

1976

Lloyd E. Lish, Jr v. Dean Compton : Petition for Rehearing

Utah Supreme Court

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J. Anthony Eyre; Kipp and Christian; Attorneys for Plaintiff/Respondent.

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UTAH SUPREME COURT

BRIEF

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THE COURT OF
THE STATE OF UTAH

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LLOYD E. LISH, JR.,

Plaintiff/Respondent.

Case No. 14111

DEAN COMPTON,

Defendant/Appellant.

ooOooo

PETITION FOR REHEARING
AND
BRIEF IN SUPPORT OF PETITION FOR REHEARING

Appeal from the judgment of the First
Judicial District Court for Box Elder
County, Honorable Judge Christofferson.

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TABLE OF CONTENTS

	<u>Page</u>
PETITION FOR REHEARING-----	1
BRIEF IN SUPPORT OF PETITION FOR REHEARING----	3
STATEMENT OF THE NATURE OF THE CASE-----	3
DISPOSITION OF THE CASE-----	3
RELIEF SOUGHT-----	3
STATEMENT OF FACTS-----	4
POINT I	
THE COURT ERRED IN RULING THAT THE DEFENDANT WAS NOT A "MERCHANT" WITHIN THE MEANING OF THE UNIFORM COMMERCIAL CODE. -----	6
POINT II	
THE COURT ERRED IN SETTING ASIDE THE VERDICT OF THE JURY THAT THE DEFENDANT HAD RECEIVED A WRITTEN CONFIRMATION OF THE CONTRACT FROM THE PLAINTIFF WITHIN A "REASONABLE TIME" WITHIN THE MEANING OF THE UNIFORM COMMERCIAL CODE. -----	13
CONCLUSION-----	16
CASES CITED	
<u>Azevedo v. Minister</u> , 471 P.2d 66 (Nev. 1970)-----	14
<u>Campbell v. Yokel</u> , 313 N.E.2d 628, 20 Ill. App. 3d 702 (1974)-----	12
<u>Cohn v. Fisher</u> , 287 A.2d 222, 118 N.J. Super 286 (1972)--	13
<u>Cook Grains v. Fallis</u> , 395 S.W.2d 555, 239 Ark. 962 (1965)-----	12
<u>Fairbourn v. Lloyd</u> , 21 Utah 2d 62, 440 P.2d 257 (1968)----	15
<u>Garrett Freight Lines v. Cornwall</u> , 120 Utah 175, 232 P.2d 786-----	15
<u>Movie Films, Inc. v. First Sec. Bank of Utah, N.A.</u> , 22 Utah 2d 1, 447 P.2d 38 (1968)-----	15

TABLE OF CONTENTS (Continued)

	<u>Page</u>
<u>Ohio Grain Co. v. Swisshelm</u> , 40 Ohio App. 2d 203, 69	
Ohio Ops. 2d 192, 318 N.E.2d 428 (1973)-----	12
<u>Olsen v. Park Daughters Inv. Co.</u> , 29 Utah 2d 421, 511	
P.2d 145 (1973)-----	15
<u>Valley Bank & Trust Co. v. Gerber</u> , 526 P.2d 1121 (1974)-	14

STATUTES CITED

Section 70A-2-103(1)(b), Utah Code Annotated-----	11
Section 70A-2-104, Utah Code Annotated-----	7
Section 70A-2-105, Utah Code Annotated-----	8
Section 70A-2-201, Utah Code Annotated-----	6
Section 70A-2-204, Utah Code Annotated-----	13
Section 70A-2-314, Utah Code Annotated-----	11
Section 70A-2-327(1)(c), Utah Code Annotated-----	11
Section 70A-2-509, Utah Code Annotated-----	11
Section 70A-2-603, Utah Code Annotated-----	11

TEXTS CITED

1 R. Anderson, <u>Uniform Commercial Code</u> , p. 220	
(2d ed. 1971)-----	7
Official Code Comments to Section 70A-2-104-----	10

IN THE SUPREME COURT OF THE STATE OF UTAH

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LLOYD E. LISH, JR.,

:

Plaintiff/Respondent.

:

-vs-

:

Case No. 14111

DEAN COMPTON,

:

Defendant/Appellant.

:

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PETITION FOR REHEARING
AND
BRIEF IN SUPPORT OF PETITION FOR REHEARING

The Respondent, Lloyd E. Lish, Jr., respectfully petitions the Court for a rehearing of this matter based upon the following grounds:

I - The Court erred in ruling that the Appellant Dean Compton was not a "merchant" within the meaning of the Uniform Commercial Code.

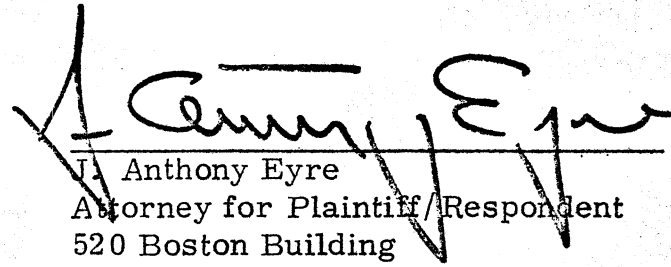
II - The Court erred in setting aside the verdict of the jury that the confirmation was mailed by Respondent Lloyd E. Lish, Jr. to Appellant within a "reasonable time" within the meaning of the Uniform Commercial Code.

WHEREFORE, Respondent requests that the Court grant a

rehearing in this matter and enter a decision affirming the verdict of the jury and the Judgment of the trial court.

Dated this 29th day of March, 1976.

KIPP AND CHRISTIAN


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BRIEF IN SUPPORT OF PETITION FOR REHEARING
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/Appellant.

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

DISPOSITION OF THE CASE

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.

This Court reversed the verdict of the jury and the Judgment of the trial court in a decision filed March 11, 1976.

RELIEF SOUGHT

The Plaintiff seeks to have the matter reheard by the Court

and for a decision affirming the verdict of the jury and the Judgment of the trial court.

STATEMENT OF FACTS

This action arises out of a contract which Plaintiff Lloyd E. Lish, Jr. 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)

On or about August 3, 1973 the Plaintiff prepared a written confirmation of the contract which contained the following: "red wheat, rye mix...15,000 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)

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) This increase was unprecedented and 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 occurred in prior years. (R. 41

91, 150)

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, which he produces in substantial quantities. The commodities which he raises are produced primarily for resale and he has been engaged in the selling of wheat for the 20 to 25 year period. He sells wheat both to merchandisers such as Mr. Lish and also directly to storage and processing companies which are located in Ogden, Utah. He also keeps himself apprised of the fluctuation of the price of wheat and other grains and personally handles all of his business transactions. (R. 100-103)

The grains which the Defendant produces are stored by him in facilities which he owns and are then sold at varying times, depending upon the market conditions. In this regard, the parties had entered into and performed three other contracts for the sale of wheat during the same year as the contract in question. The Defendant is a knowledgeable businessman and farmer and according to his testimony, he has "merchandised" grain by entering into a "future contract" for grain not yet produced. (R. 100-103)

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 a Special Verdict. (R. 204-211) A unanimous Special Verdict was returned

by the jury which found that a contract was entered into between Plaintiff and Defendant for the sale of the wheat, that the Defendant was a "merchant" within the meaning of the Uniform Commercial Code, and that a written confirmation was received by him from the Plaintiff within a reasonable time after the contract. (R. 212)

POINT I

THE COURT ERRED IN RULING THAT THE DEFENDANT WAS NOT A 'MERCHANT' WITHIN THE MEANING OF THE UNIFORM COMMERCIAL CODE.

The jury has found that a contract was entered into for the sale of the wheat by Defendant to the Plaintiff in excess of the sum of \$500.00. Plaintiff concedes that under the Statute of Frauds provision of the Uniform Commercial Code for such a contract to be enforceable, it normally must be signed by the party against whom enforcement is sought. However, the drafters of the Uniform Commercial Code have provided certain instances when a party may be bound by an oral contract, even though he has not signed a writing evidencing the same and Section 70A-2-20 provides in part as follows:

"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.

"(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]

Regardless of what may have constituted a "merchant" at common law or what interpretation was given this term by the general public, it has been given a specific meaning by the drafters of the Uniform Commercial Code because of its crucial import and impact on the foregoing statute, as well as other provisions of the Code which will be discussed hereafter. In this regard, Section 70A-2-104 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." [Emphasis added]

As can be seen by the foregoing, there are three alternative bases upon which a person can be held to be a "merchant." 1 R. Anderson, Uniform Commercial Code, p. 220 (2d ed. 1971) provides:

"A merchant is defined in terms of three concepts:

"(a) Dealer. He may be a person who deals in goods of the kind involved. Whether he deals in other goods is immaterial. He must deal in goods of the kind involved in the transaction in order to come within this first category.

"(b) Representation. He may be a person who by his occupation holds himself out as having knowledge or skill peculiar to the practices of goods involved in the transaction. Whether he actually has such knowledge or skill is immaterial if he so holds himself out.

"(c) Principal. ...

"The above categories are stated disjunctively: a person is classified as a merchant if he satisfies any one of the categories." [Emphasis added]

There is no question in this case that the Defendant is a person who "deals in goods of the kind" in question here, i.e. wheat, and thus falls squarely with the first statutory definition. As was noted in the Statement of Facts, he has been engaged in the business of raising and selling wheat for approximately 20-25 years at farms of substantial acreage located in Cassia County, Idaho and Box Elder County, Utah which were produced principally for resale. The wheat in question constitutes "goods" and Section 70A-2-105, Utah Code Annotated, provides:

"(1) 'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (chapter 8) and things in action. 'Goods' also includes... growing crops and other identified things attached to realty (section 70A-2-107)." [Emphasis added]

Likewise, the Defendant is a person who has "skill peculiar to the practices or goods involved in the transaction" which brings him within the ambit of the second statutory definition. He conceded that he had dealt with grain merchandisers such as the Plaintiff during this period, as well as directly with grain storage and processing companies in Ogden, Utah. He kept himself apprised of the fluctuating prices of wheat and other grains and handled his business transactions personally.

The Defendant is a sophisticated agricultural commodity producer and seller and to categorize him as a simple "tiller of the soil" is a conclusion not warranted by the evidence. In this regard the Defendant concedes that he has engaged in the rather sophisticated practice of entering into futures contracts for grain not yet produced and stated in part as follows:

"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) [Emphasis added]

The evidence is uncontradicted that the Defendant is a person who has "skill peculiar to the practices or goods involved in the transaction" and to hold otherwise would be to ignore the record of the case.

In its decision the Court has indicated that it feels that "the meaning of the term merchant as used in the statute under consideration

refers primarily to one whose occupation is that of buying and selling." It is clear from a reading of the definition of 'merchant' set forth in the Uniform Commercial Code that it does not require that a person buy as well as sell commodities in order to be deemed a merchant but that he "deals in goods of a kind" or has "skill peculiar to the practices or goods involved in the transaction," both of which are descriptive of the Defendant. Likewise, the evidence in this case indicates that the raising of wheat and other grains for resale is not only the "substantial part of his occupation" as defined by this Court, but is virtually the only occupation which he engages in.

The apprehension of the Court that any person may be held to be deemed a 'merchant' with respect to any casual sale by him of property which he has produced or otherwise acquired appears unjustified and this was not the intent of the drafters of the Uniform Commercial Code who have restricted persons who are held to the standard of a merchant to be those who deal in goods of the kind or have other special knowledge or skills concerning the same. The Official Code Comments to Section 70A-2-104 provide as follows:

"...For purposes of these sections almost every person in business would, therefore, be deemed to be a 'merchant' under the language 'who...by his occupation holds himself out as having knowledge or skill peculiar to the practices...involved in the transaction...' since the practices involved in the transaction are non-specialized business practices such as answering mail. In this type of provision, banks

or even universities, for example, well may be 'merchants.' But even these sections only apply to a merchant in his mercantile capacity; a lawyer or bank president buying fishing tackle for his own use is not a merchant." [Emphasis added]

The Defendant is more than a casual seller and as the record discloses, the substantial quantities of wheat which he produces are placed in storage facilities owned by him and sold when market conditions are favorable. In this regard the Defendant had sold grains to Plaintiff on three other occasions during the year in question.

As was noted by the Court in its opinion, this was a transaction of some magnitude, i. e. 15,000 bushels of wheat at \$3.30 per bushel, and if the decision is allowed to stand, it would effectively isolate the Defendant and other similarly situated producers and sellers of large quantities of agricultural products from the implied warranty that their products would be merchantable as defined in the Uniform Commercial Code. In this regard, Section 70A-2-314, Utah Code Annotated, provides in part as follows:

"Implied warranty - Merchantability - Usage of trade. - (1) Unless excluded or modified..., a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.
..."

(For other provisions of the Uniform Commercial Code where the concept of 'merchant' is significant, see 70A-2-103(1)(b), 70A-2-327(1)(c), 70A-2-603 and 70A-2-509.)

As was pointed out by Plaintiff in his Brief, the courts in the case of Campbell v. Yokel, 313 N.E.2d 628, 20 Ill. App. 3d 702 (1974) and Ohio Grain Co. v. Swisshelm, 40 Ohio App. 2d 203, 69 Ohio Ops. 2d 192, 318 N.E.2d 428 (1973), have held that where a farmer markets the commodities produced by him on a regular basis, he is a person "who deals in goods of that kind". The court in the Yokel case, supra, stated in part as follows:

"...We believe that farmers who regularly market their crops are 'professionals' in that business and are 'merchants' when they are selling those crops."

The only case found by the writer giving a contrary result is the case of Cook Grains, Inc. v. Fallis, 395 S.W.2d 555, 239 Ark. 962 (1965). However in that case there was no evidence offered at the trial that the farmer was a dealer in "goods of the kind" and, thus, he was held not to be a "merchant". This contrasts markedly to the record in this case which amply demonstrate the dealing of the Defendant in "goods of the kind" as well as his knowledge and expertise in this type of transaction.

As the record amply demonstrates in this case, the Defendant is a knowledgeable farmer-businessman who has produced and marketed wheat which constitutes the "goods of the kind" in question for some 20-25 years on a substantial basis and has a great deal of skill and knowledge with respect to the same. To hold that he is not a "merchant" within the meaning of the Uniform Commercial Code is contrary to the literal wording and purpose of the statute as set forth above.

Additionally, the jury found on conflicting evidence that the Defendant had entered into a contract for the sale of the wheat in question to the Plaintiff which finding has not been seriously attacked by the Defendant or upset by this Court. In view of this, the purpose of the Statute of Frauds should be borne in mind which was set forth by the Supreme Court of New Jersey in the case of Cohn v. Fisher, 287 A.2d 222, 118 N.J. Super 286 (1972) as follows:

"...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,..."

POINT II

THE COURT ERRED IN SETTING ASIDE THE VERDICT OF THE JURY THAT THE DEFENDANT HAD RECEIVED A WRITTEN CONFIRMATION OF THE CONTRACT FROM THE PLAINTIFF WITHIN A "REASONABLE TIME" WITHIN THE MEANING OF THE UNIFORM COMMERCIAL CODE.

The definition of what is a reasonable time within the meaning of the Uniform Commercial Code is set forth in Section 70A-1-204 which 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...."

In this case a Special Interrogatory was submitted to the jury asking them to find whether or not the confirmation was received within a "reasonable time" and their unanimous answer to this question was "Yes."

(Instruction #7, R. 207)

The decision of this Court in holding that the delay of approximately twelve (12) days in mailing the confirmation was not reasonable as a matter of law, is not supported by the record or applicable law. The decision of this Court flies directly in the face of its decision in the case of Valley Bank & Trust Co. v. Gerber, 526 P.2d 1121 (1974) where in referring to the same statute in question, stated as follows:

"Unless it is otherwise stated or agreed upon by the parties, what is a 'reasonable time' is a question of fact to be determined from the circumstances."

The decision from this Court in the Valley Bank & Trust case, supra, to the effect that what is a "reasonable time" within the meaning of the statute in question is a question of fact to be decided by the jury is uniformly supported by the authorities. In the case of Azevedo v. Minister, 471 P.2d 66 (Nev. 1970) the Court held that a delay of ten (10) weeks in sending a confirmation of the contract was not unreasonable as a matter of law and stated as follows:

"...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...."

It should be noted that what is a "reasonable time" appears to be a classic jury question and they had had an opportunity to see the witnesses, hear their testimony and review the other evidence surrounding

the transaction and made their judgment that the time in question was reasonable based on an admittedly correct statement of the law.

The concept of what is "reasonable time" under the statute in question, appears analogous to cases involving whether a person driving an automobile has acted in a "reasonable" manner which this Court has repeatedly held constitutes a question for determination by the jury. In this regard the Court in the case of Fairbourn v. Lloyd, 21 Utah 2d 62, 440 P.2d 257 (1968), stated in part as follows:

"...The statute's language self espouses the reasonable, prudent man doctrine, and in truth invites and demands that some arbitor of the facts determine whether speed, traffic and road conditions were such as to adjudge one as being reasonable or unreasonable, ..."

Plaintiff likewise feels this Court has erred in that it has invaded the province of the jury concerning what constitutes a "reasonable time" within the meaning of the statute in question which is contrary to its long established practice. See Garrett Freight Lines v. Cornwall, 120 Utah 175, 232 P.2d 786; Olsen v. Park Daughters Inv. Co., 29 Utah 2d 421, 511 P.2d 145 (1973); and Movie Films, Inc. v. First Sec. Bank of Utah, N.A., 22 Utah 2d 1, 447 P.2d 38 (1968). The Court appears to weigh the evidence and comments that there must be "some better reason than that given by the plaintiff, of mere casual delay, for his failure to give the notice for 12 days," and ponders as to what his position would have been "if the price had fallen a dollar a bushel, instead of rising that much." These factors,

as well as others, were all before the jury when the issue in question was submitted to them and they ruled in favor of the Plaintiff. Additional factors which were present included the highly unusual fluctuation in the market price which had never occurred previously, as well as the prior conduct of the parties in delaying several days from the date of the oral contract until performance of the same.

It should be noted that the statute allowed the Defendant ten (10) days to reject the confirmation and to hold that it was unreasonable as a matter of law for the Plaintiff to take approximately twelve (12) days to mail the confirmation is untenable.

CONCLUSION

The Plaintiff asserts that the Court erred in holding that the Defendant was not a "merchant" within the meaning of the Uniform Commercial Code where the evidence is uncontradicted that he dealt in "goods of the kind" and had a great degree of "knowledge," "skill" and experience in connection with the same.

Additionally, the question of whether or not the written memorandum confirming the contract was received by the Defendant from the Plaintiff within a "reasonable time" within the meaning of the Uniform Commercial Code was a classic question of fact to be submitted to the jury and the Court erred in setting aside its verdict in this regard.

Plaintiff requests that his Petition for Rehearing be granted and that a decision be entered affirming the verdict of the jury and the Judgment of the trial court.

Dated this 31st day of March, 1976.

Respectfully submitted,

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520 Boston Building
Salt Lake City, Utah 84111

Attorneys for Plaintiff/Respondent

Mailed a copy of the foregoing Petition for Rehearing and
Brief in Support of Petition for Rehearing to Omer J. Call, Attorney
for Defendant/Appellant, 26 First Security Bank Building, Brigham City,
Utah 84302, this 31st day of March, 1976.

David M. Zales, Jr.
Secretary