rather, the record demonstrates quite clearly that he rejected it only because he no longer wanted an ATM after CCC went bankrupt. Although the UCC adopts the "perfect tender" rule, it does not adopt the "perfectly happy tenderee" rule.

19} Certain defenses do remain, however. First, the UCC expressly allows for the application of the doctrine of unconscionability to finance leases, both consumer and commercial. R.C. 1310.06(A) authorizes the trial court to find "any clause of a lease contract to have been unconscionable at the time it was made * * s." If it so finds, the court is given the power to "refuse to enforce the lease contract, * * * enforce the remainder of the lease contract without the unconscionable clause, or * * * limit the application of the unconscionable clause as to avoid any unconscionable result." Id.

4 ell 20} In this case, the trial court made no findings as to whether the finance lease was unconscionable. The primary purpose of the doctrine of unconscionability is

to prevent oppression and unfair surprise. Calamari & Perillo, *Contracts* (3d Ed.1982), Section 9-40. "Oppression" refers to substantive unconscionability and arises from overly burdensome or punitive terms of a contract, whereas "unfair surprise" refers to procedural unconscionability and is implicated in the formation of a contract, when one of the parties is either *266 overborne by a lack of equal bargaining power or otherwise unfairly or unjustly drawn into a contract. *Id.* at Sections 9-37 and 9-38.

{11 21} It should be pointed that, although harsh, many characteristics of a finance lease are not inherently unconscionable and, as we have discussed, are specifically authorized by statute. Simply because a finance lease has a "hell or high water clause" does not make it unconscionable. As noted, a finance lease is a separate animal—it is supposed to secure minimal risk to the lessor. At least one court has rejected the argument that an acceleration clause in a commercial finance lease is punitive and unconscionable in the context of parties of relatively equal bargaining power. See *Emlee Equip. Leasing Corp. v. Waterbury Transmission, Inc.* (1993), 31 Conn.App. 455, 468, 626 A.2d 307.

{11 22} At the heart of Arora's defense in this case was his claim that he was misled into signing the finance lease by the CCC representative and was unfairly surprised **657 to find himself the unwitting signatory of an oppressive lease. This is clearly an argument that implicated procedural unconscionability. His claim of being an unwitting signatory, however, must be carefully balanced against the law in Ohio that places upon a person a duty to read any contract before signing it, a duty that is not excused simply because a person willingly gives into the encouragement to "just go ahead and sign." See *Whelan v. E.F. Hutton Credit Corp.* (1983), 8th Dist. No. 46724, 1983 WL 2923.

{¶ 23} Moreover, we note that courts have also recognized that the lessor may give, through word or conduct, the lessee consent to cancel an otherwise noncancelable lease. R.C. 1310.46(B)(2) makes a finance lease "not subject to cancellation, termination, modification, repudiation, excuse, or substitution *without the consent of the party to whom it runs.*" (Emphasis supplied.) As noted by the court in *Colonial Pacific Leasing*, *supra*, the UCC does not say anything with respect to the form or content of the consent. 977 P.2d at 548. The *Colonial Pacific* court concluded, therefore, "that the consent may be oral and may be established by

conduct that reasonably manifests an intent. * * * Any manifestations that the obligation of the lessee will not be enforced independently of the obligation that runs to the consenting party is sufficient." *Id.* The question whether consent has been given to a cancellation is a question of fact for the trier of fact. *Id.*

{11 24} We raise this point because the evidence indicates that there was some communication between Arora and ILC before ILC retrieved the ATM. It is unclear whether ILC removed the ATM at Arora's request, or whether the company was forcibly repossessing the equipment pursuant to the default provision of the lease. In view of the murkiness of the testimony, it is unclear when the ATM was taken back and when the final lease payment was made. One interesting question that arises from ILC's retrieval of the ATM, not addressed *267 in the record, is what ILC did with the equipment afterward. Did ILC warehouse the equipment for the next four and one-half years (conduct that would appear unprofitable and therefore unlikely) or did the company then turn around and lease the ATM to someone else? If there was another lease, was ILC actually seeking a double recovery on the ATM's rental value? In this regard, we note that the trial court ruled that ILC had failed to mitigate its damages, a finding that is not supported by the current record, but may well prove to be true upon further trial of the matter.

{¶ 25} In sum, this is a case that requires a much more elaborate presentation of evidence by the parties, and much more detailed findings of fact and conclusions of law than those actually made by the trial court. We sustain ILC's assignment of error upon the basis that the trial court did not apply the correct legal analysis, and that the evidence of record did not mandate a judgment in Arora's favor. Because of the number of outstanding issues and unresolved factual questions, we reverse the trial court's judgment and remand this case for a new trial consistent with the law set forth in this opinion.

Judgment reversed and cause remanded.

PAINTER, P.J., and SUNDERMANN, J., concur.

Parallel Citations

787 N.E.2d 652, 50 UCC Rep.Serv.2d 193, 2003 -Ohio- 1366

85 P.3d 1099

Intermediate Court of Appeals of Hawai'i.

JAZ, INC.; Jozac, Inc.; Zachariah
Vanderschiff; and Joyce Haverkate,
Plaintiffs—Appellants/Cross—Appellees,

v.

Richard B. FOLEY dba
Environmental First, Defendant,
and
First Hawaiian Leasing, Inc.,
Defendant—Appellee/Cross—Appellant.

No. 24699. I Feb. 3, 2004.

Synopsis

Background: Lessee of photo processing machine by way of equipment lease through leasing company brought action against leasing company and seller after lessee made payment but equipment was never delivered. Leasing company brought counterclaim against lessee and cross-claim against seller, and default judgments were entered against seller. Following bench trial, the Circuit Court of the Third Circuit, Ronald Ibarra, J., awarded judgment against lessee and for leasing company and awarded attorney's fees. Lessee appealed.

Holdings: The Intermediate Court of Appeals, Foley, J., held that:

- 1 lessee's act in signing acceptance certificate before delivery of equipment did not constitute acceptance under lease;
- 2 lessee's act in signing acceptance certificate before delivery of equipment did not constitute acceptance under statute;
- 3 leasing company's prepayment to seller did not require lessee to accept equipment before delivery; and
- 4 leasing company, rather than lessee or seller, had risk of loss under terms of master lease.

Vacated and remanded; fee award reversed.

Attorneys and Law Firms

****1100 *149** Jerry M. Hiatt, David R. Harada—Stone, Kamuela, on the briefs, for plaintiffs-appellants/cross-appellees.

Robert D. Triantos, Kevin E. Moore (Carlsmith Ball LLP), Kailua Kona, on the briefs, for defendant-appellee/cross-appellant.

WATANABE, Acting C.J., FOLEY, J., and Circuit Judge SAKAMOTO in Place of BURNS, C.J., and LIM, J., Recused.

Opinion

Opinion of the Court by FOLEY, J.

I. INTRODUCTION

This case arises out of the purchase of a photo processing machine by Plaintiffs—Appellants/Cross—Appellees JAZ, Inc. (JAZ), JOZAC, Inc. (JOZAC), Zachariah Vanderschiff (Vanderschiff), and Joyce Haverkate (Haverkate) (collectively referred to as Jaz or Lessee). Jaz purchased the photo processing machine from Richard B. Foley dba Environmental First (Foley or Vendor) by way of an equipment lease through Defendant—Appellee/Cross—Appellant First Hawaiian Leasing, Inc. (First HI Leasing or Lessor).

Jaz appeals from the Amended Final Judgment filed October 30, 2001 (Amended Final Judgment) and the Findings of Fact, Conclusions of Law and Order filed February 12, 2001 in the Circuit Court of the Third Circuit (circuit court).¹ On appeal, Jaz contends the circuit court erred in holding: (1) Jaz had accepted the equipment; (2) the risk of loss had passed to Jaz; (3) First HI Leasing's premature payment to Vendor was not a material violation of the lease; and (4) Jaz ****1101 *150** was obligated to begin lease payments when the equipment had not been delivered, installed, and inspected.

1 The Honorable Ronald Ibarra presided.

First HI Leasing appeals from the Amended Final Judgment and the "Order Granting in Part Defendant First Hawaiian Leasing, Inc.'s Motion for an Award of Attorney's Fees and Costs Filed February 22, 2001," filed March 13, 2001 in the circuit court. First HI Leasing contends the circuit court abused its discretion when it denied First HI Leasing reasonable attorney's fees based upon the amount of the Amended Final Judgment for prevailing on the claims of Jaz's complaint. First HI Leasing also contends it should have been awarded attorney's fees based upon the amount of the alleged damages sought at trial by Jaz.

We conclude the circuit court erred as contended by Jaz and therefore vacate the Amended Final Judgment and the Findings of Fact, Conclusions of Law and Order filed February 12, 2001.

II. BACKGROUND

In 1998 JAZ owned and operated a photo processing store at the King's Shop complex in Waikoloa, Hawai'i. JOZAC owned and operated a store called "Zac's Photo" in the North Kona Shopping Center; the store provided photo processing, copying, and shipping services. Vanderschiff was the president of JAZ and JOZAC, and Haverkate was the vice president, secretary, and treasurer of JAZ and JOZAC.

On or about March 1998, Jaz sought to acquire a photo processing machine to expand their business. Jaz contacted Foley about purchasing a used Noritsu, model 2211, photo processing machine (Noritsu). Foley quoted the price of the Noritsu as \$50,000.00. Jaz had previously purchased other photo processing equipment from Foley. Jaz contacted First HI Leasing to arrange a lease to acquire the Noritsu.

On April 8, 1998, First HI Leasing approved a lease application from JAZ. On April 13, 1998, First HI Leasing and JAZ executed Master Lease Agreement No. A3196 (Master Lease), a Non—Tax—Oriented Lease Addendum, an Addendum to Master Lease Agreement No. A3196, a UCC-1 Financing Statement, and Lease Schedule No. 66179. Vanderschiff and Haverkate, as individual guarantors, executed a Continuing Guaranty. On behalf of JOZAC, Haverkate executed a Certificate for Corporate Resolutions Authorizing Guaranty of Lease(s). On behalf of JAZ, Vanderschiff and Haverkate also executed an Officer's Certificate for Corporate Leasing Resolutions, and Vanderschiff executed a Negative Pledge Agreement.

On April 13, 1998, Vanderschiff and Haverkate, on behalf of JAZ, also signed, but did not date, an Acceptance Certificate.

On April 14, 1998, First HI Leasing prepared Purchase Order No. 11740 to Environmental Leasing and a check request in the amount of \$50,065.00 payable to First Hawaiian Bank. On April 15, 1998, Vanderschiff, as President of JAZ, signed a Notice of Warranties in Connection with Finance Lease and, as President of JOZAC, signed the April 13, 1998 Continuing Guaranty, making JOZAC a guarantor.

At some point between April 13 and April 15, First HI Leasing filled in the date of April 15, 1998 on the Acceptance

Certificate. On April 15, First Hawaiian Bank made a wire transfer of \$50,000.00 to Environmental First based upon a Wire Transfer Customer Authorization signed by First HI Leasing.

Foley never delivered the Noritsu to Jaz. Jaz made monthly lease payments totaling \$13,732.02 to First HI Leasing; the last payment was received by First HI Leasing on March 3, 1999. On August 10, 1998, Jaz filed a complaint against Foley and First HI Leasing. On May 17, 1999, First HI Leasing filed a counterclaim against Jaz and a cross-claim against Foley.

Default judgments against Foley were entered in favor of Jaz and First HI Leasing. After a bench trial, the circuit court awarded judgment against Jaz and in favor of First HI Leasing on Jaz's complaint and First HI Leasing's counterclaim. The circuit court awarded First HI Leasing attorney's fees on its counterclaim based on twenty-five percent of the judgment amount, costs, and interest.

****1102 *151 III. STANDARD OF REVIEW**

A. Findings of Fact (FoF) and Conclusions of Law (CoL)

1 We review a trial court's FOFs under the clearly erroneous standard.

An FOF is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction in reviewing the entire evidence that a mistake has been committed. An FOF is also clearly erroneous when the record lacks substantial evidence to support the finding. We have defined "substantial evidence" as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

[*State v. JKotis*, 91 Hawai'i[, 319,] 328, 984 P.2d[, 78,] 87 [(1999)] (footnote omitted).

Hawaii appellate courts review conclusions of law de novo, under the right/wrong standard. Under the right/wrong standard, this court examines the facts and answers the question without being required to give any weight to the trial court's answer to it.

Robert's Hawai'i School Bus, Inc. v. Laupahoehoe Transportation Co., Inc., 91 Hawai'i 224, 239, 982 P.2d 853, 868 (1999).

Leslie v. Estate of Tavares, 91 Hawaii i 394, 399, 984 P.2d 1220, 1225 (1999) (internal quotation marks, citations, and brackets omitted; bracketed material in citation added).

IV. DISCUSSION

A. Introduction.

The central issue of this case is whether, under the Master Lease or Hawaii Revised Statutes (HRS) Article 490:2A (Leases), Jaz owes money to First HI Leasing for the Noritsu that was not delivered by Foley. There is a dispute as to whether goods can be accepted prior to delivery under the Master Lease or HRS Article 490:2A. There is also a dispute as to whether Jaz accepted the Noritsu under the terms of the Master Lease or HRS Article 490:2A. The parties also dispute whether Jaz owes rental payments to First HI Leasing under a "hell or high water" clause in the Master Lease or under HRS § 490:2A-407 (1993).

2 3 Hawaii Revised Statutes Article 490:2A, commonly referred to as the Uniform Commercial Code—Leases (UCC—Leases), was enacted to provide a comprehensive set of rules dealing with leases.² Parties are generally free to agree to any terms of a contract. *City Express, Inc. v. Express Partners*, 87 Hawaii 466, 470 n. 4, 959 P.2d 836, 840 n. 4 (1998). The provisions of UCC—Leases apply to every "transaction, regardless of form, that creates a lease." HRS § 490:2A102 (1993). Parties may agree to vary the provisions of HRS

Article 490:2A in their lease.³ Therefore this court will look to the terms of the Master Lease before applying the UCC—Leases provisions.

2 House Standing Committee Report No. 670 in 1991 House Journal at 1076 states in relevant part:

The provisions of this bill contain basic contract rules to govern leases of goods, including matters of offer and acceptance, statute of frauds, warranties, assignments of interest, and remedies upon breach of contract. The bill is a comprehensive set of rules dealing with every phase of leasing transactions and clarifies previous questions of security interests.

3 HRS § 490:2A-103(a)(4) (1993) states:
§ 490:2A-103 Definitions and index of definitions. (a) In this Article unless the context otherwise requires:

(4) "Conforming" goods or performance under a lease contract means goods or performance that are

in accordance with the obligations under the lease contract.

The Master Lease between Jaz and First HI Leasing stated in part:

1. MASTER LEASE AGREEMENT. First Hawaiian Leasing, Inc. (the "Lessor") hereby agrees to lease to the above-described Lessee, and the Lessee agrees to lease from the Lessor, all machinery, equipment and other personal property ("Equipment") described in the lease schedules ("Lease Schedules") executed concurrently herewith, or which may from time to time hereafter be executed by the Lessor and the Lessee and attached hereto ****1103 *152** and incorporated by reference, upon the terms and conditions set forth in this Master Lease Agreement and the Lease Schedules. As used herein, the term "this Lease" includes this Master Lease Agreement and all Lease Schedules, and unless the Lessor has made an election to separate this Lease pursuant to paragraph 20 below, this Lease shall constitute one undivided lease of the Equipment. All of the terms, covenants and conditions of this Lease shall govern the rights and obligations of the Lessor and the Lessee, except as specifically modified in writing.

The terms of the Master Lease govern the rights and obligations of Jaz and First HI Leasing. The provisions of HRS Article 490:2A apply to the Master Lease in the absence of specific lease terms.

B. Jaz did not accept the Noritsu by signing the Acceptance Certificate.

1. Express acceptance by terms of Master Lease.

4 5 Jaz contends it did not accept the Noritsu by signing the Acceptance Certificate. First HI Leasing contends that Jaz accepted the Noritsu before delivery by signing the Acceptance Certificate. The Acceptance Certificate stated in relevant part:

This Acceptance Certificate pertains to all of the Equipment described in the attached Exhibit A. The Equipment is covered by Lease Schedule No. 66179, which forms a part of Master Lease Agreement No. A3196 executed by the Lessor and the Lessee (hereinafter call [sic] the "Lease").

1. Acceptance of the Equipment. The Lessee hereby certifies to the Lessor that:

- (a) All of the Equipment has been delivered and installed;
and
- (b) The Lessee has accepted the Equipment for purposes
of commencing the Lessee's rental payment obligations
under the Lease.

This acceptance of the Equipment is without prejudice to the Lessee's rights against the vendor or manufacturer of the Equipment for remedying any claimed defects.

The Master Lease stated in part:

8. INSPECTION AND ACCEPTANCE OF EQUIPMENT; REJECTION.

(b) Upon the completion of its inspection of the Equipment, the Lessee shall promptly deliver to the Lessor an executed acceptance certificate (the "Acceptance Certificate") or reject the Equipment pursuant to paragraph 8(c) below.

... THE LESSEE'S ACCEPTANCE OF THE EQUIPMENT PURSUANT TO THIS PARAGRAPH 8(b) SHALL BE FOR THE SOLE PURPOSE OF COMMENCING THE LESSEE'S RENTAL PAYMENT AND OTHER OBLIGATIONS TO THE LESSOR UNDER THIS LEASE.

Generally, parties are free to agree to any terms of a contract, including the method of acceptance. *City Express*, 87 Hawaii at 470 n. 4, 959 P.2d at 840 n. 4. First HI Leasing limited the purpose and scope of the Acceptance Certificate to commencement of rental payments and other obligations to First HI Leasing. Therefore, First HI Leasing may not use the Acceptance Certificate for the purpose of showing that Jaz accepted the Noritsu before delivery. Jaz's right to inspect the Noritsu is not an obligation to First HI Leasing because an inspection is for the benefit of Jaz.

In its answering brief, First HI Leasing cites *Stewart v. United States Leasing Corp.*, 702 S.W.2d 288 (Tex.App.1985), to support the argument that a signed acceptance certificate by a lessee is sufficient to show acceptance of goods before delivery. In *Stewart*, the Texas Court of Appeals ruled that a signed acceptance certificate was adequate to show acceptance by the lessee. The Texas Court of Appeals stated: "The consideration for the lease was not delivery of the copy machine but, instead, was United's purchase of the copy machine following receipt of the signed Acceptance

Certificate." 702 S.W.2d at 290. Under the rationale of *Stewart*, when a lessee is obligated to provide an acceptance certificate before delivery and the lessor fails **1104 *153 to deliver the item, the lessee has no recourse because the lessee has already accepted the goods. The rationale of *Stewart* is unpersuasive because it fails to give plain meaning to the language of the acceptance certificate. The plain meaning of an acceptance certificate that states an item has been delivered and accepted means the lessor or vendor has actually delivered the item and the lessee has accepted the item. The instant case is also distinguishable from *Stewart* based on the language of the Master Lease. The acceptance certificate in *Stewart* stated that the lessee accepted the goods as satisfactory in all respects for the purpose of the lease. *Id.* Jaz did not make an acceptance for all purposes of the Master Lease.

Other cases dealing with signing an acceptance certificate before delivery are contrary to *Stewart*. In *Colonial Pacific Leasing Corp. v. J.W.C.J.R.*, 977 P.2d 541 (Utah Ct.App.1999), the Utah Court of Appeals stated that taking possession of the goods, signing a form acceptance before receipt of goods, and making a lease payment are not determinative of acceptance. *Id.* at 545. In *Moses v. Newman*, 658 S.W.2d 119 (Tenn.Ct.App.1983), the Tennessee Court of Appeals held acceptance had not occurred despite purchaser's possession of the goods because affording a purchaser a reasonable opportunity to inspect does not imply possession. *Id.* at 121-22. In *Tri—Continental Leasing Corp. v. Law Office of Richard W. Burns*, 710 S.W.2d 604 (Tex.Ct.App.1985), the Texas Court of Appeals held that there was no acceptance because the buyer must have a reasonable opportunity to inspect the goods. *Id.* at 608. In *Information Leasing Corp. v. GDR Investments, Inc.*, 152 Ohio App.3d 260, 787 N.E.2d 652 (2003), the Ohio Court of Appeals held that merely signing an acceptance certificate is not acceptance because the requirement of a reasonable time for inspection cannot be circumvented. *Id.* at 655-56. Under these cases, signing an acceptance certificate before delivery does not mean a lessee has accepted the goods. The lessee must have a reasonable time for inspection, which requires that lessee have actual possession of the goods.

There was no delivery of the Noritsu. Therefore, there was no reasonable time for inspection. Jaz did not accept the Noritsu in accordance with the terms of the Master Lease by signing the Acceptance Certificate because there was no delivery, no reasonable time for inspection of the Noritsu, and First HI Leasing had limited the purpose of the Acceptance Certificate.

2. Express acceptance under HRS § 490:2A-515.

6 First HI Leasing contends that Jaz accepted the Noritsu under HRS Article 490:2A by signing the Acceptance Certificate. Hawaii Revised Statutes § 490:2A-515 (1993) states in relevant part:

§ 490:2A-515 Acceptance of goods. (a) Acceptance of goods occurs after the lessee has had a reasonable opportunity to inspect the goods and:

- (1) The lessee signifies or acts with respect to the goods in a manner that signifies to the lessor or supplier that the goods are conforming or that the lessee will take or retain them in spite of their nonconformity; or
- (2) The lessee fails to make an effective rejection of the goods (section 490:2A-509(b)).

Hawaii Revised Statutes § 490:2A-515 explicitly states two ways to accept goods. A lessee must have a reasonable amount of time to inspect the goods and either (1) act in a manner that signifies that the goods are conforming or (2) fail to reject the goods. There are no other ways to accept goods under HRS § 490:2A-515.

The Noritsu was not delivered. Therefore, Jaz did not have a reasonable time to inspect the goods. First HI Leasing did not show that Jaz agreed to accept the Noritsu before delivery under HRS § 490:2A-515.

3. Implied acceptance by action.

8 First HI Leasing contends that, despite the lack of compliance with HRS § 490:2A-515 or the terms of the Master Lease, Jaz accepted the Noritsu before delivery because prepayment was required. The ****1105 *154 language in** the Master Lease did not state that any prepayment for the Noritsu meant Jaz accepted the Noritsu. First HI Leasing's Purchase Order No. 11740 stated in relevant part:

3. Inspection. All of the Equipment described herein are subject to inspection by the Purchaser or the Lessee upon arrival at the address specified on the reverse side hereof, even though payment may have been made for the same prior to such arrival. If, upon completion of such inspection, it is determined that the Equipment does not conform to the requirements of this purchase order, the Purchaser and/or the Lessee shall be entitled to reject the nonconforming or defective Equipment and return the

same to the Vendor, whereupon the Vendor shall refund to Purchaser any part of the purchase price theretofore paid for such Equipment, together with all charges incurred by the Purchaser or the Lessee for transportation, handling, and storage.

First HI Leasing's purchase order to Foley specifically stated that the equipment was subject to inspection even if payment was made prior to delivery. Lease Schedule No. 66179 stated in relevant part:

8. INSPECTION PERIOD: The Lessee shall have a period of three (3) day(s) after delivery and installation to inspect the Equipment unless the time for inspection is extended with Lessor's approval.

First HI Leasing gave the right of inspection to Jaz even though prepayment was required. First HI Leasing's Lease Schedule and Purchase Order show that Jaz had a right to inspect the equipment after delivery. Prepayment by First HI Leasing did not require Jaz to accept the Noritsu before delivery.

C. Jaz had no duty to make rental payments.

9 Jaz contends it is not responsible for any losses under the terms of the Master Lease. First HI Leasing contends Jaz is responsible for any such losses. The Master Lease stated in part:

12. LOSS, DAMAGE TO OR DESTRUCTION OF EQUIPMENT.

(a) The Lessee shall bear the risk of loss, damage to or destruction ("Loss") of the Equipment, whether resulting from fire, theft, collision, governmental action or any cause whatsoever, and regardless of whether the Loss is covered by insurance or not, from the date of execution of the Lease Schedule (or if the Equipment is ordered from a Vendor, then from the date risk of loss passes from the Vendor) until the Equipment is returned to the Lessor upon the expiration of the Rental Term or earlier termination of this Lease.

(b) ANY LOSS OF THE EQUIPMENT SHALL NOT RELIEVE THE LESSEE OF ANY OBLIGATIONS UNDER THIS LEASE, INCLUDING ITS OBLIGATION TO PAY RENT, UNLESS AND UNTIL THE LESSEE'S OBLIGATIONS ARE TERMINATED BY THE LESSOR PURSUANT TO PARAGRAPH 12(d) BELOW.

Under the terms of the Master Lease, Jaz bears the risk of loss for any cause whatsoever from the date the risk passes

from Vendor to Jaz. The Master Lease does not specify when the risk of loss passes from Vendor to Jaz, and thus HRS § 490:2A-219 (1993) will be applied. Hawaii Revised Statutes § 490:2A-219 states in relevant part:

§ 490:2A-219 Risk of loss. (a) Except in the case of a finance lease, risk of loss is retained by the lessor and does not pass to the lessee. In the case of a finance lease, risk of loss passes to the lessee.

(b) Subject to the provisions of this Article on the effect of default on risk of loss (section 490:2A-220), if risk of loss is to pass to the lessee and the time of passage is not stated, the following rules apply:

(1) If the lease contract requires or authorizes the goods to be shipped by carrier:

(i) And it does not require delivery at a particular destination, the risk of loss passes to the lessee when the goods are duly delivered to the carrier; but

****1106 *155** (ii) If it does require delivery at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the lessee when the goods are there duly so tendered as to enable the lessee to take delivery.

(2) If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the lessee on acknowledgment by the bailee of the lessee's right to possession of the goods.

(3) In any case not within paragraph (1) or (2), the risk of loss passes to the lessee on the lessee's receipt of the goods if the lessor, or, in the case of a finance lease, the supplier, is a merchant; otherwise the risk passes to the lessee on tender of delivery.

10 11 12 First HI Leasing cannot show the risk of loss passed from Vendor to Jaz under HRS § 490:2A-219 because the Noritsu was never delivered to Jaz. "[I]f the parties do not agree on when risk of loss will pass, section 2A-219(2) allocates risk in rules based on the mode of physical transfer of the goods, generally allowing the risk to remain on the party who had control over the goods at the time of the loss." 3A William D. Hawland & Frederick H. Miller, *Uniform Commercial Code Series* § 2A-219 at 355 (1993). "[A]bsent a default by either party, the risk of loss passes to the lessee when the lessor tenders the goods; that is, when it completes its obligation to physically deliver the goods." 19 Richard A.

Lord, *Williston on Contracts* § 53:38 at 158 (4th ed.2001). The risk of loss in a finance lease passes to the lessee upon the lessee's receipt of the goods if, as here, the supplier is a merchant. *Id.* at 159.

First HI Leasing contends that the risk of loss may not have passed to Jaz, but it does not fall on First HI Leasing. First HI Leasing erroneously relies on HRS § 490:2A-220 (1993) to place the risk of loss on Foley, while requiring Jaz to make rental payments. Hawaii Revised Statutes § 490:2A-220 states in relevant part:

§ 490:2A-220 Effect of default on risk of loss. (a) Where risk of loss is to pass to the lessee and the time of passage is not stated:

(1) If a tender or delivery of goods so fails to conform to the lease contract as to give a right of rejection, the risk of their loss remains with the lessor, or, in the case of a finance lease, the supplier, until cure or acceptance.

There must be a tender or delivery of goods under HRS § 490:2A-220 for the risk of loss to pass to Jaz in the case of a finance lease. It was undisputed that the Noritsu was not delivered to Jaz. There was no evidence that there was a tender of the Noritsu by Foley to Jaz. Therefore the risk of loss is not on Foley.

First HI Leasing had the option of executing a recourse agreement⁴ or seeking acceptance ****1107 *156** by Jaz in order to avoid any risk of loss. First HI Leasing did not arrange for a recourse agreement, which would have put the risk of loss for prepayment on Jaz. First HI Leasing relied on the Acceptance Certificate. First HI Leasing failed to secure Jaz's acceptance by limiting the purpose of its own acceptance certificate and by failing to comply with HRS § 490:2A-515.

4 First HI Leasing's use of recourse agreements was explained by First HI Leasing Vice President Brian Y.C. Lau in this exchange between Mr. Lau and Jaz's counsel:

Q. [Jaz's counsel] Now let's go to this transaction and get into it in a little more detail, Mr. Lau. You have available to you as one of the tools which First Hawaiian Leasing uses in situations where advance funding is wanted, you have a document called a "Recourse Agreement"; is that correct?

A. [Mr. Lau] Yes.

Q. Can you just explain to the Court what a recourse agreement is, please?

A. A recourse agreement is an instruction from the lessee or the customer to pay vendor a dollar amount.

Q. And to pay early or outside of the confines of the lease; is that correct?

A. It could be paid at any time. It's identical to a note.

Q. But it's—if I understood your deposition testimony and the way these deals work, its a way to get money to the vendor outside of the lease which acknowledges cash is going to the vendor before the lease commences. It's a tool that can be used. Is that right?

A. It's a tool that can be used.

Q. Okay. Now, recourse agreement—there's a form for that in your files like these other forms that were used in this case; is that correct? A.

It's in our computer bank, yes.

Q. And it would be an easy thing to generate one for a transaction like this?

A. We could produce one, yes.

Q. And no recourse agreement was produced or ever signed in this case; correct?

A. Correct.

First HI Leasing must bear the risk of loss because it made payment to Foley before delivery of the Noritsu and without acceptance by Jaz.

D. Jaz's irrevocable promise to make the payments under HRS § 490:2A-407 did not apply because Jaz did not accept the Noritsu.

13 **14** Jaz contends it does not owe rental payments because the irrevocable promise to make the payments under HRS § 490:2A-407 (1993) does not apply. First HI Leasing argues that Jaz's promise to make rental payments is irrevocable under HRS § 490:2A-407, which provides in relevant part:

§ 490:2A-407 Irrevocable promises: finance leases. (a) In the case of a finance lease that is not a consumer

lease the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods.

Acceptance of goods is a requirement for HRS § 490:2A-407 to apply. Jaz did not accept the Noritsu, so HRS § 490:2A-407 does not apply. Jaz does not owe rental payments for the Noritsu under HRS § 490:2A-407 because Jaz did not accept the Noritsu.

E. First HI Leasing's attorney's fees and costs.

15 First HI Leasing contends (1) the circuit court abused its discretion when it denied First HI Leasing reasonable attorney's fees based upon the amount of the Amended Final Judgment for prevailing on the claims of Jaz's complaint, and (2) First HI Leasing should have been awarded attorney's fees based upon the amount of the alleged damages sought at trial by Jaz. The circuit court erred in granting judgment for First HI Leasing on the counterclaim, and no costs or attorney's fees should have been awarded to First HI Leasing. Thus the circuit court's award of partial fees and costs to First HI Leasing was also in error.

V. CONCLUSION

The "Order Granting in Part Defendant First Hawaiian Leasing, Inc.'s Motion for an Award of Attorney's Fees and Costs Filed February 22, 2001," filed March 13, 2001 is reversed. The Amended Final Judgment filed October 30, 2001, and the Findings of Fact, Conclusions of Law and Order filed February 12, 2001 are vacated, and this case is remanded to the circuit court for further proceedings consistent with this opinion.

Parallel Citations

85 P.3d 1099, 52 UCC Rep.Serv.2d 703

170 S.W.2d 604
Court of Appeals of Texas,
Houston (1st Dist.).

TRI—CONTINENTAL LEASING CORP., Appellant,
v.
LAW OFFICE OF RICHARD W. BURNS, Appellee.

No. 01-85—m361—CV. I Dec. 19,
1985. I Rehearing Denied May 8, 1986.

Leasing corporation sued to recover rentals allegedly due under copy machine lease. The 164th District Court, Harris County, Peter S. Solito, J., entered take-nothing judgment and leasing corporation appealed. The Court of Appeals, Evans, C.J., held that: (1) evidence supported findings that contract was rescinded because of copier's malfunction and that disclaimers of representation of fitness and of agency relationship with vendor's salesman were unconscionable and could not be given conclusive effect; (2) leasing corporation had impliedly authorized vendor's salesman to represent it and had ratified his conduct; and (3) lessee had not "accepted" machine. On motion for rehearing, the Court, held that there was sufficient evidentiary basis for finding of unconscionability.

Affirmed.

Levy, J., dissented and filed opinion.

Attorneys and Law Firms

*605 Stephen E. Price, Freedman & Hull, Houston, for appellant.
Scott, William H., Jr., Beeton, Timothy A., Houston, for appellee.

Before EVANS, C.J., and DUGGAN and LEVY, JJ.

Opinion

OPINION

EVANS, Chief Justice.

Tri-Continental Leasing Corporation appeals from a take-nothing judgment entered against it in a suit to recover rentals allegedly due under a written lease of a copying machine. We affirm the trial court's judgment.

The basic facts are undisputed. The appellee, Richard W. Burns, was approached by an office equipment vendor, Business Equipment of Houston, Inc. in March 1982. The vendor's salesman, Clint Enloe, represented to Burns that he had a copying machine worth \$5,000 that he would sell for \$4,200. Enloe told Burns that if he wanted to acquire the machine under a lease transaction, he could write off the cost for tax purposes. Enloe produced a printed lease form, bearing the heading "Tri-Continental Leasing Corporation, Vendor Service Division," which designated Tri-Continental as the lessor of the equipment. The blank spaces in the printed form were filled in by handwriting to show a 36—month lease term, rent payable in monthly installments of \$189.40 each, and an advance payment of \$568.47 for the first and last two months rent payments. The lease was dated March 30, 1982, and provided that it would not become effective until accepted by a duly authorized officer of Tri-Continental.

On April 5, 1982, before Tri-Continental's officer executed the lease, the vendor's salesman, Enloe, had the copying machine delivered to Burns' offices. At that time, Burns executed a "Delivery and Acceptance Receipt," acknowledging "full inspection" of the machine and that it was "in good condition." Tri-Continental executed the lease agreement on April 7, 1982.

Soon after delivery, the machine malfunctioned and could not be repaired. The machine continuously jammed and tore up the paper. It also leaked a fluid and emitted nauseous odors, making Burns' secretary ill on several occasions. Enloe visited Burns' office three or four times in an attempt to fix the machine. On April 21, 1983, Burns paid \$312.70 to the vendor for work performed by Enloe in an effort to repair the machine. In spite of these efforts, the machine continued to malfunction, and Enloe finally told Burns that the machine could not be fixed. On May 3, 1982, before the due date of the next lease payment, Burns advised Enloe by letter that he was terminating the lease and asked that the machine be removed from his office. In June or July of 1982, Burns had conversations with Tri-Continental's office, and he again asked that the machine be picked up at his office. In September and October 1982, he wrote to Tri-Continental's attorneys making similar requests. Finally, in January or February of 1983, Tri-Continental did repossess the copier and sold it for approximately \$500. Tri-Continental brought this action in November 1982, asserting that it had declared the balance of all lease payments due, so that Burns owed it a total sum of \$6,770.05, plus interest and attorney's fees.

By answer and counterclaim, Burns asserted that Tri-Continental and Business Equipment of Houston, Inc. were, in effect, one and the same. He alleged that they had conspired to defraud him through false representations that the machine was in working condition and that Business Equipment, as Tri-Continental's exclusive dealership *606 agent, would repair any defects. He alleged that both Tri-Continental and Business Equipment knew or should have known that the equipment would not perform as represented, that there was an entire failure of consideration, and that notwithstanding the lessor's written disclaimers of responsibility, which were unconscionable and against public policy, Tri-Continental and Business Equipment were bound by their implied warranty that the equipment was suitable for its intended use.

After a non jury trial, the court found that Burns and Business Equipment, the "assignee" of Tri-Continental, executed the lease agreement on March 20, 1982, and that Tri-Continental ratified the agreement on April 7, 1982; that the copying machine was delivered to Burns by Business Equipment on April 5, 1982; that on the following day, April 6, 1982, the machine malfunctioned, and despite repeated attempts at repair by Business Equipment, the machine never performed as intended; that Burns notified Tri-Continental of his intent to rescind the lease as early as June 1982, but that neither Business Equipment nor Tri-Continental made any attempt to repossess it until January or February 1983. The court further found that the solicitation of the lease agreement by Tri-Continental or its "assignee," Business Equipment, constituted an offer to Burns, which Burns accepted; but that despite such offer and acceptance, there was no consideration due to the fact that the copier never performed its intended function, and as a result, Burns rescinded the contract. The court also found that Tri-Continental had not made a reasonable effort to mitigate damages, and that the terms of the lease agreement were onerous, overreaching, and against public policy.

On these findings, the trial court entered a take-nothing judgment with respect to Tri-Continental's action against Burns, and against Burns on his counter-claim against Tri-Continental. Only Tri-Continental appeals.

In its first 12 points of error, Tri-Continental challenges the sufficiency of the evidence supporting the trial court's findings. Because these are "no evidence" points, we consider only the evidence, and reasonable inferences to be drawn therefrom, that supports the trial court's judgment, and we

reject all evidence and inferences to the contrary. *Glover v. Texas General Indemnity Co.*, 619 S.W.2d 400 (Tex.1981).

1 There is legally sufficient evidence to support the trial court's findings that the copying machine never performed its intended function, that this constituted a complete failure of consideration, and that the contract was rescinded for that reason.

But Tri-Continental contends that these findings must be disregarded, as a matter of law, because of the express disclaimers contained in its written lease. Tri-Continental points to provisions in the lease that provide, in effect, that the lessor has made no representations or warranties "of any kind or nature, directly or indirectly, express or implied, after any manner whatsoever, including the suitability of such equipment, its durability, its fitness for any particular purpose, its merchantability, its condition, ... (and) that the equipment is leased 'as-is.'" The lease further provides that if the equipment does not operate "as represented or warranted by the vendor" or is "unsatisfactory for any reason," the lessee's only claim is against the vendor and that the lessee will nevertheless pay the lessor all the rents payable under the lease.

In a prior case, this Court has upheld written disclaimer provisions in an equipment lease that contained language similar to that in Tri-Continental's lease. *Southwest Park Out-patient Surgery, Ltd. v. Chandler Leasing Division*, 572 S.W.2d 53 (Tex.Civ.App.—Houston [1st Dist.] 1978, no writ). In that case, an appeal from a summary judgment in favor of the equipment lessor, we held that despite summary judgment evidence showing that the defective equipment did not meet its intended function, the lessee remained liable to the lessor for the stipulated rental payments.

*607 There is a substantial distinction between the situation in *Chandler* and that presented here. In *Chandler*, we were not faced with a finding that the lease terms were unconscionable, but only with summary judgment proof showing the defective nature of the equipment. Here, the trial court not only found the equipment to be so defective that it failed to perform its intended function, but also, in effect, that the disclaimer provisions in the lease agreement were unconscionable. Although Tri-Continental generally challenges this finding by a point of error, it does not point out in its argument in what manner the evidence is insufficient to support this finding.

In deciding whether a contract is unconscionable, a court is entitled to look at "the entire atmosphere in which the agreement was made, the alternatives, if any, which were

available to the parties at the time of the making of the contract; [and] the non-bargaining ability of one party." *Wade v. Austin*, 524 S.W.2d 79, 86 (Tex.Civ.App.—Texarkana 1975, no writ).

Unconscionable conduct is statutorily defined as "an act or practice which, to a person's detriment: (A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or (B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration." Tex.Bus. & Com.Code Ann. sec. 17.45(5) (Vernon Supp.1986).

2 Here, it is undisputed that Burns was unfamiliar with the operation of the copying machine. Until he actually tried to use it in his office, he could not determine whether it was in good working condition. Obviously, Enloe, the vendor's salesman, was in a superior position to know whether the machine would perform its intended function. The trial court could reasonably have decided that Enloe, being in a superior position of knowledge, took advantage of Burns to a "grossly unfair degree" by representing that the machine would perform its intended function, and that Tri-Continental authorized or ratified the salesman's conduct. *See Chastain v. Koonce*, 28 Tex.Sup.Ct.J. 509 (June 19, 1985). Thus, there is some evidence to support the first test of section 17.45(5).

3 It is also undisputed that the machine malfunctioned soon after it was delivered to Burns, and that despite Enloe's attempts to have it repaired, it was never of any use to Burns. In the light of all the circumstances attending the transaction, the trial court could reasonably have decided that Burns was compelled to rely on the salesman's representations, and having done so to his detriment, he received no value for the consideration he paid in the transaction. This would support the trial court's ruling under the second test of section 17.45(5).

The next question is whether the salesman's representations may be attributed to Tri-Continental. Although the trial court's findings referred to Tri-Continental as the vendor's "assignee," the real issues are whether Tri-Continental impliedly authorized the vendor's salesman to act on its behalf, and whether it ratified the salesman's conduct.

4 **5** We conclude that there is evidence to support a finding that Tri-Continental impliedly authorized the vendor's salesman to represent it in the transaction, and that it also ratified such conduct after the defective equipment was delivered. Although Tri-Continental's lease contained written disclaimers that expressly denied the existence of any agency

relationship between it and the vendor or the vendor's salesmen, those disclaimers cannot be given conclusive effect in view of the trial court's findings that the lease terms were unconscionable. Similarly, the trial court's finding of unconscionability precludes conclusive effect being given to the stipulation that the parties' entire agreement is set forth in the lease, subject to modification only by a writing signed by Tri-Continental's executive officer. *See Weitzel v. Barnes*, 691 S.W.2d 598 (Tex. 1985). This distinguishes this case from ***608** *Stewart v. United States Leasing Corp.*, 702 S.W.2d 288 (Tex.App.—Houston [1st Dist.], 1985, no writ), because in that case there was no finding of unconscionability.

6 We also conclude that the trial court's judgment should be sustained, notwithstanding Burns' execution of the Delivery and Acceptance Receipt at time of delivery, acknowledging "full inspection" of the machine and that it was "in good working condition." In a sale of goods, acceptance occurs when the buyer has had "a reasonable opportunity to inspect the goods." Tex.Bus. & Com.Code Ann. sec. 2.606 (a)(1) (Vernon 1968). This same principle is also applicable in this case involving the leasing of equipment. It is undisputed that Mr. Burns signed the receipt when the equipment was delivered and before he had any opportunity to test the working order of the machine. We overrule Tri-Continental's points of error one through twelve.

For the reasons stated above, we also overrule points of error 14 and 15, in which Tri-Continental contends generally that the evidence is legally insufficient to support the trial court's judgment.

We need not consider Tri-Continental's thirteenth point of error in which it contends that the trial court erred in excluding certain documentary exhibits. The excluded documents related to the issues of the amount of rentals due and owing under the terms of the lease and Tri-Continental's attempt to accelerate the unaccrued rental payments. Because we have concluded that the trial court properly entered the take-nothing judgment, we need not consider these issues or the related issue of whether Tri-Continental had the right to accelerate unearned rentals for the balance of the lease term. *See American Lease Plan v. Ben-Kro Corp.*, 508 S.W.2d 937, 943 (Tex.Civ.App.—Houston [1st Dist.] 1974, writ ref d n.r.e.) (in which this Court held that a lease contract with similar terms did not permit a recovery of unaccrued rental payments).

The judgment of the trial court is affirmed.

LEVY, Justice, dissenting.

Because the majority finds a controlling distinction in this case from *Southwest Park Outpatient Surgery, Ltd v. Chandler Leasing Division*, 572 S.W.2d 53 (Tex.Civ.App.—Houston [1st Dist.] 1978, no writ), consisting of the trial court finding here that the lease disclaimer provisions were unconscionable, I respectfully dissent.

The majority asserts that the trial court could "reasonably" have decided:—

that Enloe, the vendor's salesman, knowingly misrepresented the condition of the copying machine to Burns (notwithstanding the lessor's express disclaimer in the lease of any warranty or representation of fitness whatever, the lease providing that the equipment is leased "as is");

that Enloe "took advantage of Bums (a practicing lawyer) to a 'grossly unfair degree' " (apparently suggesting that Enloe was gifted with clairvoyance by knowing in advance that the machine would not function as intended and notwithstanding Bums's written acknowledgement of receipt of the machine "in good working condition"); and

that Tri-Continental authorized or ratified Enloe's conduct (despite the lease's express disclaimer denying the existence of any agency relationship between Tri-Continental and the vendor or the vendor's salesman).

Further, the majority asserts—without supporting authority—that the lease's disclaimers, and the stipulation that the entire agreement of the parties is set forth in the lease, "cannot be given conclusive effect" because of the trial court's unconscionability finding.

This finding, I think, contradicts this Court's earlier decision in a similar equipment lease case, *Southwest Park, supra*, which upheld the enforceability of the lease. I fail to see any evidence or reason that the lease is "unconscionable," merely because the lessor was not responsible for, nor was the enforceability of the lease dependent upon, the performance of the machine. Burns agreed that if the machine *609 failed to operate properly, or if any warranty by Business Equipment, Inc., the vendor, was breached, all such claims would be against the vendor. To facilitate this, Tri-Continental agreed to assign to Burns all rights that it had, as the purchaser against the vendor, for breach of warranty or representation concerning the equipment. It was specifically provided by the lease that Business Equipment

was not an agent of Tri-Continental, that any representations by Enloe were not binding on Tri-Continental, that the lease contained all the agreements between the parties, and that "failure of the equipment properly to operate" would not relieve Burns of his obligations under the lease. Tri-Continental did not guarantee the operation of the copying machine and, to the contrary, expressly disclaimed such a guarantee. Consideration for the lease was not the copier, but the lessor's purchase of the copier and the extension of credit to the lessee, all of which the lessor performed. The lease agreement was expressly made irrevocable, and Bums's responsibilities under the lease were binding and enforceable even if the equipment malfunctioned. Bums was without recourse against Tri-Continental, but not as against Business Equipment as vendor. This hardly makes the lease "unconscionable."

I would sustain Tri-Continental's first twelve, and the fourteenth and fifteenth, points of error on the grounds that both the findings of the trial court and its judgment are not supported by legally sufficient evidence. *See Fettig v. Fettig*, 619 S.W.2d 262, 269 (Tex.Civ.App.—Tyler 1981, no writ); *Trevino v. Munoz*, 583 S.W.2d 840, 843 (Tex.Civ.App.—San Antonio 1979, no writ). It appears to me, however, that *American Lease Plan v. Ben-Kro Corp.*, 508 S.W.2d 937 (Tex.Civ.App.—Houston [1st Dist.] 1974, writ ref d n.r.e.), effectively precludes Tri-Continental's claimed right to accelerate unearned rentals for the balance of the equipment lease term.

I would reverse the judgment of the trial court and remand the cause for a new trial.

On Motion for Rehearing

In its motion for rehearing, supported by able amicus curiae arguments, Tri-Continental contends that the majority opinion confuses the "doctrine of unconscionable contract," as stated in the Uniform Commercial Code, with "unconscionable action or course of action" under the Deceptive Trade Practices Act. Arguing that the question of whether a contract is unconscionable must be determined as a matter of law, Tri-Continental contends that the trial court's finding that the disclaimer provisions in its lease were "onerous, overreaching and against public policy," constituted a legal conclusion, not a fact finding.

7 The decision as to whether a contract clause is unconscionable, so that its enforcement should be denied or limited, is a matter of law for the court's determination. But in

making that determination, the court must look to the "entire atmosphere" in which the agreement was made, *Wade v. Austin*, 524 S.W.2d 79, 86 (Tex.Civ.App.—Texarkana 1975, no writ). Thus, evidence is admissible to show the commercial setting at the time of the making of the contract. Compare Tex.Bus. & Com.Code Ann. sec. 2.302(b) (Vernon 1968). In deciding the fairness of a contract's substantive terms, the court must also consider whether there were "procedural abuses," such as an unfair bargaining position between the parties at the time the agreement was made. *Wade v. Austin*, 525 S.W.2d at 86; *Transamerican Leasing Co. v. Three Bears, Inc.*, 586 S.W.2d 472 (Tex.1979).

8 Here, there was evidence from which the trial court could factually have found that the sales agent took "grossly unfair" advantage of Bums' lack of knowledge to a "grossly unfair degree" and that there was a "glaring and flagrant" difference between the consideration paid by Bums for the copier and the value he actually received. See *Chastain v. Koonce*, 700 S.W.2d 579, 582-83 (Tex.1985). There was also evidence from which the court could have found that Tri-Continental authorized and ratified the sales agent's conduct in dealing with Bums. Thus, the trial *610 court had sufficient evidentiary basis for a factual determination of unconscionable action or course of action under Tex.Bus.

& Com.Code Ann. sec. 17.45(5) (Vernon Supp.1986). *Chastain v. Koonce*, 700 S.W.2d 579. On the basis of these factual determinations, the trial court could properly have concluded, as a matter of law, that the disclaimer clauses were unconscionable under the circumstances present when the contract was made. Tex.Bus. & Com.Code Ann. sec. 2.302 comment 1 (Vernon 1968) and authorities cited therein. Having decided that the contractual disclaimer clauses were unconscionable, the trial court acted within its discretion in denying their enforcement in the instant case. Sec. 2.302 comment 2.

Our holding in this case does not constitute a general condemnation of the contract clauses in question, and in this respect we adhere to our previous holding in *Southwest Park Outpatient Surgery, Ltd. v. Chandler Leasing Division*, 572 S.W.2d 53 (Tex.Civ.App.—Houston [1st Dist.] 1978, no writ).

The motion for rehearing is overruled.

DUGGAN, J., also participating.

LEVY, J., dissents.

No. 67539-74

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

FINANCIAL PACIFIC LEASING, LLC,
a Washington limited liability company,

Respondent

v.

LAW OFFICES OF DAVE A. SHARP, P.A., a Florida corporation,
DAVID A. SHARP, individually, and MARIANNE SHARP

Appellants,

On Appeal from the Superior Court of King county
The Honorable J. Wesley Saint Clair
Cause No. 10-2-30494-1 KNT

DECLARATION OF SERVICE

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The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served via ABC Legal Messengers for delivery by Friday, December 2, 2011, a copy of the Brief of Respondent to:

Christopher E. Allen, Esq.
Morton McGoldrick 820
"A" St., Suite 600
Tacoma, WA 98402
(Counsel for Appellants)

Signed at Tacoma, Washington this 1st day of December, 2011.

McGAVICK GRAVES, P.S.

By: Ourui: ' CiLoVir/
Anita K. Acosta