

1976

Lloyd E. Lish, Jr v. Dean Compton : Amicus Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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LLOYD E. LISH, JR.,

Plaintiff/Respondent.

vs

DEAN COMPTON,

Defendant/Appellant.

UTAH IDAHO GRAIN EXCHANGE,
a non-profit Corporation,

AMICUS CURIAE

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

Case No. 14111

BRIEF OF AMICUS CURIAE IN
SUPPORT OF PETITION FOR
REHEARING

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

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FILED

APR 13 1976

Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

| | Page |
|---|------|
| BRIEF IN SUPPORT OF PETITION FOR REHEARING . . | 1 |
| STATEMENT OF THE NATURE OF THE CASE | 1 |
| DISPOSITION OF THE CASE | 1 |
| RELIEF SOUGHT | 2 |
| STATEMENT OF FACTS | 2 |
| POINT I | |
| THE COURT ERRED IN RULING THAT THE DEFENDANT WAS NOT A "MERCHANT" WITHIN THE MEANING OF THE UTAH UNI- FORM COMMERCIAL CODE | 2 |
| CONCLUSION | 10 |

CASES CITED

| | |
|--|------|
| Campbell v. Yokel, 20 Ill. App. 3d 702, 313 N.E. 2d 628 (1974) | 4, 8 |
| Cook Grains, Inc. v. Fallis, 239 Ark. 962, 395 S.W. 2d 555 (1975) | 7 |
| Continental Grain Co. v. Harbach, 400 F. Supp. 695 (U. S. Dist. Court Ill., 1975) . . | 5 |
| Ohio Grain Co. v. Swisshelm, 15 U.C.C. 304 (Ohio App. 1973) | 8 |
| Oloffson v. Coomer, 11 Ill. App. 3d 918, 296 N.E. 2d 871 | 4 |
| Sierens v. Clausen, 60 Ill. 2d 585, 328 N.E. 2d 559 (1975) | 4, 8 |

TABLE OF CONTENTS

| | Page |
|--|------|
| STATUTES | |
| Section 70A-2-201 Utah Code Annotated | 3, 9 |
| Section 70A-2-205 Utah Code Annotated | 9 |
| Section 70A-2-104 Utah Code Annotated | 3 |
| LAW REVIEWS | |
| Note, Cook Grains v. Falls, 65 Mich. L. Rev. 345 | 8 |
| TEXTS | |
| Anderson's Uniform Commercial Code, 2d Ed. Vol. 2 at page 221 | 8 |

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| Plaintiff/Respondent. | : | |
| vs. | : | |
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| Defendant/Appellant. | : | |
| ***** | : | |
| UTAH IDAHO GRAIN EXCHANGE, | : | |
| a non-profit corporation, | : | |
| AMICUS CURIAE | : | |

BRIEF OF AMICUS CURIAE

STATEMENT OF THE NATURE OF THE
CASE

This is an action by a grain dealer against a grower for breach of contract.

DISPOSITION OF THE CASE

The trial court submitted the matter to a jury with respect to the question of whether the defendant grower was a merchant within the meaning of the Utah Uniform Commercial Code and, therefore, would come within the "merchant exception" to the general Utah Uniform

Commercial Code statutes of frauds. The Plaintiff prevailed in the trial court and the matter was timely appealed. This Court reversed on the question of whether the Defendant was a merchant within the meaning of the Utah Uniform Commercial Code, and on appeal the Defendant prevailed.

RELIEF SOUGHT

Amicus Curiae seeks to have the matter reheard by the Court upon the special finding that the Defendant and Appellant was not a "merchant".

STATEMENT OF FACTS

Amicus Curiae does not substantially dispute the facts as set forth in Appellant's and the Respondent's briefs heretofore filed, and taken together with the facts stated in this Court's opinion rendered March 11, 1976, are adapted as Statement of Facts of Amicus Curiae. In addition, Amicus Curiae is interested in being heard on the petition for rehearing and is a non-profit Utah corporation whose members are interested in the everyday transactions involved in the buying and selling of local commodities.

The Utah Idaho Grain Exchange, while primarily concerned with the process of inspection, also has an interest in the orderly marketing of commodities.

POINT I

THE COURT ERRED IN RULING THAT THE DEFENDANT WAS NOT A MERCHANT WITHIN THE MEANING OF THE UTAH UNIFORM COM-

MERCIAL CODE.

This Court in its opinion found the defendant, based on the facts it observed, was not a merchant within the conceptual meaning of the Utah Uniform Commercial Code. It is with this sole finding that Amicus Curiae take exception.

Section 70A-2-201 of the Utah Uniform Commercial Code provides that:

" . . . 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"

An exception to this general provision is made for dealings between merchants in Section 70A-2-201 (2), which states that:

" . . . 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 . . . [the Statute of frauds] against such party unless written notice of objection to its contents is given within ten days after it is received."

In the present case the trial court found that there was an oral contract admittedly for a sum in excess of \$500.00, and that written confirmation was mailed and received by the Defendant grower within a reasonable time and that no written objection to its content was sent.

Section 70A-2-104 of the Utah Uniform Commercial Code defines a merchant as:

"(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.

.

(3) 'Between merchants' means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants."

It is the position of Amicus Curiae that the word "merchant" is incorporated in the Utah Uniform Commercial Code as a term of art and it is given a specific definition which is not entirely analogous to the commonly accepted definition of the term.

Two significant decisions have been reached in Illinois which State is close to the grain trade business, that is which State houses the Chicago Board of Trade. The Illinois Appellate Courts were split on the issue. Sierens v. Clausen, 21 Ill. App. 3d 450, 315 N.E. 2d 897 (Third District 1974), (a farmer is not a merchant); Campbell v. Yokel, 20 Ill. App 3d 702, 313 N.E. 2d 628 (Fifth District 1974) (a farmer is a merchant); Oloffson v. Coomer, 11 Ill. App. 3d 918, 296 N.E. 2d 871 (Third District 1973) (farmer is not a merchant). Because of the impact of these decisions and the impact on the operations of the Chicago Board of Trade, the matter was extensively briefed and the Illinois Supreme Court decided the matter in Sierens v. Clausen, 60 Ill. 2d 585,

328 N.W. 2d 559 (1975). In Sierens, grain elevator operators sued a farmer who failed to deliver on two oral forward contracts to sell soybeans to the plaintiffs. Plaintiffs alleged that they had confirmed the oral contract in writing pursuant to the "merchant exception" to the Uniform Commercial Code Statute of Frauds, and in accordance with the usual customs of the grain business. Plaintiffs alleged that defendant was familiar with the custom of oral sales followed by confirmation. Defendant claimed that he was a farmer and not a merchant. The facts from the record indicated that the defendant had farmed for thirty-four years, had cultivated over 300 acres of corn and soybeans, and had sold his crops to grain elevators both under cash sales and future contracts for at least five years. The court held:

"The practice of grain and soybean growers in selling their products in the manner described in plaintiffs' amended complaint is well known and widely followed. We know of no reason why under the circumstances shown here the defendant, admittedly a farmer, cannot at the time of the sale be a 'merchant'." 328 N.W. 2d at 561.

In another case, Continental Grain Company v. Harbach, 400 F. Supp. 695 (U.S. Dist. Court, N.D. Illinois, Sept. 9, 1975), the plaintiff sued an Illinois farmer, Harbach, for breach of a grain sales contract, involving over \$10,000.00. The Federal Court applying substantive Illinois law in a diversity case decided that the defendant was a merchant when the alleged contract was made within the meaning of the Uniform Commercial Code. The sole issue before the Court as an issue of law

was whether or not the defendant farmer was a merchant, so that the merchant exception to the Uniform Commercial Code's Statute of Frauds would be applied. The Court decided the case by comparing the factual circumstances of the defendant Harbach under the Sierens case (Supra), and although the defendant had only sold soybeans for a few months, the commodity in question, the Court concluded that he was definitely a merchant within the meaning of the Uniform Commercial Code, a merchant exception to the Statute of Frauds by virtue of his general business knowledge, and the fact that he had made futures contracts with the Chicago Board of Trade and was generally familiar and understood that forward contracts were often made by telephone, and that buyers then confirmed them in writing.

In the case at bar, the Defendant Compton testified that he had been a farmer for 20 to 25 years, either by himself or with his father, and primarily produces hay and grain for resale (TR. 100). The Defendant Compton further testified that he has two farms, one in southern Idaho and one in Box Elder County, both of which produce primarily grain. He sells grain to dealers such as Mr. Lish, and has sold to other grain dealers. He testified that he had sold directly to grain storage facilities or marketers, such as Pillsbury Company in Ogden, and had had people haul grain for storage and has made deals directly with the storage facilities and marketers (Tr. 101). The Defendant Compton also testified that he had merchandized grain by making a contract ahead of the time

the grain is produced with the grain merchandizers. He has sold to other grain dealers and merchandizers, he hires employees to operate equipment on his farm under his supervision and has primarily sold directly to the mills over the 20 to 25 year period (Tr. 102). These activities are surely sufficient to prove that Defendant Compton, at the time of the alleged sale, was a merchant.

In the Continental Grain Company case (Supra), the Court observed:

"Finally, defendant attempts to distinguish between growing soybeans and selling them. He claims that at best he was a merchant only with respect to growing soybeans. Even if it were possible to thus parse these two stages of commercial agriculture, our decision rests on defendant's familiarity with the business practices involved, and not his knowledge of selling soybeans specifically." 400 F. Supp. at 700.

It should be noted that the only case cited by the Appellant in support of its position that Appellant was not a merchant is Cook Grains, Inc. v. Fallis, 395 S. W. 2d 555, 239 Ark. 962 (1965). As far as this writer can determine that was the first case to pass upon the question after the enactment of the Uniform Commercial Code in several states, and it should be noted that it was decided at a period of time prior to the "Russian wheat deals" and also at a time when the commodities markets fluctuated on a short term scale much less than is the present condition. Both parties, as well as an independent witness, testified that a fluctuation of from \$3.63 per bushel to \$4.37 per bushel for No. 1 red wheat, from the 2nd through the 14th days of August, 1973, was highly unusual and nothing

comparable had previously occurred (R. 41, 91, 150). The Cook Grains case has been criticized by some of the legal commentators, and in Anderson's Uniform Commercial Code, 2d Ed. Vol. 2, at page 221, see also, Case Note: Cook Grains, Inc. v. Fallis, 65 Mich. L. Rev. 345, wherein the author concludes:

"Because of the importance of agriculture to our economy, to deny that a farmer may be considered a merchant is to weaken considerably the Uniform Commercial Code as an instrument which regulates the commercial affairs of the country. There does not appear to be any reason why the contractual dealings surrounding the marketing of farm products should not be regulated by the same laws that apply to other sales when all of the parties involved are experienced in the type of transaction taking place."

Regarding the Cook Grains case, Amicus Curiae respectfully submits that the weight of authority, both in number of decisions and later dates of decision, is clearly to the contrary. See for example Ohio Grain Co. v. Swisshelm, 40 Ohio App. 2d 203, 69 Ohio App. 2d 192, 318 N.E. 2d 428 (1973); Campbell v. Yokel, 20 Ill. App. 3d 702, 313 N.W. 2d 628, (1974) (discussed in Respondent's brief and Respondent's brief in support of petition for rehearing); Sierens v. Clausen, 328 N.E. 2d 559 (1975); Continental Grain Company v. Harbach, 400 F. Supp. 695 (U.S. Dist. Court Ill., 1975), all concluding that the farmers in the individual cases were merchants.

Amicus Curiae asserts that there are two other compelling reasons why the finding of this Court concluding that the Defendant and Appellant Compton was not a merchant at the time of the alleged sale should be

reconsidered. First, if it is found that farmers who regularly sell their commodities as opposed to the isolated casual sale are not "merchants" then there would be no implied warranty of merchantability with respect to the goods or commodities involved in the sale. Section 70A-2-314 imposes the implied warranty of merchantability only upon sellers who are merchants with respect to goods of that kind.

Secondly, to allow the decision to stand will force the entire industry to reduce each transaction to writing and would substantially burden the entire industry, including the farmer who regularly sells his crops. If this were not done the ordinary practice in the industry of an oral agreement followed by confirmation would bind the grain dealer or the mill and not the farmer. For example, if an oral agreement had actually been made and was followed by written confirmation signed by the grain dealer or broker, and had been received by the farmer, the farmer would be in a position to speculate on a contract to which the grain company or dealer was bound from the moment of mailing the confirmation. Section 70A-2-201 and §70A-2-205 make it clear that the offer confirmed by a merchant binds him to the agreement even without consideration.

If the market price fell below the contract price the farmer could hold the grain broker to its agreement, whereas, if the market price goes up the farmer could deny the existence of the contract asserting the Statute of Frauds and then sell his crop on the open market at the higher price.

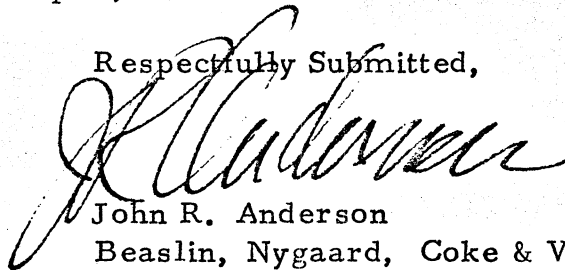
This Court concluded in its previous opinion that this was equally true of both parties. It is not equally true of both parties if the confirmation is mailed to the grower within a "reasonable time". To hold that the grower in this case is a merchant would allow him ten days to speculate in any event.

CONCLUSION

Amicus Curiae respectfully requests the Court to consider on re-hearing whether under the facts the Appellant should be classified a "merchant" under the provisions of the Utah Uniform Commercial Code.

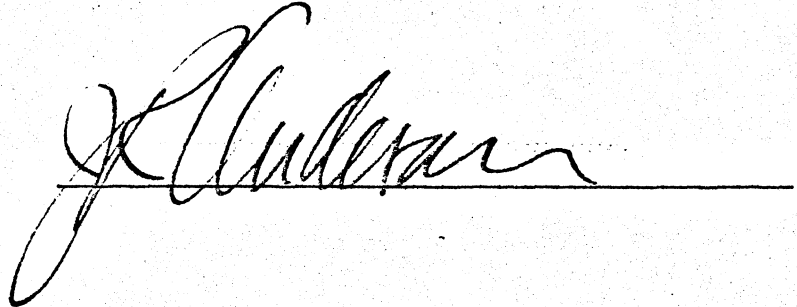
Dated this 13th day of April, 1976.

Respectfully Submitted,



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Mailed a copy of the foregoing Brief of Amicus Curiae in Support of Petition for Rehearing to Omer J. Call, Attorney for Defendant/ Appellant, 26 First Security Bank Bldg., Brigham City, Utah, 84302, and to J. Anthony Eyre, Attorney for Plaintiff/Respondent, Kipp and Christian, Attorneys at Law, 520 Boston Building, Salt Lake City, Utah, 84111, this 13th day of April, 1976.

A handwritten signature in dark ink, appearing to read "J. Anthony Eyre", is written over a horizontal line.

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