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Utah Supreme Court

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James M Richards; Richards, Bird and Kump; Attorney for Defendant-Respondent.
Keith E. Sohm; Attorney for Plaintiff-Appellant.

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BRIEF

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IN THE SUPREME COURT

OF THE STATE OF UTAH

TATES, INC.,

Plaintiff-Appellant,

vs.

LITTLE AMERICA REFINING CO., A Corporation dba LITTLE AMERICA,

Defendant-Respondent.

CASE NO. 14415

BRIEF OF DEFENDANT-RESPONDENT

APPEAL FROM THIRD DISTRICT COURT
OF SALT LAKE COUNTY
HONORABLE GORDON R. HALL PRESIDING

RICHARDS, BIRD & KUMP
JAMES M. RICHARDS
200 Law Building
333 East Fourth South
Salt Lake City, Utah 84111

Attorneys for Defendant-Respondent

KEITH E. SOHM
Suite 81 Trolley Square
Salt Lake City, Utah 84102

Attorney for Plaintiff-Appellant

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TABLE OF CONTENTS

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
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INDEX OF AUTHORITIES

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
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OTHER AUTHORITIES

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
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IN THE SUPREME COURT

OF THE STATE OF UTAH

TATES, INC.,	:	
Plaintiff-Appellant,	:	
vs.	:	CASE NO. 14415
LITTLE AMERICA REFINING CO., A Corporation dba LITTLE AMERICA,	:	
Defendant-Respondent.	:	

BRIEF OF DEFENDANT-RESPONDENT

STATEMENT OF THE CASE

This is the second appeal by the plaintiff in this case, being an action to recover the amount allegedly owing on the sale by plaintiff to defendant of a passenger bus, subject to defendant's affirmative defense of a deduction for damages incurred because of plaintiff's failure to deliver the bus when promised.

DISPOSITION IN THE LOWER COURT

This matter was tried on the merits on the 2nd day of March, 1974, before Honorable Gordon R. Hall, District Judge, at the conclusion of which judgment was entered in accordance

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with defendant's Motion to Dismiss and that an accord and satisfaction had been made resulting in dismissal of the Complaint and of the Counterclaim.

Thereafter, the said judgment was appealed to the Supreme Court of Utah by the plaintiff and reversed by order of the Supreme Court on May 15, 1975.

Thereafter, the plaintiff on the 27th day of June, 1975, filed its Motion for Judgment and Costs, which was resisted by the defendant; and on the 4th day of September, 1975, Findings of Fact, Conclusions of Law and Judgment were entered in favor of the plaintiff and against the defendant in the amount of $3,407.26 plus interest or a total of $5,349.06 and costs in the amount of $118.20; and the Court ruled that the Court had no jurisdiction to hear the Counterclaim and that the same had been dismissed with prejudice with no appeal therefrom.

Thereafter, and on September 12, 1975, the defendant filed a Motion for New Trial, which was noticed for hearing on September 18, 1975, at which time in open court Keith E. Sohm, attorney for the plaintiff, and Richard L. Bird, Jr., attorney for the defendant, stipulated that the evidence at the original trial of the action was still before the Court, where and if material, and that upon written memoranda as to the facts and the law, the Court would rule upon the Motion for

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New Trial and upon the set-off affirmatively pleaded in the Answer to the Complaint, if the Court ruled that it was properly before the Court.

Thereafter, on December 30, 1975, a judgment was entered awarding plaintiff $414.76, which was determined by deducting the defendant's damages of $2,992.50 from the amount owing to the plaintiff on the contract of $3,407.26. Plaintiff was also awarded its costs in the amount of $118.20. (R. 5) In support of this judgment, the lower Court found that it could properly consider defendant's affirmative defense for the deduction of its damages from the price due to the plaintiff on the contract; that the plaintiff had promised delivery of the bus by the end of November, 1972, and its failure to deliver by that time was a breach of the contract; that defendant's damages of $2,992.50 were reasonable and should be deducted from the price owing to the plaintiff; and that plaintiff's claim for $845 for the repair of its loaner bus was without merit. (R. 16)

Plaintiff has appealed from that judgment.

RELIEF SOUGHT ON APPEAL

The defendant respectfully submits that the decision and judgment of the lower Court should be affirmed and that plaintiff's request for interest, attorneys' fees and $845

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plus interest for alleged damage to its loaner bus should be denied.

STATEMENT OF THE FACTS

Defendant generally agrees with plaintiff's statement of the facts; however, there are some inconsistencies which will be designated in this statement of the facts as defendant finds them. Defendant does not agree with the plaintiff's statement that this Court has already ruled in favor of judgment for the plaintiff and finds nothing in this Court's opinion to support that assertion. (R. 58) Moreover, this is a conclusion of law and not a statement of fact.

The plaintiff sent a letter dated January 12, 1972 to the defendant offering to sell the defendant a bus with certain specifications. (R. 97) Plaintiff indicated in its letter that it could make delivery in approximately ninety days (R. 97). On January 21, 1972, the defendant accepted the plaintiff's offer by sending it an order, making reference to the plaintiff's letter of January 12 (R. 98.5). Plaintiff knew that the time of delivery was critical to the defendant, inasmuch as the rush season for the defendant would begin in June. (Tr. 56) When the bus was not delivered within the approximate ninety-day period, numerous contacts were made between the parties concerning delivery of the bus. (Tr. 57) Recognizing the defendant's need and its obligation to supply a bus, plaintiff gave a loaner bus to the defendant free of charge and without obligation for its temporary

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use. (Tr. 59-60)

In September and October, 1972, the plaintiff sought to obtain a partial payment from the defendant but without success, because it could not give the defendant adequate assurance of a date of delivery. (Tr. 99) When the plaintiff was billed by its supplier for the construction of the chassis, it once again contacted the defendant for a partial payment. In a meeting on November 3, 1972, the plaintiff promised delivery of the bus by the end of November, 1972 (Tr. 62) and in reliance thereon, the defendant paid $10,000 by check dated November 3, 1972, and not November 11, 1972 as is indicated by the plaintiff in its statement of the facts (Ex. 5-D, Tr. 63). In December, 1972, the defendant returned the plaintiff's loaner bus, because it was inoperable.

Because defendant was without a bus, it rented a bus from Rock Springs-Jackson Bus Line at a cost of $2,992.50 from December 1, 1972 to and including January 16, 1973 (R. 85), at which time the bus for which is had contracted was delivered (R. 99). The bus was picked up from the plaintiff by Dave Timlin, an employee of Little America, whose scope of employment went no further than taking physical delivery of the bus for Little America. (Tr. 78) He signed an invoice as having received it. (R. 99)

The defendant denies the assertion of plaintiff that

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a delivery receipt and billing were sent to Little America soon after January 17, 1973 (Tr. 83.5). On February 12, 1973, the defendant sent a letter to the plaintiff setting out its damages, which had been deducted from the price due for the bus (R. 84), and then delivered a check dated February 17, 1973 for the net balance of $15,107.11 (Ex. 7-D, Tr. 67).

The defendant disagrees with the plaintiff's statement that this Court considered the matter once and in effect said defendant couldn't hold out $3,407.26, giving judgment to the plaintiff for that amount. Defendant finds nothing in this Court's decision on the first appeal to support such a statement.

ARGUMENT

POINT I

THE EFFECT OF THIS COURT'S REVERSAL ON THE FIRST APPEAL WAS TO PLACE THE PARTIES IN THE SAME POSITION AS THEY WERE BEFORE THE JUDGMENT WAS RENDERED IN THE LOWER COURT

In Phebus, et al. v. Dunford, 114 Utah 292, 198 P.2d 973 (1948), the Supreme Court had before it for a second time a quiet title action involving conflicting claims of the parties. In rendering judgment on the first appeal, the court had directed:

> "The decision of the lower court is reversed, and the case remanded to that court for proceedings to conform to this opinion. Costs to appellant." 198 P.2d 973.

On remand, the successful appellants wanted the lower court to set aside its former decision and enter judgment for them. The court held that no action in the trial court was necessary to

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set aside its former decision and enter judgment for them. The court held that no action in the trial court was necessary to set aside the decision, because the action of the Supreme Court had accomplished that without anything further. The court then held:

> "A reversal of a judgment or decision of a lower court such as this places the case in the position it was before the lower court rendered that judgment or decision and vacates all proceedings and orders dependent upon the decision which was reversed." Id. at 974.

The court went on to state that the lower court did not need to take any action to vacate its former decision, because the reversal by the Supreme Court had effectually vacated and set aside that decision, and then stated:

> "The lower court's former decision, in its entirety, having been set aside, that court should proceed to a determination of the case the same as if no such previous decision by it had been rendered. The only restriction imposed upon it in accomplishing a final determination of the case lies in the issues decided upon the appeal to this Supreme Court. [See citation] Those issues may not be acted upon or decided contrary to the way they were decided by this court. Other than that restriction, the lower court may act in this case as it may act in any case at a time prior to its final determination of the facts and law of the case." Id. at 974.

In its ruling on the first appeal in the present case, Tates, Inc. v. Little America, 535 P.2d 1228, this Court described the situation as follows:

> "At the conclusion of the plaintiff's evidence, defendant moved for dismissal. The trial court

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> reserved ruling thereon; and after defendant had presented its evidence, the court granted the motion to dismiss on the ground that there had been an accord and satisfaction. Plaintiff appeals attacking that ruling."

In addition to asserting as error the ruling of an accord and satisfaction, the plaintiff also alleged that the lower court had erred in denying plaintiff's claim for $845 cost to overhaul its loaner bus and in allowing defendant's cost in renting a bus to be assessed against the plaintiff, and for allowing unreasonable costs to be assessed. After stating its decision and the reasons therefor, this Court concluded:

> "Accordingly, the finding of an accord and satisfaction and the judgment based thereon are in error.
>
> "Other matters assigned as error have been considered and are deemed to be without merit.
>
> "The judgment is reversed. Costs to plaintiff (appellant)." 535 P.2d 1231.

The defendant submits that in accordance with Phebus v. Dunford, supra, the situation on remand to the lower court was that the parties were placed in the same position as they had been prior to the ruling by the lower court that there was an accord and satisfaction, and that the lower court only needed to make a determination of the case as if no such previous decision by it had been rendered, with the restriction that it make no ruling contrary to the decision of this Court, which was that there

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was no accord and satisfaction; that the lower court was not in error in denying plaintiff's claim for $845 to repair its loaner bus; and that the lower court was not in error in allowing defendant's damages to be assessed against the plaintiff in an amount which was not unreasonable. This the lower court proceeded to do and properly rejected plaintiff's claim that this Court's reversal meant that plaintiff should have judgment on its claim and that defendant's claim for damages by way of set-off or recoupment was without merit. Upon receiving memoranda on the law and facts, the lower court properly proceeded to make its determination.

POINT II

THE LOWER COURT PROPERLY FOUND THAT PLAINTIFF HAD PROMISED DELIVERY OF THE BUS BY THE END OF NOVEMBER, 1972 AND THAT PLAINTIFF'S FAILURE TO DELIVER BY THAT TIME WAS A BREACH OF THE CONTRACT

In its decision on the first appeal, this Court stated the manner in which it will review the facts found by the trial court:

> "On appeal we apply the traditional rules of review: We assume that the trial court believed those aspects of the evidence which may be deemed to support his finding and judgment; and we survey the evidence in the light favorable thereto. Memmott v. U.S. Fuel Co., 22 Utah 2d 356, 453 P.2d 155." 535 P.2d 1228.

In its Memorandum Decision (R. 16), the lower court found:

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> "2. That the Court previously found in Findings of Fact No. 6 that when plaintiff demanded a down payment of $10,000 it promised delivery by the end of November, 1972."

In making that decision, the lower court was citing a prior Finding of Fact prepared by the plaintiff, which recites:

> "6. On or about November 3, 1972, plaintiff demanded a substantial payment and promised delivery of the bus by the end of November, 1972, whereupon defendant made the deposit of $10,000." (R. 29)

In the fall of 1972, Mr. Knaus requested a down payment, which generated a lot of discussion (Tr. 61). Mr. Knight wanted to be assured that he would receive delivery of the bus before he made a down payment. The testimony at this point was as follows (beginning at Tr. 62, line 7):

> "Q (Mr. Bird) . . . I want you to try to address yourself to the conversation between you and Mr. Knight just before the time when he released $10,000.
>
> "A My whole feeling about that is what the factory had told me and then I promised him.
>
> "Q You don't remember what you told Mr. Knight?
>
> "A Yes. This same thing.
>
> "Q What did you tell?
>
> "A Well, to the best as to what the factory was telling me we could deliver in a certain length of time and I'm not sure that I know the date that you're referring to because there were several times in there.
>
> "Q Well, the check for $10,000 is dated November 3rd, 1972.

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> "Q Then that would have to be the date we had the conversation, yes." (Tr. 62)

In referring to this same conversation in his testimony, Mr. Knight testified:

> "Our conversation was that he had asked on several occasions for a down payment or money to be paid to him to pay to Madsen Corporation for the work that they had completed on the chassis; and I had not made such payment on November 3rd. Mr. Knaus came to see me and we had a conversation regarding the bus. He said that he had spoken to the people at Ward and he had talked with someone who was in authority at Ward and that he felt good about the answer he had received; and for the first time he felt confident that we would have the bus by the end of November. And said that they did make -- need to make a payment to Madsen. And based upon the promise of a delivery by the end of November, which he said was a date he felt good about and that he was sure it could be back made, I then gave him $10,000 in a check made out jointly to Tates, Inc. and Jay Madsen Corporation." (Tr. 99)

This promise of the plaintiff to make delivery by the end of November, 1972, supplied a term which had been left indefinite in the original agreement and was supported by payment of $10,000. A contract may be formed, although some terms are left open. At U.C.A. § 70A-2-204(3), it states

> "Even though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."

When the time for delivery is indefinite in a contract, U.C.A.

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§ 70A-2-309(1) applies:

> "The time for shipment or delivery or any other action under a contract if not provided in this chapter or agreed upon shall be a reasonable time."

In determining what is a reasonable time, U.C.A. § 70A-1-204(2) provides:

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

In the Official Coments to this section of the Uniform Commercial Code, which are not set forth in our volume of the Utah Code but which may be found following the identical sections in the Idaho Code, Title 28, states at § 28-1-204, Comment 2:

> "Under the section [referring to § 70A-1-204], the agreement which fixes the time need not be part of the main agreement, but may occur separately."

Defining the term "agreement", U.C.A. § 70A-1-201(3) states:

> "'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances, including course of dealing or usage of trade or course of performance as provided in this Act."

The language used by the parties in the conversations cited above shows that an agreement for the delivery of the bus by the end of November was in fact made. In addition, the strong implication to be drawn from the fact that the plaintiff had not made delivery within the approximate ninety-day period

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originally specified and the fact that Mr. Knight was not willing to make a down payment until assurances of delivery by a specified date were made, is that an agreement for delivery by the end of November, 1972, was in fact made.

The consideration to support this agreement was the payment of $10,000 by Little America at a date prior to the time it was previously obligated to make payment under the original contract. Since the original contract did not specify a date for payment, Little America was not obligated to make payment until the bus was delivered. See U.C.A. § 70A-2-310(a). By making a payment of $10,000 before delivery, Little America supplied consideration to support the plaintiff's promise to deliver by the end of November, 1972.

Although consideration was given, it was technically unnecessary because:

> "An agreement modifying a contract within this Article needs no consideration to be binding." U.C.A. § 70A-2-209(1).

Even if this Court determines that the lower court was in error in finding a promise for delivery by the end of November after viewing all the evidence in a light most favorable to the sustaining of that decision, this Court should still find that plaintiff's delivery of the bus beyond the end of November was

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beyond a reasonable time and, therefore, a breach of the contract. Plaintiff specified in its offer that delivery could be made within approximately ninety days (R. 97), and was aware that it was very important for the defendant to have the bus delivered for the rush season during the summer (Tr. 56). Plaintiff recognized that its delay was unreasonable in supplying the loaner bus without charge. In making his $10,000 payment to the plaintiff on November 3, 1972, Mr. Knight notified the plaintiff that the end of November would be the end of the reasonable time for delivery of the bus and that after that time, Tate's would be considered to be in breach of the contract. Mr. Knight testified concerning a conversation with the plaintiff in February of 1973 regarding the defendant's damages incurred because of the plaintiff's failure to deliver the bus by the end of November. Mr. Knight stated:

> "I explained to them that since the end of November, which had been the promise -- the last promised delivery date that we had had a situation where both the loaner bus and the flexible bus were out of commission and that they could not be run. And that I had had expenses that had accrued as a result of that. And I explained that I was taking the November 30th date because that had been the date that was promised in association with the $10,000 check; and that I had accumulated my expenses since that date and I enumerated those and told him that these were expenses that we had incurred." (Tr. 100)

In Idaho Code § 28-2-309, Comment 5 of the Official Comments

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to the Uniform Commercial Code in reference to the identical provision at U.C.A. § 70A-2-309, states:

> "The obligation of good faith under this Act requires reasonable notification before a contract may be treated as breached because a reasonable time for delivery or demand has expired. This operates both in the case of the contract originally indefinite as to time and of one subsequently made indefinite by waiver."
>
> And Comment 6 states:
>
> ". . . Effective communication of a proposed time limit calls for a response, so that failure to reply will make out acquiescence. . . . Only when a party insists on undue delay or on rejection of the other party's reasonable proposal is there a question of flat breach under the present section."

The plaintiff did not reject the defendant's proposal for delivery by the end of November. On the contrary, they made a promise and gave strong assurances that delivery would be made by that time. When an undue delay beyond the end of November occured, the reasonable time for delivery was ended and plaintiff was in breach under the contract.

A party to a contract is in breach of that contract if it fails to fulfill the obligations of the contract. U.C.A. § 70A-2-301 states:

> "The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract."

By the failure of the plaintiff to deliver the bus by the end of November, 1972 as promised or within a reasonable time, which

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time terminated at the end of November, 1972, the plaintiff was in breach of its obligation to deliver under the contract.

Acceptance by the defendant of the bus did not constitute a waiver of the breach. U.C.A. § 70A-2-607(2) on effect of acceptance, states:

> "Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it . . . but acceptance does not of itself impair any other remedy provided by this chapter for nonconformity."

This section further provides at (3):

> "Where a tender has been accepted, the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."

The bus was delivered on January 16, 1973 (R. 99). Shortly thereafter on February 12, 1973, and before final payment was made, Little America notified the plaintiff that it had breached its obligation by delivering the bus after the end of November, 1972, and that Little America was going to deduct its expenses incurred because of that breach from the price remaining to be paid (Tr. 100, 122; R. 84). Although the plaintiff was in breach under the contract, because of the defedant's need for the bus, it never expressed an intention to terminate the contract because of the breach, but decided to accept the bus and then assert its damages as a deduction against the price.

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POINT III

THE LOWER COURT PROPERLY DEDUCTED DEFENDANT'S DAMAGES OCCASIONED BY PLAINTIFF'S BREACH FROM THE PRICE DUE TO PLAINTIFF

Defendant asserted two affirmative defenses in its Answer and also asserted a Counteclaim. Its first affirmative defense states:

> "Defendant denies that there is a balance due on the contract and affirmatively alleges in respect thereto that because of the 270-day late delivery, the defendant suffered damages exceeding the claim of plaintiff, which amounts should be offset against the claim of plaintiff." (R. 94)

The defendant's second affirmative defense was accord and satisfaction and its Counterclaim was for damages because of plaintiff's failure to deliver the bus as promised. The lower Court's finding of an accord and satisfaction was appealed to this Court and was reversed. The defendant did not appeal on its Counterclaim. Therefore, when the case was remanded, the lower Court could not consider the accord and satisfaction. However, the plaintiff's Complaint and the defendant's first affirmative defense asserted in its Answer still remained and the lower Court was required to make its decision based thereon, even if the counterclaim was not to be considered.

Set-off and recoupment and deduction of damages for breach may be pleaded as affirmative defenses. U.C.A.

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§ 70A-2-714 on buyer's damages for breach in regard to accepted goods, at (1) states:

> "Where the buyer has accepted goods and given notification [Subsection (3) of Section 70A-2-607], he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable."

Also, U.C.A. § 70A-2-717 on deduction of damages from price, states:

> "The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract."

Utah has adopted the same provision concerning affirmative defenses as is found in the Federal Rules of Civil Procedure. In commenting on Rule 8(c), which sets forth typical affirmative defenses and the relation of an affirmative defense to a counterclaim, it is stated at 2A, Moore's Federal Practice, ¶ 8.27[3] on page 1855:

> "At common law matter in recoupment or set-off could be used defensively, but not for the purpose of obtaining an affirmative recovery. Recoupment arose from the same transation as the plaintiff's claim. Set-off, on the other hand, arose out of a transaction different from that sued on. Under Rule 13, recoupment affords the basis for a compulsory counterclaim; and set-off for a permissive counterclaim, and normally should be pleaded as such. Accordingly, Rule 8(c) does not specifically list them as affirmative defenses. At times, though, a defendant may desire to use recoupment or

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> set-off defensively, rather than as the basis of a counterclaim seeking affirmative relief, and he may properly do so. Aside from the denomination as 'counterclaim' instead of defense,' and a demand for judgment, there would be no substantial difference in statement."

Further, on page 1851, it states:

> "It should be noted that the enumeration in Rule 8(c) is not exclusive; 'Any other matter constituting an avoidance or affirmative defense' must be pleaded affirmatively also."

A thorough reading of the case relied on by plaintiff in its brief, U.S. Plywood Corp. v. Hudson Lumber Co., 17 F.R.D. 258 (1955), shows that that case is firmly in support of defendant's position. After explaining that the purpose of pleading is mere notice-giving and that formalism in pleading has been eliminated as to details of claims and defenses, the court stated that the allegations in pleadings should be construed in a manner favorable to the pleader; and if the language was at all ambiguous, it should be construed favorably to the pleader. In that case, the defendant sought to deduct damages occasioned by plaintiff's breach of contract from the amount owing to the plaintiff and pled this affirmatively. The court stated that the defense may be pleaded in diminution of the defendant's liability or in mitigation of the award due for the purchase price, and that the defense is not a counterclaim but a recoupment. The court then noted:

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> "There is a marked distinction between recoupment and a counterclaim. Recoupment does not seek an affirmative judgment. It is defensive." 17 F.R.D. 262.

In overruling the plaintiff's objection that the affirmative defense did not state any specific amount and that the pleading was, therefore, insufficient, the court stated that since no responsive pleading was required, then it did not prejudice the plaintiff, because he could find out by discovery the amount of the defendant's claim.

In the present case, the defendant's affirmative defense does not seek judgment for any specific amount, because it is pled in mitigation of the plaintiff's claim and can only be allowed up to the amount of that claim.

The defendant also asserted a counterclaim for its damages in a specific amount, asking for affirmative relief. The inability of the defendant to assert the counterclaim following the remand to the lower court in no way affects its right to assert its affirmative defense because it is a separate count or defense. Rule 8(e)(2), Utah Rules of Civil Procedure, states:

> "A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements."

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In Basic Boats, Inc. v. United States, (E.D. Virginia, 1970), 311 F.Supp. 596, 14 F.R.Serv.2d 180, where the defendant had asserted a counterclaim which was ruled to be barred by the statute of limitations, the court held:

> "Since the facts supporting the counterclaim undeniably arose out of the same cause of action which gives rise to plaintiff's suit, there is ample authority to the effect that the counter-claim should be treated as an affirmative defense by way of recoupment, and this is true even though as an affirmative cause of action it may be barred by limitation."

POINT IV

THE LOWER COURT PROPERLY FOUND THAT THE DAMAGES CLAIMED BY THE DEFENDANT WERE REASONABLE

In rendering its decision on plaintiff's first appeal, in which plaintiff asserted as error the lower Court's allowance of defendant's deduction for its expenses and the lower Court's finding of the reasonableness of those expenses, this Court stated:

> "Other matters assigned as error have been considered and are deemed to be without merit." 535 P.2d 1232.

Little America had an emergency situation for transporting its employees to work each day in that it had no bus available to do so. The only bus line which could provide a bus immediately was the bus line chosen by the defendant (Tr. 113).

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Mr. Knight, who testified that the expenses were reasonable (Tr. 115), was familiar with the expenses incurred in operation of Little America's own bus and had checked with a bus line in Salt Lake City to determine what another bus line would charge. (Tr. 111) There was no evidence introduced by the plaintiff to show that these expenses were in fact unreasonable.

The Court allowed expenses beginning on December 1, 1972, to and including January 17, 1973, which was the period of time following plaintiff's breach for failure to deliver at the end of November until the delivery. The amount of damages computed by the Court was based on the statements sent to Little America by Rock Springs-Jackson Bus Line (R. 85) as follows:

Period	Charge	Amount
Dec. 1 - Dec. 6	$25 per trip, 3 trips per day	$ 450.00
Dec. 7 - Jan. 2	$22.50 per trip, 3 trips per day	1,822.50
Jan. 3	$22.50 per trip, 2 trips	45.00
Jan. 8	$25 per trip, 2 trips	50.00
Jan. 9 - 16	$22.50 per trip, 3 trips per day	600.00
Jan. 17	$25 per trip, 1 trip	25.00
	TOTAL	$2,992.50

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POINT V

THE LOWER COURT PROPERLY DENIED PLAINTIFF'S CLAIM FOR EXPENSES FOR THE REPAIR OF ITS LOANER BUS

Plaintiff claims that an expense in the amount of $845 should be paid to it for the repair of its loaner bus, which claim is set forth in the plaintiff's Reply to defendant's Counterclaim (R. 76). There was never any definite evidence presented by the plaintiff for its claim upon which the Court could grant relief. Mr. Urie, plaintiff's General Manager, stated in response to the question, "Do you remember the approximate odd dollars or is it --", answered:

> "Between $800 and $900. It was approximately $845 or 50 dollars -- between eight and nine hundred." (Tr. 80)

It was improper for the plaintiff to state a new cause of action for additional damages in its Reply to defendant's Counterclaim. In Straw v. Temple, 48 Utah 258, 159 P. 44 (1916), the court stated that the plaintiff cannot enlarge its complaint by allegations in its reply; in other words, in no event can a cause of action be either stated or enlarged in the reply to a counterclaim.

An allegation in a reply is to take issue with an answer or counterclaim and cannot initiate, in whole or in part, a cause of action. See Utah Lead Co. v. Piute County, 92 Utah 1, 65 P.2d 1190 (1937).

The loaner bus was given to the defendant for its use free of charge and without any contractual obligation for the

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care or maintenance of the bus (Tr. 60, Tr. 122). Because the plaintiff had failed to deliver a bus within the period of approximately ninety days, which the plaintiff had originally indicated would be the delivery time, the plaintiff recognized that it was its obligation to bear the expense of supplying a substitute bus for the defendant and bearing all costs incident thereto. There is no evidence to indicate the cause of the damage to the motor of the bus, nor any evidence to indicate that the defendant was in any way at fault.

Furthermore, the lower Court's denial of plaintiff's claim for $845 was alleged as error by the plaintiff in its first appeal to this Court. In rendering its decision on that appeal, this Court stated:

> "Other matters assigned as error have been considered and are deemed to be without merit." 535 P.2d 1232.

This claim has been previously considered by this Court and rejected; the evidence supporting it is inadequate; it was improperly asserted in plaintiff's Reply to defendant's Counter-claim; and should, therefore, once again be denied.

POINT VI

THE LOWER COURT PROPERLY DENIED PLAINTIFF'S CLAIM FOR INTEREST AND ATTORNEYS' FEES

The plaintiff bases its claim for attorneys' fees and interest on an invoice (Ex. 3-P, R. 99), which was signed by

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Dave Timlin, an employee of Little America, who was required to sign the invoice before he drove the bus away to indicate that he had received it.

There is no evidence to indicate that Mr. Timlin had any actual or implied authority to enter into a contractual obligation requiring Little America to pay interest and attorneys' fees. Mr. Timlin is a bus driver and it was stated that he was an employee whose scope of employment did not exceed picking up the bus for Little America (Tr. 78).

These facts fall squarely within the holding of Spanish Fork Packing Co. v. House of Fine Meats, Inc., 29 Utah 2d 312, 508 P.2d 1186 (1973), in which an employee received deliveries of meat products for the defendant and signed an invoice acknowledging receipt of the meat, and where the court held that there was no binding contract for interest and attorneys' fees because in the application of basic contract principles, the creation of a contract requires a meeting of the minds of the parties and the burden of so proving is upon the party who claims there was a contract. The court cited an earlier case, B & R Supply Co. v. J.M. Bringhurst, 28 Utah 2d 442, 503 P.2d 1216 (1972), which states:

> ". . . It is first to be observed that the conditions of the invoice are aptly described by the defendants

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> as 'small inconspicuous print.' Defendant's affidavit avers that they '. . . at no time whatsoever authorized any of the persons who signed certain invoices . . . to contract on his behalf . . . other than on open accounts.' There is no affirmative showing to the contrary, nor that any contractual terms or conditions on the invoices were called to their attention, nor that they were aware of them, nor that they did anything other than to initial the invoices acknowledging receipt of the merchandise. Under those circumstances we can see no basis for a conclusion that the defendant entered into a contract to pay attorneys' fees." 503 P.2d 1217.

The court went on to observe that in delivering the product the plaintiff was doing what it was required to do already under the original contract, and then stated:

> "If upon receipt of the merchandise, the invoice or delivery slip, the purchaser signed, purported to impose further conditions or covenants, a serious question would arise as to whether there was any consideration for such further obligation." 508 P.2d 1187

The facts of the present case fall squarely within the holding of the two Utah cases cited above, and the plaintiff's claim for interest and attorneys' fees based on an alleged contract should be denied.

CONCLUSION

Upon remand after reversal by this Court, the lower Court properly considered plaintiff's Complaint and defendant's affirmative defense. The evidence showed that plaintiff promised delivery of the bus by the end of November, 1972, and the Court

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properly deducted defendant's damages occasioned by the plaintiff's breach of the contract for failure to deliver the bus as of that date. The evidence supports the lower Court's conclusion that the damages claimed by the defendant were reasonable and that the plaintiff was not entitled to expenses for repair of its loaner bus or attorneys' fees and interest. This Court should affirm.

DATED this 1st day of May, 1976.

Respectfully submitted,

RICHARDS, BIRD & KUMP

By _____
JAMES M. RICHARDS

Attorneys for Defendant-Respondent

CERTIFICATE OF SERVICE

I certify I mailed two copies of the foregoing Brief, postage prepaid, to Keith E. Sohm, attorney for plaintiff-appellant, Suite 81 Trolley Square, Salt Lake City, Utah 84102, this 3rd day of May, 1976.

_____

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