

1975

# Lloyd E. Lish v. Dean Compton : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

----- oooOooo -----

LLOYD E. LISH, JR.,

:

Plaintiff/Respondent,

:

-vs-

:

Case No. 14111

DEAN COMPTON,

:

Defendant/Appellant.

:

-----oooOooo-----

BRIEF OF RESPONDENT

-----  
Appeal from Judgment of the First  
Judicial District Court for Box Elder  
County, Honorable VerNoy Christofferson, Judge  
-----

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

----- oooOooo -----

LLOYD E. LISH, JR.,	:	
Plaintiff/Respondent,	:	
-vs-	:	Case No. 14111
DEAN COMPTON,	:	
Defendant/Appellant.	:	

-----oooOooo-----

BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

This is an action by the Plaintiff/Respondent, Lloyd E. Lish, Jr., against the Defendant/Appellant, Dean Compton, for damages which he sustained as the result of a contract for the sale of wheat which was breached by Defendant.

The parties will be referred to herein as they appear in the lower court.

DISPOSITION IN THE LOWER COURT

The trial of the case was held in the District Court of Box Elder County on the 13th and 14th days of February, 1975 before the Honorable VeNoy Christoffersen with a jury. The case was submitted to the jury on Special Verdict and on February 14, 1975 they returned the Verdict.

answering the Interrogatories in favor of the Plaintiff and against the Defendant.

The Defendant made an oral Motion for Judgment Notwithstanding the Verdict which was denied and Judgment was entered in favor of the Plaintiff on April 28, 1975.

#### RELIEF SOUGHT ON APPEAL

The Plaintiff seeks to have the Judgment of the District Court affirmed.

#### STATEMENT OF FACTS

This action arises out of a contract which Plaintiff, Lloyd E. Lish, Jr., claims he entered into with the Defendant, Dean Compton, on August 2, 1973 whereby Defendant agreed to sell and Plaintiff agreed to buy 15,000 bushels of red wheat "as is" at \$3.30 per bushel. Defendant denied that the contract was entered into and, additionally, asserted the Statute of Frauds as a defense. (R. 204, Jury Instruction #4)

Both parties testified that a telephone conversation occurred between them on August 2, 1973 wherein they discussed the sale of 15,000 bushels of wheat from Defendant to Plaintiff. It was the Defendant's contention that only one conversation occurred between the parties on this date and that even though the sale of the wheat was discussed, no contract was entered into. (R. 132, 133, 142) Conversely, the Plaintiff testified that two telephone conversations occurred between the parties on this date and in the first conversation the price of wheat was discussed and Defendant made mention of the fact that some of his neighbors had received \$3.25 per bushel for comparable wheat at this time. Plaintiff further testified that in the second conversation an oral contract was entered into for the sale of 15,000 bushels of red wheat "as is" at \$3.30 per bushel. (R. 15-18)

In reviewing the telephone log of the Defendant, it confirmed the fact that two calls were made between Defendant and Plaintiff on the date in question. (R. 144, Exhibit #13)

On or about August 3, 1973 the Plaintiff prepared a written confirmation of the contract which contained the following: "red wheat, rye mix...15,00 bushels, \$3.30 per bushel, as is." (R. 19, Exhibit #2) This confirmation was mailed by the Plaintiff to the Defendant on or about August 14, 1973 and was received by the Defendant in the mails in the afternoon of August 15, 1973. (R. 27, Exhibit #3)

Following the conversation between Plaintiff and Defendant on August 2, 1973, the Plaintiff contacted Pillsbury Mills Company in Ogden, Utah on the same date and entered into an oral contract with them for the sale of 15,000 bushels of red wheat "as is" at \$3.45 per bushel. This contract was evidenced by a written confirmation which was prepared by Pillsbury Mills Company on or about August 2, 1973 and was received by the Plaintiff some days thereafter. (R. 19, Exhibit #1)

From the 2nd through the 14th days of August, 1973 the price of #1 red wheat on the Ogden grain market increased from \$3.63 per bushel to \$4.37 per bushel. (R. 35-40, Exhibit #4) Both the Plaintiff and the Defendant, as well as Mr. Rudolph Globoker, an employee of Pillsbury Mills Company, Ogden, Utah, testified that such a sharp fluctuation in this short a period of time was highly unusual and nothing comparable to this had previously occurred. (R. 41, 91, 150)

The Defendant, Dean Compton, was aware of the sharp increase

of the price of wheat during this period and on August 15, 1973 he telephoned the Plaintiff, Lloyd E. Lish, Jr., for the ostensible purpose of requesting that Plaintiff haul his wheat from his farm in Idaho to Ogden, Utah. As soon as this request was made, the Plaintiff interjected and told the Defendant that, "You have no wheat," and that he had resold it to the Pillsbury Mills Company and inquired whether or not the Defendant had received the written confirmation. The Defendant replied that he had not received the confirmation at that time. (R. 29-30, 133-134) During this or a second conversation on the same date, Mr. Lish testified that Mr. Compton told him he could "get out" of his contract with the Pillsbury Mills Company and Mr. Lish responded that he did not think he could, however, if Pillsbury Mills Company would be willing to release him from his contract, which he intended to perform, he would be glad to release Mr. Compton. (R. 30) He made the request that Mr. Compton contact the representatives of Pillsbury on that day and Mr. Compton met and discussed the matter with them in Ogden, Utah. The Defendant was advised by the representatives of Pillsbury that Mr. Lish did in fact have a contract with them and that they intended to enforce the same. (R. 146-147) Mr. Rudolph Globoker, who was present during the conversation, testified that Mr. Compton said he did not sign a contract with Mr. Lish and that he "couldn't sustain a \$19,000 loss." (R. 89-90)

Mr. Compton concedes that after he returned to his home on August 15, 1973 he received the written confirmation from Mr. Lish and that he did not send a written rejection of the same to Plaintiff. (R. 103)

Both Plaintiff and Defendant testified that in the spring and early



summer of 1973 they had entered into a verbal contract or contracts whereby Mr. Compton agreed to sell and Mr. Lish agreed to buy certain wheat and barley. (R. 43-45, 140-141) Mr. Compton acknowledges that the contracts were verbal and that no written confirmations were received by him. Additionally, a time lapse in excess of one month occurred from the time the contract was entered into until the grain was hauled and payment received by the Defendant and no writing existed until the completion of the transaction to evidence the same. (R. 151) Another transaction between the parties occurred on or about July 27, 1973 wherein Mr. Compton contacted Mr. Lish by telephone and requested that he take a truck to Mr. Compton's farm in Little Mountain, Box Elder County, Utah, so he could deposit his wheat in the same for storage. Both parties testified that a sale was intended to be made in the future but that no contract was entered into concerning the price for the wheat at this time. After the truck was filled it was taken to the grain mill in Ogden, Utah for storage. (R. 141) On or about September 3, 1973 and following Mr. Compton's failure to deliver the 15,000 bushels of red wheat at \$3.30 per bushel to Mr. Lish, the parties entered into an oral contract for the sale of the wheat. Mr. Compton concedes that he sold the wheat to Mr. Lish at this time at \$3.30 per bushel, notwithstanding the fact that the price of wheat at that point in time had increased by approximately \$1.00 per bushel. (R. 153-154) It was the Plaintiff's testimony that the Defendant told him to apply the 1,000 bushels of wheat to the 15,000 bushel contract and the settlement statement which he proposed at the completion of the transaction verifies this. (R. 59-60, Exhibit #7)

The Defendant is the owner of farms in Cassia County, Idaho and Box Elder County, Utah. His occupation for the past 20 to 25 years has been in raising and selling farm commodities, principally wheat. He concedes that the commodities which he raises are produced primarily for resale and that he has been engaged in the selling of grain for the 20 to 25 year period. He sells grain both to grain merchandisers such as Mr. Lish and also directly to grain storage facilities or marketers which are located in Ogden, Utah. He also keeps himself apprised of the fluctuation of the price of grains and personally handles all of his business transactions. Additionally, the Defendant admits he has "merchandised" grain by entering into a "future contract" for grain not yet produced. (R. 100-103)

The evidence disclosed that the Defendant, Dean Compton, failed to perform his contract with the Plaintiff, other than for delivery of the 1,000 bushels as set forth above. It also indicates that the Plaintiff performed his contract with Pillsbury Mills Company which resulted in substantial losses to him because of the increased price of wheat at the time of the breach. (R. 59, 81)

The jury was instructed as to the contentions of each of the parties and as to the applicable law and the case was submitted to them on Special Verdict. (R. 204-211) A unanimous Special Verdict was returned by the jury which provided as follows:

"We the jury find from a preponderance of the evidence in this case the following answers to the questions propounded to us:

"1. Has the defendant admitted in his testimony or otherwise in court that an oral contract for

the sale of the wheat was entered into with plaintiff?

Yes   X   No       

"2. Was an oral contract entered into between plaintiff and defendant for the purchase and sale of wheat?

Yes   X   No       

"3. Was the defendant, on August 2, 1973, a merchant as defined by the court's instructions?

Yes   X   No       

"4. Was a written confirmation received by the defendant from the plaintiff within a reasonable time?

Yes   X   No.       

"5. What was the market price of as is wheat as of August 15, 1973?

\$4.25 per bushel. " (R. 212)

#### POINT I

THE PROCEEDINGS IN THE LOWER COURT ARE PRESUMED BY THE REVIEWING COURT ON APPEAL TO BE CORRECT.

There are numerous cases from the Supreme Court of the State of Utah, as well as other jurisdictions, supporting the general proposition of the law stated in Point I and no cases have been found by Plaintiff stating a contrary position.

There is not only a presumption of validity on appeal of the proceedings in the lower court, but the burden is on the Defendant affirmatively to demonstrate error, and in the absence of such, the judgment must

be affirmed by the reviewing court. Leithead v. Adair, 10 Utah 2d 282, 351 P.2d 956; Coombs v. Perry, 2 Utah 2d 381, 275 P.2d 680. Not only are the pre-judgment proceedings in the trial court presumed to be correct, but every reasonable contentment must be indulged in by the appellate court in favor of it. Burton v. Z.C.M.I., 122 Utah 360, 349 P.2d 516; Nagle v. Club Fontainbleu, 17 Utah 2d 125, 405 P.2d 346; Petty v. Gindy Mfg. Corp., 17 Utah 2d 32, 404 P.2d 30.

The proposition of law set forth in Point I is binding upon the appellate court whether the case was tried before a judge only or to a judge sitting with a jury. However, the presumption in favor of validity has more weight when the trial court has given its approval to the determination of the jury as set forth in its verdict by refusing to grant a new trial or a judgment notwithstanding the verdict to the losing party. See Gordon v. Provo City, 15 Utah 2d 287, 391 P.2d 430.

## POINT II

THE JURY FOUND THAT THE DEFENDANT ADMITTED IN HIS TESTIMONY OR OTHERWISE IN COURT THAT AN ORAL CONTRACT FOR THE SALE OF THE WHEAT WAS ENTERED INTO WITH THE PLAINTIFF.

It is the contention of the Plaintiff that notwithstanding the denial by the Defendant in his Answer that a contract was entered into, his testimony in Court was sufficient to show that he had admitted the oral contract was entered into with the Plaintiff and the jury so found in answer to Interrogatory #1. The legal proposition encompassing the Plaintiff's position concerning this issue is set forth in Section 70A-2-201, Utah Code Annotated, which provides in part

as follows:

"70A-2-201. Formal requirements - Statute of Frauds. - (1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

. . .  
"(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

. . .  
" (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made...." [Emphasis added]

As set forth above, if a party admits in his "pleadings, testimony or otherwise in court" the existence of an oral contract, the Statute of Frauds will no longer be a defense to the same. In this case, notwithstanding the Defendant's denial in his Answer that no contract was entered into, there was considerable testimony by him that an oral contract was in fact entered into. The Defendant testified that he had talked with the Plaintiff about the sale of 15,000 bushels of red wheat on August 2, 1973 at \$3.31 per bushel. He further conceded that if he had received a written confirmation from the Plaintiff at an earlier date after the conversation of August 2, 1973, he would have considered the contract binding. His testimony in this regard is as follows:

"Q - Okay. As I understand your testimony, Mr. Compton, you would have considered that you had a binding contract with Mr. Lish if you had received this confirmation in the mail on an earlier date; is that correct?

"A - Yes, if an earlier date or a phone call.

"Q - And had Mr. Lish sent you this confirmation and you received it on an earlier date, you would have considered the transaction binding; is that correct?

"A - In a reasonable length of time, yes.

"Q - And because you didn't receive it until the 15th you did not feel that you had a binding contract with Mr. Lish; is that correct?

"A - That is right, yes." (R. 149, 150)

The untenable position of the Defendant concerning this is evidenced by the following testimony:

"Q - Do you think your position would have been different had the price of grain remained the same or gone down between August second and August 15?

"A - I'm sure it would." (R. 150)

Additionally, the Defendant totally acknowledges the contract by his partial performance of the same in "selling" wheat to Mr. Lish for the contract price of \$3.30 per bushel on September 3, 1973 when the market price greatly exceeded this.

It was noted above that the Statute of Frauds does not purport to deny the existence of an oral contract if proven, but only provides that under some circumstances the same is unenforceable. In the case of Cohn v. Fisher, 287 A.2d 222, 118 N.J. Super 286 (1972) the Supreme Court

of the State of New Jersey was presented with a case involving the same statute as is in question here. The Court held that if a party admitted in his deposition, answers or otherwise the existence of a contract, he could not assert the Statute as a defense and stated as follows:

"This court is of the opinion that if a party admits an oral contract, he should be bound to his bargain. The statute of frauds was not designed to protect a party who made an oral contract, but rather to aid a party who did not make a contract, . . ." [Emphasis added]

Inasmuch as the jury has made a finding that the Defendant admitted the existence of an oral contract as contended by the Plaintiff, i. e. for the sale of 15,000 bushels of red wheat "as is" at \$3.30 per bushel, the contract is binding on the parties and there is no requirement that a "written confirmation" be received or that the parties be deemed to be "merchants."

### POINT III

THE PLAINTIFF AND DEFENDANT ARE DEEMED MERCHANTS WITHIN THE MEANING OF THE UNIFORM COMMERCIAL CODE AND A WRITTEN CONFIRMATION OF THE ORAL CONTRACT WAS RECEIVED BY DEFENDANT FROM PLAINTIFF WITHIN A REASONABLE TIME.

It is Plaintiff's position that an oral contract existed for the sale of the wheat by Defendant to Plaintiff and that the parties are deemed to be "merchants" within the meaning of the Uniform Commercial Code, and that a "written confirmation" was received by Defendant from Plaintiff within a reasonable time after the oral contract was entered into.

As was set forth in Point II, Section 70A-2-201 provides for

some exceptions to the use of the Statute of Frauds as a defense and one such exception is as follows:

"(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received...." [Emphasis added]

As was noted in the Statement of Facts, the Defendant had engaged in the business of raising and selling grain for approximately 20 to 25 years at his farms located in Cassia County, Idaho and Box Elder County, Utah. The farm commodities raised by him were produced principally for resale. He also stated that he had dealt with grain merchandisers such as the Plaintiff during this period, as well as directly with grain mills and storage facilities in Ogden, Utah. He kept himself apprised of the fluctuating prices of grains and handled his business transactions personally. Additionally, the Defendant states that he has "merchandised" in the grain business:

"A - Yes. I'm hesitating; I want to be sure I get the gist of the question. I've sold directly to mills and I have had merchandisers or dealers haul it for me to those places for storage and put in my name, and then I have made the deal and the settlement at a later date. I have also merchandised where I have made a contract ahead of time, a future contract, before the grain is produced or before it is harvested, and with grain merchandisers." (R. 101-102)

In Instruction #6 the Court instructed the jury as to who would be deemed a "merchant" within the meaning of the Uniform Commercial Code as



set forth in Section 70A-2-104 which provides as follows:

"(1) 'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

The jury, in answer to Interrogatory #3 found the Defendant on August 2, 1973 was a "merchant" as defined in the Court's Instruction.

In the case of Campbell v. Yokel, 313 N. E. 2d 628, 20 Ill. App. 3d 702 (1974) the Illinois Supreme Court was presented with the question of whether a person who is engaged in the farming business could be a "merchant" within the meaning of the Uniform Commercial Code. In holding that the Defendants were "merchants," the Court stated as follows:

"The defendants in the instant case have admitted in discovery depositions that they have grown and sold soybeans and other grains for several years. They have sold to the plaintiffs and to other grain companies in the past. We believe that a farmer who regularly sells his crops is a person 'who deals in goods of that kind.'"

"The authors of the comments to the Uniform Commercial Code state that the term 'merchant' applies to a 'professional in business' rather than to a 'casual or inexperienced seller or buyer.'... The defendants admittedly were not 'casual or inexperienced' sellers. We believe that farmers who regularly market their crops are 'professionals' in that business and are 'merchants' when they are selling those crops.

"...Placing this small burden upon farmers in certain instances lessens the possibility that the statute of frauds would be used as an instrument of fraud. For example, assuming that an oral agreement had been reached in the instant case, that the farmers had received the written confirmation signed by the plaintiffs and that the farmers were not 'merchants,' the farmers would be in a position to speculate on a contract to which the grain company was bound. ...Our holding reduces the possibility of this type of practice in cases in which the farmer is a person who regularly sells crops of this kind involved in the transaction at hand." [Emphasis added]

Also, in the case of Ohio Grain Co. v. Swisshelm, 15 U.C.C. 304 (Ohio App. 1973) a fact situation existed which is remarkably similar to the fact situation in the instant case. The Plaintiff alleged that the Defendant had orally agreed to sell him 15,000 bushels of soybeans at \$5.00 per bushel to be picked up at Defendant's farm, but refused to perform the contract, notwithstanding the fact that a written confirmation of the same had been received by him and he had failed to reject the same in writing. The Plaintiff sustained damages when the market price of soybeans increased approximately \$1.00 per bushel. In holding that the Defendant was a merchant, the Court stated as follows:

"He would represent defendant as a simple tiller of the soil, unaccustomed to the affairs of business and the market-place. Farming is no longer confined to simple labor. Only an agri-businessman may hope to survive. This defendant was clearly familiar with farm markets and their operation and followed them with some care. For example, he was familiar with the bean market in Cincinnati, as well as that in his local community. In his many years of farming, he knew that corn was sold for varying prices, depending upon its moisture, quality and condition, and admitted having some idea that the same was true of beans. He had

sold some beans a number of years before." [Emphasis added]

On an application for rehearing, the Court affirmed its ruling and stated as follows:

"While it is true that the terms 'farmer' and 'merchant' are non synonymous, yet neither are they mutually exclusive, and each may possess some of the qualifications of the other. If, as in our present case, a farmer is chargeable with the knowledge or skill of a merchant, he is required to act accordingly."

The only case cited by Defendant in his Brief to the effect that a farmer may not be deemed to be a merchant within the meaning of the Uniform Commercial Code is Cook Grains, Inc. v. Fallis, 395 S. W.2d 555, 239 Ark. 962 (1965). It should be noted that in the instant case and in the two cases set forth above, there was evidence introduced that the farmer produced his commodities primarily for resale and had knowledge of their value and markets relating to the same. Conversely, in the Cook Grains case, there was no evidence introduced that the Defendant had any knowledge other than that of farming and the Court stated as follows:

"There is not a scintilla of evidence in the record, or proffered as evidence, that appellee is a dealer in goods of the kind or by his occupation holds himself out as having knowledge or a skill peculiar to the practices of goods involved in the transaction, and no such knowledge or skill can be attributed to him."

It should also be noted that the decision in the Cook Grains case has been criticized by the leading treatise on the Uniform Commercial Code. In Anderson's Uniform Commercial Code, Second Edition, Vol. 2

at page 221, the editors, in referring to the case state as follows:

"...If the farmer customarily sells the type of farm commodities in question... there is no reason why he should not be deemed to be a merchant...."

As was noted by the prior authorities, there is no logical or legal reason why a person who has the requisite knowledge concerning sales of certain commodities, even though he may also be a farmer and produce the commodities sold by him, may not be deemed to be a "merchant" within the Uniform Commercial Code. In this instance the Defendant clearly was knowledgeable about the sale of the commodity in question and had a considerable amount of expertise on the subject matter and should be bound by his contracts as was the Plaintiff.

The second criteria for the provisions of this exception to the Statute of Frauds is that a "written confirmation" be sent and received by the Defendant within a reasonable time after the oral contract was entered into on August 2, 1973. The "written confirmation" was received on August 15, 1973 and the jury found that this was within a "reasonable time." (R. 105, 212)

The jury was instructed as to what was meant by a "reasonable time" within the meaning of the Uniform Commercial Code and Section 70A-1-204 provides in part as follows:

"(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action...."

The Court further informed the jury that in determining what is a reasonable time, they could take into account the course of dealing between the parties

which is defined in Section 70A-1-205, Utah Code Annotated. (Instruction #7, R. 207)

The only evidence of what constitutes a "reasonable time" was the testimony of the Plaintiff to the effect that there was no unusual or undue delay in sending the written confirmation. (R. 80)

Additionally, as was set forth in the Statement of Facts, the sharp increase in the price of wheat during the elapsed time in question had not occurred on any previous occasion and was totally unexpected by the parties.

In the instant case the prior dealings between the parties occurred from approximately March or April through July of 1973 wherein oral agreements were entered into whereby Defendant agreed to sell and Plaintiff agreed to buy certain wheat and barley. These contracts were entered into orally and no written confirmations of the same were sent by Plaintiff to Defendant. Additionally, a time lapse in excess of one month existed from the time the contracts were entered into until the Defendant was paid and no written evidence of the contract existed until this time. In view of the foregoing, it can scarcely be contended by the Defendant that a practice had been established whereby he should have received a written confirmation of the oral contract prior to the lapse of 13 days which occurred in the instant case.

In the case of Azevedo v. Minister, 471 P.2d 661 (Nev. 1970) the Nevada Court, in a case involving the sale of 1,500 tons of hay, addressed itself to the question of what was a "reasonable time" under the same

statutes as involved in the instant case, and stated as follows:

"4. The 'Reasonable Time' Factor.

"Subsection 2 of NRS 104.2201 provides that the confirming memorandum must be sent within a reasonable time after the oral contract is made. Appellant argues that the delay of 10 weeks...as a matter of law is an unreasonable time. We do not agree. What is reasonable must be decided by the trier of facts under all the circumstances of the case under consideration...." [Emphasis added]

For other cases holding that what is a "reasonable time" within the meaning of the Uniform Commercial Code is a question for the trier of fact, see Robinson v. Jonathan Logan Financial, 277 A.2d 115 (1971); and Irrigation Motor & Pump Co. v. Belcher, 483 P.2d 980 (1971).

The Defendant, in his Brief, cites some cases to the effect that what is a reasonable time may be determined by the Court as a matter of law. However, these cases do not deal with the provisions of the Uniform Commercial Code and even if they did, the legal principle therein is only applicable if the surrounding circumstances during the time period are not in dispute as they were in the instant case. In this regard the case of Hill v. Hobart, 16 Maine 164 (1836) cited by the Defendant provides as follows:

"... But where what is a reasonable time depends upon certain other controverted points, or where the motives of the party into the question, the whole is necessarily to be submitted to a jury, before any judgment can be formed, whether the time was or was not reasonable."

The Defendant admits that no written rejection of the written confirmation was sent by him to the Plaintiff. However, in his Brief he argues

that the oral statement to the Plaintiff that he did not intend to perform eliminates the necessity of the written rejection. This contention has been made by him without any supporting statutory or case law and is clearly without merit. In this regard, the Supreme Court of the State of Nevada in the Azevedo case, supra, discussed the purpose for the adoption of the particular provision of the Uniform Commercial Code requiring that a written rejection be sent and stated as follows:

"While §2-201(2) of the Code is entirely new in the commercial law field, its only effect is to eliminate the defense of the statute of frauds. The party alleging the contract still has the burden of proving that an oral contract was entered into before the written confirmation. The purpose of the subsection of the Code is to rectify an abuse that had developed in the law of commerce. The custom arose among business people of confirming oral contracts by sending a letter of confirmation. This letter was binding as a memorandum on the sender, but not on the recipient, because he had not signed it. The abuse was that the recipient, not being bound, could perform or not, according to his whim and the market, whereas the seller had to perform. Obviously, under these circumstances, sending any confirming memorandum was a dangerous practice. Subsection (2) of Section 2-201 of the Code cures the abuse by holding a recipient bound unless he communicates his objection within 10 days."

The foregoing principle was also discussed in the case of Tiffany v. W. M.K. Transit, 493 P.2d 1220, 16 Ariz.App. 415 (1972). The Court quoted with approval from an article in the Arizona Law Review which provided as follows:

"... 'Under subsection (2)..., when a letter of confirmation is employed between merchants,

the recipient must give written notice of objection within ten days after receipt or he is precluded from setting up the Statute of Frauds.... Buyers and sellers should confirm all oral contracts by letter and should reply immediately (accepting or rejecting) upon receipt of such memoranda from the other party.' "

The jury has found, based upon substantial evidence, that the parties entered into the contract as claimed by the Plaintiff for the sale of wheat and that the Defendant was a "merchant" within the meaning of the Uniform Commercial Code and that a written confirmation was received by the Defendant within a "reasonable time" thereafter. Consequently, the Statute of Frauds is not a bar to the Plaintiff's claim.

#### POINT IV

THE COURT CORRECTLY COMPUTED THE AMOUNT OF DAMAGES SUSTAINED BY THE PLAINTIFF.

It is the position of the Plaintiff that the damages sustained by him is the difference between the contract price of \$3.30 per bushel and the price on the date of the breach of \$4.25 per bushel. This legal principle is contained in Section 70A-2-713, Utah Code Annotated, which provides as follows:

"Buyer's damages for nondelivery or repudiation. -  
(1) Subject to the provisions of this chapter with respect to proof of market price (section 70A-2-723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price..." [Emphasis added]

The jury found in answer to Interrogatory #5 that the market price of "as is" red wheat on August 15, 1973 was \$4.25 per bushel which was based upon



considerable evidence from the Plaintiff and from the representative of Pillsbury Mills Company.

The damages awarded were based upon the difference in the two prices of \$.95 per bushel multiplied by the number of bushels called for in the contract, i. e. 15,000. However, the Defendant was given credit for the 1,000 bushels which he had delivered in September of 1973 at the contract price of \$3.30 per bushel. This computation of damages was proper and in accordance with the provisions of the Uniform Commercial Code set forth above.

Some contention is made by the Defendant in his Brief that the damages assessed against him should be limited to the 12,000 bushels of wheat which he actually produced from the farm in Cassia County, Idaho in 1973. This argument is made without any supporting authority and it would be totally inconsistent to allow the Defendant who had denied that a contract was entered into to change his position at this point to claim that the contract was to be of a different quantity or was to be an "amount produced" contract. In Instruction #4 the Court advised the jury of the contention of the Plaintiff concerning the contract as follows:

"The plaintiff alleges that on the second day of August, 1973, the parties entered into a contract wherein the defendant agreed to sell and the plaintiff agreed to buy 15,000 bushels of red wheat at \$3.30 per bushel,..."

The jury found in answer to Interrogatories #1 and #2 that the contract as claimed by the Plaintiff was entered into between the parties.

POINT V

THE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WAS PROPERLY DENIED.

The Supreme Court of the State of Utah has repeatedly ruled that the law is in favor of the submission of disputed issues to the jury and of supporting their verdict when the same has been rendered. See Smith v. Franklin, 14 Utah 2d 16, 376 P.2d 541. It has also been held that it is the fundamental right of litigants to have their disputed issues submitted to the jury and that if the Courts were ready to override their jury verdicts when they disagreed with them, the right of trial by jury would be effectively denied. In this regard, the Court in the case of Lund v. Phillips Pet. Co., 10 Utah 2d 276, 351 P.2d 952, stated as follows:

"It is to serve the policy of safeguarding the right of trial by jury that in doubtful cases the doubts are resolved in favor of submitting the case to the jury; and in favor of supporting the verdict when rendered...."

In this case the parties have had an opportunity to present their cases to the Court and the jury who answered a Special Verdict finding in favor of the Plaintiff and against the Defendant on conflicting evidence and the Court declined to upset the verdict of the jury. In view of the foregoing, it seems that the following much quoted provision is applicable:

"Anyone acquainted with the practical operation of a trial by jury and the human factors that must play a part therein is aware that it would be almost impossible to complete a trial of any length without some things occurring with which counsel, after the case is lost, can find fault and, in zeal for his cause, all quite in good faith, magnify into error which to him and the

losing parties seems blameable for their failure to prevail. However, from the standpoint of administering evenhanded justice the court must dispassionately survey such claims against the over-all picture of the trial, and if the parties have been afforded an opportunity to fully and fairly present their evidence and arguments upon the issues, and the jury has made its determination thereon, the objective of the proceeding has been accomplished. And the judgment should not be disturbed unless it is shown that there is error which is substantial and prejudicial in the sense that it appears that there is a reasonable likelihood that the result would have been different in the absence of such error....' Hales v. Peterson, 11 Utah 2d 411, 360 P.2d 822"

#### CONCLUSION

Based upon the testimony of the Defendant, there was ample justification for the finding by the jury that he had admitted "in his testimony or otherwise in court" that the contract as claimed by the Plaintiff for the sale of wheat was entered into.

The jury found that an oral contract was entered into, that the Defendant was a "merchant" and that a written confirmation of the contract was received by Defendant from Plaintiff within a "reasonable time" thereafter as those terms are defined in the Uniform Commercial Code and there is no basis for upsetting its verdict.

Additionally, the Court correctly computed the measure of damages as being the difference between the contract price of the commodity and its price as of the date of the breach.

Based upon the foregoing, the Judgment of the trial court should  
be affirmed.

Respectfully submitted,

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Mailed a copy of the foregoing Brief of Respondent to  
Omer J. Call, Attorney for Defendant/Appellant, 26 First Security Bank  
Building, Brigham City, Utah 84302, this 8th day of September, 1975.

Wm M. Fales, Jr.  
Secretary