1982

Gail Billings, Et Al. v. Stanley T. Farley, Et Al. : Brief of Defendants-Appellants Garn L. Baum And Peggy Baum

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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ail Billings, et al.,
Plaintiffs and Respondents,

v.

tanley T. Farley, et al.,
Defendants and Appellants.

BRIEF

No. 17336

BRIEF OF DEFENDANTS-APPELLANTS GARN L. BAUM AND PEGGY BAUM

APPEAL FROM JUDGMENT IN DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH,

JUDGE GEO^GE E. BALLIF

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FILED

JUL 28 1982

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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Gail Billings, et al.,
Plaintiffs and Respondents,

v.

Stanley T. Farley, et al.,
Defendants and Appellants

PETITION FOR REHEARING

NO. 17336

COME NOW DEFENDANTS-APPELLANTS GARN L. BAUM AND PEGGY BAUM, PRO SE, AND petition the Court for a rehearing in the above-captioned matter and allege that the Court erred in its June 24, 1982 Decision, in these ways:

POINT 1. Plaintiffs have burden to prove existence and terms of contract; no proof was adduced.

POINT 2. Utah State law precludes enforcement of plaintiffs' alleged oral contract.

POINT 3. Evidence did not establish the price at which Muir-Roberts sold its cherries.

POINT 4. Letter of July 10, 1973 was to give the growers an idea of what the grower price would be 10 days from then when defendants would begin purchasing their cherries.

POINT 5. What defendants' profits were from 1973 cherry operation.

POINT 6. Evidence did not establish Muir-Roberts' price was 21½ cents.

POINT 7. Evidence did not show Muir-Roberts' price was the fair market price.

POINT 8. Evidence did not show price freeze was lifted July 18, 1973.

POINT 9. Complaint must fail; no evidence was presented to prove the allegations therein.

POINT 10. More on the context of the case

Defendants Garn L. and Peggy Baum believe the Court did not thoroughly understand certain aspects of the case, thus erred unknowingly. These defendants in their accompanying brief have intended to elucidate those areas they believe were misconstrued by the Court. Additionally, pursuant to Rule 76 (e) Rules of Civil Procedure, defendants have cited authorities relied upon to sustain the points, where applicable, listed in this petition.

Respectfully submitted this 28th day of July 1982.

Peggy Baum

PEGGY BAUM, APPELLANT PRO SE

Garn L. Baum

GARN L. BAUM, APPELLANT PRO SE

MAILING CERTIFICATE

I hereby certify that I mailed two copies of this Petition for Rehearing to plaintiffs' attorneys Dallas H. Young, Jr. and Dave McMullin at their address Ivie and Young, 48 North University Avenue, Provo, Utah 84601, and hand-delivered two copies to Robert N. Macri, attorney for Appellants Farley, at 738 South 600 East, Salt Lake City, Utah 84102, on this 28th day of July 1982.

Peggy Baum

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATEMENT OF CASE

As late as December 1974 plaintiffs filed a Complaint against defendants--a cherry processor and cash buyer of fresh sour cherries, alleging that defendants who had purchased plaintiffs' 1973 cherries at 15 cents per pound and paid for them November 1973 owed them more money because commission merchant-and-consignment buyer Muir-Roberts in March 1974 settled at 20 cents with those plaintiffs who during the same season in which they sold cherries to the defendants also consigned some to Muir-Roberts, and further alleged that the defendants agreed and contracted with the plaintiffs to pay them what was being paid by the other processors in the area; defendants responded declaring they purchased the fruit at a firm quoted price of 15 cents and had not agreed or contracted with the plaintiffs at any other price.

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DISPOSITION IN LOWER COURT

On March 31, 1980 Judge George E. Ballif, of the Fourth Judicial District Court, ordered, adjudged and decreed that judgment be entered against Garn L. Baum and Peggy Baum and Stanley T. Farley in favor of the plaintiffs; additionally, judgment was entered in favor of cross-claimant Stanley T. Farley and against Garn L. and Peggy Baum. After a hearing on September 12, 1980, Judge Ballif denied defendants' motions to amend and for a new trial,filed because of newly discovered evidence which would make apparent the fact that plaintiff John Gillman--the very man who initiated the poisoning of minds which brought about the lawsuit--clearly knew the price at which the defendants were purchasing the cherries was 15 cents.

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RELIEF SOUGHT ON APPEAL

Defendants-Appellants seek a reversal of the Decree entered by Judge Ballif, as the Decree is entirely unjustified in the absence of a written contract for a price better than 15 cents.

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STATEMENT OF FACTS

The remaining plaintiffs who received judgments in this case are fruit growers in Utah County. Defendant-Appellant Garn L. Baum operated a fruit processing plant in Provo, Utah in 1973, and had, since 1952. During the time between 1952 and 1973 many of the plaintiffs as well as other growers had sold their sour cherries to Garn L. Baum.

In 1973 defendant Baum was experiencing financial difficulties due to a hail storm in 1969, marketing problems in 1971, and an unseasonably cold-weather state-wide freeze-out in the spring of 1972 which caused Utah to be declared a disaster area. Because defendant Baum sought government help that might be available through the Department of Agriculture, John Gillman--deceased fruit grower in Utah County and the Director of Consumer and Market Services in the Dept. of Agriculture--learned of Baum's financial plight.

When the Bank of American Fork foreclosed on Baum's property, including the processing plant, the plaintiffs Harley Gillman, Merrill Gappmayer and Gillman Brothers--John in the Dept. of Agriculture, Dean and Glade--attempted a take-over of Baum's plant and property, but it "did not materialize because Stanley Farley came to the assistance of Baums and their property was salvaged for the 1973 season." (Record at 233, par. 3)

The growers were interested in 1973 in patronizing defendant Baum for the purposes of 1. maintaining a competitive atmosphere in the fruit processing

business, 2. to help Baum out, and 3. to have a home for their fruit when the plant of another processor--Muir-Roberts--was plugged up with an oversupply of cherries, (Record at 561, lines 10-26; at 477, lines 9-11; at 123, lines 12-15; at 93, answer to No. 6; at 102, question No. 6 and answer) since there was a tremendous crop of cherries that year and a real concern that "there was not enough equipment in the state of Utah to handle the volume of cherries to be processed." (Record at 461, lines 14-30; at 123, lines 8-11)

A price freeze imposed by President Nixon on June 13, 1973 which placed a ceiling on commodities across the country was in effect on July 10, 1973, and on that July 10th defendant Garn L. Baum sent a letter to growers of cherries letting them know that through the help of his sister Ora Farley and brother-in-law Stanley T. Farley the Baum processing plant would be operating that year and that he defendant Baum expected the price at which they would be purchasing the sour cherries from the growers in about 10 days to be at 15 cents unless the price freeze was lifted by then.

Defendant Baum had a competitor in Utah Valley which processed sour cherries by the name of Muir-Roberts. Muir-Roberts was a licensed commission merchant (5-1-2 (e) Utah Code Annotated). Defendant Baum was licensed as a "dealer" (5-1-2 (g) Utah Code Annotated). Defendant Baum also had a competitor by the name of Banquet Foods--formerly Western Pack--in the Brigham City area. Muir-Roberts was also a competitor of Baum in that area. Baum had purchased sour cherries in the Brigham City area during other cherry seasons, but by the time he received the help from Stan Farley in 1973 most of the growers there were already committed to either Muir-Roberts or Banquet Foods; thus Baum only made purchases totaling 17,608 pounds from 8 growers there that year, then bought no more since the amount of cherries he was getting didn't justify the haul.

Another of Baum's competitors was fruit grower-processor Dave McMullin, attorney for the plaintiffs in this lawsuit, whose cherry processing plant is located in Genola, near Payson, Utah. Dave McMullin, whose plant rarely accepted cherries from the public, was mostly a competitor of Baum's in the selling market--the potential buyers for Baum's and McMullin's processed cherries were the same buyers.

Commencing on July 20, 1973 defendant Baum bought cherries at 15 cents per pound (Record at 475, lines 28 to line 5 at 476) from the plaintiffs and at least another 115 growers (Record at 477, lines 18-19), processed the cherries and had them sold during July 1973. During the same harvest time, growers--including some of the plaintiffs--consigned cherries to competitor Muir-Roberts cherries which Muir-Roberts processed then held for sale, as its license permitted until after the price freeze had been lifted. The price freeze was lifted September 12, 1973.

In November 1973 defendant Baum paid the growers and plaintiffs the 15 cent purchase price for their cherries. On March 22, 1974 Muir-Roberts settled with its growers at about 5 cents per pound more on a comparable grade. (Plaintiffs' Exhibit No. 15)

When Baum applied for his 1974 license, John Gillman, officer in the Dept. of Agriculture, received Baum's financial statement.

Sometime between March 22, 1974 and late July or August 1974, plaintiff Harley Gillman, a cousin to John, Dean and Glade Gillman, typed a letter to the Baums which was to be an attempt to make them pay more for the cherries defendants bought in 1973. However, this letter was never sent to the Baums because Dave McMullin had told the Gillmans they needed to find one person who heard Baums quote more than 15 cents. (Record at 186, lines 25-30 and to line 5 on

Glade and Harley Gillman, being the prime movers, and other plaintiffs licited growers to join in a lawsuit, this one, against the defendants. ecord at 114, questions 10, 11 and 12 and answers; at 125, question 11 and swer; at 86, questions 11 and 12 and answers; at 95, questions 11 and 12 and swers)

In December 1974, almost a year and a half after defendants purchased e plaintiffs' cherries, this lawsuit was filed seeking 5 cents per pound re for their cherries, claiming the other processors paid 20 cents. (Record 2) It named 16 plaintiffs. Many of the plaintiffs listed had not given thority to the attorneys--Dave McMullin and Dallas Young, Jr.--to put them the lawsuit, and one by one as the various plaintiffs learned they were rties to it, had their names removed: Percy Adams did; so did C.A. Robert- n and Stan Adams as well as Robert Olsen and Dean Peck; and the L.D.S. Church- med Elberta Farm Corporation vehemently stated it was not a party to the suit, ver had been, that it had never authorized the act of being named in the matter, d moved the Court to have its name stricken. (Record at 177, also at 37, , 42 and 43)

At the trial, only 6 of the original 16-named plaintiffs remained. Of ese 6, three are defendants and one a co-conspirator in a federal anti-trust it presently on appeal in Denver, which alleges that these people acted in olation of the U.S. anti-trust laws and conspired to drive the Baums out of siness. (Record at 67, lines 23-29)

The Complaint alleged that the defendants were a commission merchant his is referring to this case, here, Billings v. Farley); since then the fendants proved that they were a "dealer" and not a "commission merchant". d their duties are not the same.

ARGUMENT

POINT 1

Plaintiffs have burden to prove existence and terms of contract; no proof was adduced.

In suit on a contract, plaintiff has the burden to prove the existence and terms of the contract--Madrid v. Norton, 596 P.2d 1108. Wyo. 1979.

Plaintiffs presented testimony that Garn L. Baum had conversations with the plaintiffs Merrill Gappmayer, Paul Hansen and Dean Gillman, a partner of Gillman Brothers, and promised them that Fantasy Fruits would pay as much for cherries as a competing processor, Muir-Roberts, was paying. However, plaintiffs did not present one shred of evidence to prove that Garn L. Baum made any such promise. They did not have one witness to bear out the testim of any or all of the three. Furthermore, Garn L. Baum denied making such a promise and testified that he purchased the cherries at 15 cents. (Record at 531, line 1 and at 552, lines 13-16)

Additionally, Merrill Gappmayer had already sworn under oath that he had no conversation(s) whatsoever with Garn, regarding what Fantasy Fruits was paying him for his cherries. In his answers to defendants' interrogatories, Merrill Gappmayer stated that he knew of no oral representation(s) or contract made by the defendants Garn L. Baum or Peggy Baum or any party acting as their agent with him--Gappmayer, or any party acting as the plaintiffs' agent regar the purchase, processing or marketing of sour cherries during 1973. (Record 116, question No. 36 and answer) Merrill Gappmayer also answered "None" to the question: "If such oral representation or contract as referred to in Interrogatory No. 36 was made; state: a. The location of such oral representa of contract; b. The date of such; c. The identity of all persons present dur

such; d. Your best recollection of all conversations relating to such oral representation or contract." Merrill Gappmayer's answer to any and all of these was "None". (Record at 117, 4-part question No. 37 and answers) These answers sworn to nearly a year before trial, while his memory was much fresher, overwhelmingly contradict his story given at trial. And there is no chance that Merrill Gappmayer misunderstood these questions; he went to great lengths in his testimony at trial to show how well-informed and intelligent he is.

The 115 or more growers who sold cherries to the defendants and are not plaintiffs in this suit were mute testimony that the defendants paid the price at which they purchased the cherries, because the plaintiffs launched an active campaign--using Baum's mailing list of growers--to get the growers to join this suit. The affidavits of 16 growers who sold cherries to the defendants, attesting to the fact that the defendants quoted and paid 15 cents, added still more weight on the side of the defendants (Record at 178, 179 and 180), as did the testimony presented by seven grower-witnesses who verified the defendants quoted 15 cents. These growers were Lawrence Smith (Record at 439, line 2); Hugh Park (Record at 511, lines 19-21 and lines 30 to 13 at 512); Max Roundy (Record at 514, lines 22 to line 6 at 515); Kamel Kader (Record at 517, lines 21-23 and at 518, lines 1-9); Terry Jenkins (Record at 557, lines 4-21); John Fowers and Jim Fowers (Record at 502, lines 8-9 and lines 26-30). Also, "Orem growers Cecil Ferguson and John Fowers said they were approached by Glade Gillman and asked if they wanted to sue. Both declined because Baum had paid them what he had quoted. Ferguson called the suit void and said, 'Garn paid us what he told us and that was it.'" Another grower said, "I told Gillman that we were dealing with Banquet Foods and they paid 15 cents a pound; should we sue them too?" (Record at 183, lines 7-15 and 24-27)

Also, it should not be a question of whether to believe Merrill Gappmayer,

Paul Hansen and Dean Gillman or Peggy and Garn Baum; but instead, whether to believe the affidavits of the growers and the testimony from the growers for the defense, and the better-than-100 growers who by their non-participation in the suit agreed the price quoted and paid was 15 cents, or to believe the testimony three plaintiffs, one of which drastically changed his story and two of which tried to take-over the Baum plant. The judge should have given more thought to this tremendous weight which was extremely supportive to defendants' position. And where the Baums, over the twenty-odd years, had built up an enterprise worth more than a million dollars, <u>their</u> testimony should have been more seriously considered, and <u>their witnesses</u>' testimony more seriously considered, instead the judicial ear bent toward the five or six complainers, many of which were Gillmans or related to the Gillmans, people which the judge knew had been involved in an attempted take-over of the Baum plant. Too, Judge Ballif, in his decision, said he chose to not believe Garn and Peggy because <u>Garn</u> said this or that.....he gave no reason not to believe <u>Peggy</u>.

In any event, defendants point out that without a witness or witnesses to any alleged oral contract or representation, the only thing Dean Gillman, Paul Hansen and Merrill Gappmayer <u>proved</u> was that three people could get together and come up with a similar claim; such testimony without supportive proof is worthless and cannot stand up in Court.

ARGUMENT

POINT 2

Utah State law precludes enforcement of plaintiffs' alleged oral contract.

According to the <u>Utah State Statute Of Frauds, 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</u>

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. Emphasis added. See Section 70A-2-201, Utah Code Annotated, Subsection (1).

Evidence presented showed that each plaintiff sold cherries worth $500 or more to the defendants; also, plaintiffs produced no written contract; thus the alleged oral contract for better than 15 cents is not enforceable.

ARGUMENT

POINT 3

Evidence did not establish at what price Muir-Roberts sold its cherries.

Plaintiffs did not present to the Court by way of testimony or document the price at which Muir-Roberts sold its cherries. Plaintiffs' attorneys base their assertion of a 35 cent price, on what Garn L. Baum said in his testimony. Well, let's examine what Garn L. Baum said in answer to plaintiffs' attorney's question "Do you know the price at which Muir-Roberts sold their cherries?" He said this: "I think it was 35 cents. I think they all got 35 cents. If they kept them beyond when the ceiling was lifted, they could have gotten 45 cents. I don't know what they got on their books. I don't know what they got." Emphasis added. (Record at 553, lines 7 and 11-15)

Garn L. Baum did not know at what price Muir-Roberts sold its cherries. He had no way of knowing this. Plaintiffs' attorneys knew that defendant Baum had said he didn't know, yet they grabbed onto this figure and presented it as the true price at which Muir-Roberts had sold, to confuse the Court. Where Muir-Roberts did not settle with its growers until March 22, 1974 (Plaintiffs' Exhibit No. 15),it is much more likely that Muir-Roberts held its cherries and didn't sell them until late in 1973 or early 1974, well after the price freeze

was lifted and the price had risen to 45 cents or more. (Record at 475, lines 12-16) Trial Judge Ballif said: "They may have sold in January, well after the price freeze was lifted, and the price may have gone up to sixty cents (.60¢) then, and they may have been settling with all the people on the basis of a much higher price than what Mr. Baum got when he sold for thirty-five cents (.35¢)." (Record at 582 beginning at line 25) It is the contention of defendants Baum that Muir-Roberts did sell its cherries after the price had risen to 45 cents.

ARGUMENT

POINT 4

Letter of July 10, 1973 was to give growers an idea of what the grower price would be 10 days from then when defendants would begin purchasing their cherr

On July 10, 1973 a price freeze was in effect. The price freeze placed a ceiling on what the processed cherries could be marketed for. (Defendants di not sell raw cherries.) On July 10th there was talk and speculation that the price freeze might be lifted. On July 10th the defendants expected the sour cherry harvest would begin in about 10 days, because the sweet cherries that came right ahead of them were scheduled to begin on July 16th.

Defendants needed to purchase cherries to run through their plant, so they decided to write a letter to the growers and let them know the Baum plan would be open for business. Defendants wanted to quote them a firm price, in the letter, but, because no one yet knew how long the price freeze would last, defendants did the next best thing: they gave the growers an idea of what the grower price would be 10 days from then when defendants would begin purchasing their cherries, by telling them what the price was in Michigan right then. Defendants added that "If locked in prices are lifted from the processor and

retailer, the grower prices could go up substantially."

On July 10, 1973 it was not known for certain that should the price freeze be lifted the grower price would go higher; defendants thought that it could. Defendants did not say in their letter that the grower prices will go up; they told the growers they could. On July 10th they didn't know for sure--should the price freeze be lifted--if the price at which they could sell the processed cherries, that July, would indeed be higher, inasmuch as processors were always scrambling to sell their cherries at pack-time.

Be that as it may, this letter was to indicate what the defendants' grower price was expected to be when they opened up for business on July 20th. That was when the defendants would purchase the growers' cherries...the letter was very clear that these cherries would be purchased, not consigned like the cherries Muir-Roberts would receive. And in order to buy something, one has to have a price. And when that something is cherries, the buyer has to have a grower price. It gives the growers something to consider.

A cash-buyer dealer can't wait until next year to have a price; he has to have a price right at the time he is buying them, so that he can determine his costs and sell the processed cherries. He has to get the cherries sold in the summer so he can get the returns from the pie companies--who buy them, in time to pay the growers by late fall. Time will not permit him to wait and see what his competitor pays eight months later. He can study what the other cash-buyer is offering at the same time, however; and in 1973 it was 15 cents on a 95 score. (Record at 498, lines 11-21)

On July 20th, 1973 the growers could either consign their cherries to Muir-Roberts and take whatever Muir-Roberts could get for them minus Muir-Roberts' costs and commission, or they could sell to the defendants at a set price which was 15 cents per pound on a 95 score or better. (Record at 234, lines 4 and 5 of

next to last paragraph) With the defendants, the price was a sure 15 cents; with Muir-Roberts it was a gamble, "a walk in the dark" (to quote grower John Fowers); but, at the same time, there was the chance with Muir-Roberts that price would be more. There was also the chance it could be less...

Where no one could foretell the duration of the price freeze, which was ordered again on July 18, 1973 to remain in effect for another period of time, it wasn't known how long a processor would have to hold his processed cherries if he were intent upon keeping them until the price freeze was over. A processor or speculating on the market might keep them a long, long time. And, in this the freezing and handling costs could eat away any price gains of a few cents per pound.

It is so easy to look at something, like the price of cherries, in retrospect, and see how the price freeze was lifted near summer's end and how the market climbed from 35 cents to 45 cents and more; but during July 1973, no one could say what the processed cherries might bring somewhere down the road in time, and no one could predict when the price freeze would be lifted.

Defendants offered 15 cents a pound to anyone who wanted to sell their cherries to them; no price was being offered, then, that was any higher. It wasn't a one on one deal where defendants sat down with each grower and individually contracted their cherries; Muir-Roberts contracted cherries, but the defendants simply quoted the price at which they were buying cherries, and any and all growers who cared to sell their cherries to them at that price could do so just by bringing their cherries in.

If the growers chose to sell to the defendants at a set price, and then Muir-Roberts later paid more, the growers couldn't come back and say they wanted more money just because they made a wrong choice that year; they could have it both ways. They could either go the sure way with the defendants,"

they could go with Muir-Roberts and gamble on receiving a higher price, quite some time later, even into the following year.

If Muir-Roberts had kept the cherries until the end of 1973 and the price freeze hadn't lifted, it would have had to sell at 35 cents or less and would have had several months storage to deduct from the sales before paying the growers, and therefore the growers would have received less than 15 cents.

The July 10th letter was nothing more than an indication, as far as the sour cherries were concerned, of what the defendants' price for the season would be.

ARGUMENT

POINT 5

What defendants' profits were from 1973 sour cherry operation.

Plaintiffs' attorneys would have the Court believe that defendants made an astronomical profit on the 1973 sour cherry operation. This was not so. To support this, defendants bring to the Court's attention the figures given to the attorneys, by the defendants, in defendants' answers to Plaintiff's Interrogatories, which showed at what price defendants sold the processed cherries, their costs and their profits. Selling at 35 cents per pound, the defendants' net profit per pound was 8 cents. Salaries or management were not figured in these costs. Based on the number of pounds sold--1,350,000, the profit was $108,000. (Record at 148 and 149) which, for the size of the operation and the amount of the investment and the on-again off-again feast or famine nature of fruit, was not excessive. Other incomes for the year came from inventory and other operations, etc.; defendants also handled other fruits, and because of a loss-carry forward, the net income was $16,000. (Plaintiffs' Exhibit No. 16)

At any rate, what defendants' profit was is immaterial since they pu chased the cherries at a firm price and paid it. And defendants add that Marshall v. Parkes, 5 Cal. Rptr. 657, it was held that a complaint based an express oral contract will not sustain a recovery on theory of unjust ment.

ARGUMENT

POINT 6

Evidence did not establish Muir-Roberts' price was 21½ cents.

The evidence showed that Muir-Roberts paid two prices: 21½ cents on 97 score or better, and 10 cents. Muir-Roberts paid Reed Pettingill 10 c per pound for his A grade cherries, which means they were tops. Reed Pet testimony regarding the 10 cent price he received from Muir-Roberts came missing when the transcript was transcribed by court reporter Myron Frazi and the tape which recorded Pettingill's testimony regarding the 10 cent is garbled at the point where Pettingill made the all-important statement ever, Reed Pettingill declared in his affidavit that he did indeed make t "10 cent" statement. (This affidavit is on page 13 of Defendants-Appella Brief filed in this case on February 13, 1981 by attorney Robert Macri.)

This 10 cent price that Muir-Roberts paid Reed Pettingill strongly contradicts that the price Muir-Roberts paid was 21½ cents. This testimo by Pettingill should in all fairness not be disregarded. The section of referred to, should be listened to for the Court's determination.

In the instant that the Court will not consider this 10 cent price w was egregiously omitted from the transcript, then a price of 15 cents on pack out must be considered in its stead, since Reed Pettingill also testi that Muir-Roberts guaranteed them fifteen cents and that Muir-Roberts was

them on a pack out. Pettingill testified that a pack out meant "they will pay you after your cherries run through the pitter and everything, and they pay you on what comes out of the machines." (Record at 497, lines 23-30 and at 498, lines 1-8)

Defendants did not pay on a pack out which meant that the growers were paid for less weight than what they brought in; defendants paid on the actual weight they received from the growers.

ARGUMENT

POINT 7

Evidence did not show Muir-Roberts' price was the fair market price.

Defendants agree with plaintiffs regarding the three authorities listed below which they cited in one of their filings in an effort to define what a fair market price is:

1. Black's Law Dictionary, 4th edition says a fair market value is the price at which a willing seller and a willing buyer will trade." Emphasis added.

2. Webster's definition of fair market value is the same as just quoted.

Fifteen cents was the price at which over 100 growers and the defendants were willing to trade, and did trade; thus the fair market value or fair market price was clearly established at 15 cents.

Banquet Foods, also known as Western Pack, (Record at 496, lines 25-26) another of the defendants' competitors and one that was also a cash buyer and dealer like the defendants, was also purchasing sour cherries at 15 cents. (Record at 498, lines 15-21 and at 183, lines 24-27) The willing growers who sold their cherries at 15 cents to the willing Banquet Foods further confirm the 15 cent fair market price.

3. The Court in Utah Assets Corp. v. Dooley Brothers Association, 70 d P.2d 738 (Utah 1937) said:

"Market value is frequently used, where a definite market value can be ei fixed, as a standard of value....An opinion of market value must necessarily w be intended to fix the value at which the property ought to give a fair re if sold to someone who is willing to purchase under ordinary selling condi-t

In this case 15 cents per pound was the fair market value of the cherr Banquet Foods was willing to purchase cherries at 15 cents, not 21½, but 15 cents. Therefore, the defendants' price of 15 cents clearly conformed wit the standard of value.

A 21½ cent price is out of line with the fair market price; so is the 10 cent price to which Reed Pettingill testified.

The fact that Muir-Roberts was licensed under Sec. 5-1-2 (e), U.C.A. 1 as a "Commission merchant" whereas Mr. Farley and Fantasy Fruits were licen under subdivision (g) of that same section as a "dealer", and in fact condu their buying operations differently, does indeed foreclose the trial court's finding that 21½ cents per pound was the fair market price. Where Muir-Robert was a commission merchant, it could take the cherries on consignment without quoting a price and without determining a price until months later after it sold the cherries. In fact, it had to sell the cherries before it could co up with a price, because that is the way a commission merchant operates. see what they finally sell the cherries for, then deduct their costs and com ission and pay the balance to the growers. Because of the method a commis merchant uses, Muir-Roberts was not soliciting cherries at 21½ cents in Jul when defendants and Banquet Foods were purchasing at 15 cents...Muir-Robert 21½ cent price was not established until the following March 1974; the only price at which cherries were being solicited was 15 cents--quoted by the

dants, Banquet Foods, and--according to Reed Pettingill--Muir-Roberts; thus 15 cents was the going price or fair market price. That Muir-Roberts--some eight months later--paid more than the July 1973 market price, does not alter what the market price at that time of purchase actually was.

As to the price of 20 cents said to have been paid by Payson Fruit Growers, the defendants call the following to the attention of the Court:

> Payson Fruit Growers is a cooperative that in 1973 was not soliciting cherries from outside their association of members, and only took on additional cherries to help take up the slack because of the tremendous crop, and testimony by Don Christiansen was that Payson Fruit Growers had its own limitations and processed all their own cherries first. (Record at 462, lines 6-8, 15-16, and 30) And these additional cherries were taken on at the end of the regular run.

There was no evidence presented that any plaintiffs' cherries were solicited by Payson Fruit Growers at 20 cents. There was no evidence of when the 20 cent price was established. Also, it doesn't matter what their costs were or at what price they sold their cherries; being a cooperative it is in a different ballgame. It's like comparing a potato to a head of lettuce. The two processors just can't be compared.

Plaintiffs Billings and Harley Gillman were paid the fair market price, as were all the other plaintiffs and all the other growers. But the fact remains that this is immaterial because the defendants bought the cherries from all the growers--plaintiffs included--at 15 cents. There was only one price quoted and one price paid, and that was 15 cents. There was no evidence produced to prove to the contrary.

ARGUMENT

POINT 8

Evidence did not show price freeze was lifted July 18, 1973.

On June 13, 1973 President Nixon ordered a freeze for a maximum perio 60 days on the prices of all commodities and services for sale except the prices charged for raw agricultural products. That Executive Order was No. 11723. Then on July 18, 1973, came the Executive Order No. 11730, whic stated that: "The price freeze established by Executive Order 11723 remain in effect until 11:59 p.m., e.s.t., August 12, 1973...." (See Executive Or No. 11730, Weekly Compilation of Presidential Documents Vol 9 July-Dec 197 page 912, Section 1)

Such price controls, ordered in a series of phases, did not end until September 12, 1973. Defendants sold their processed fruit before the price freeze was lifted.

For the purpose of clarification, the defendants state here that they did not tell the growers that the grower price was frozen at 15 cents. The effect the price freeze had on the raw cherries was this:

> With a ceiling on the price at which the processed cherries could marketed, the price to the grower was likewise restricted; in other wo since the price at which the defendants could sell their processed fru pack was held down, so was the price at which the defendants would be willing to purchase the cherries.

ARGUMENT

POINT 9

Complaint must fail; no evidence was presented to prove the allegations the

Under the First Count, defendants point out contradictions to plaintiffs' allegations, as follows:

3. Plaintiffs did not deliver cherries in June to defendants. (See Plaintiffs' Exhibit No. 2)

4. Defendants did not operate as a commission merchant. Fact proved.

5. Defendants were <u>not</u> required by law to make any accounting whatsoever as provided in Title 5, Chp. 1, Sections 18 and 19, Utah Code Annotated 1953, since this applies to commission merchants.

6. Defendants did <u>not</u> charge plaintiffs excessive commission and charges; defendants charged plaintiffs no commission or charges at all.

Under the Second Count, defendants contradict allegations therein as follows:

1. First Count failed.

2. Defendants did <u>not</u> agree or contract with the plaintiffs to pay the amounts which were being paid by the other processors to producers of tart cherries within the area. Defendants, throughout the entire picking-processing season, did no more than offer to purchase sour cherries at 15 cents to anyone who had cherries for sale.

3. Plaintiffs' allegation or claim that they relied upon the statements and past practices of the defendants when they delivered the tart cherries to the defendants, is supportively weak and would hold about as much water as a single-ply tissue-bottomed bucket. To <u>rely</u> means to have confidence or trust; therefore what number 3 of the Second Count means is that the plaintiffs--because of favorable past practices of the defendants--had confidence and trust in the defendants that the defendants would pay them the 15 cents as quoted. Too, they're saying that because of the confidence and trust there was no

written contract(s) between the plaintiffs and the defendants.

The Complaint fails on both counts, as outlined above; and above all, because there was no written contract.

ARGUMENT

POINT 10

More on the context of the case.

Here, defendants must make mention of certain conditions and/or happeni they feel have adversely affected the fairness toward them in this case. Fi the missing portion of Reed Pettingill's crucial testimony. The defendants heard Pettingill make the statement, and the defendants reported the incorre transcription to Richard V. Peay, State of Utah, Office of the Court Admini tor, Salt Lake City. The court reporter denied any mistake or wrong doing, a he was not made to correct the omission. That was atrociously unfair. Defe dants believe an act of this type--omitting testimony from a transcript--sho not be tolerated and could be criminal, and further believe the Court Syste should not be made a mockery of.

Secondly, Dave McMullin has made gifts of various kinds of fruit, fro farm, to the Trial Judge George E. Ballif, on many, many occasions, and thes acts, alone--which show they're friends or he wouldn't accept the fruit--caus the judge to be prejudiced, and the judge should have disqualified himself fr the case, even though the defendants did not have this information at the ti so didn't ask for his disqualification.

Thirdly, the plaintiffs' attorneys had and have an interest in this cas beyond that of representing the plaintiffs. Dallas Young Jr. and Dave McMull partners in the partnership "South Shores"--a huge West Mountain and Genola operation with 430 acres of fruit orchards purported to be the largest in

state, and Dave McMullin owner of another 350 acres planted in fruit, have encouraged growers to join the suit and have willingly represented the plaintiffs in this action because they wanted to rid themselves of a competitor in the cherry processing business...competitor in the selling market.

It was nothing short of brazen behavior on the part of these attorneys, McMullin and Young when they named the lawsuit after Percy Adams, a man and grower who had not asked to be made a part of it, nor had he given them any authority to put him in it, and it made a fool out of Percy Adams when he didn't find out he was named in it until he read about it in the paper.

For these attorneys to enter a corporation and individuals in a lawsuit, without authority from these parties, to do so, is unheard of and horrendously unfair not only to the corporation and the unknowing farmers, but also just as unfair, if not more so, to the defendants. And for the attorneys to use these unsuspecting growers and corporation to further their own selfish gain is even more despicable.

To show just how brazen these two attorneys were, imagine putting a corporation,owned by the L.D.S. Church,in a lawsuit,without any authority. May the defendants say again that Harold Boyer said the Elberta Farm Corporation never authorized the act of being named as plaintiff and that its inclusion as a party plaintiff was contrary to the corporation's intent and desire. Mc Mullin, a co-conspirator in the anti-trust case already mentioned, and Young put the corporation in because of the Church's powerful influence, the defendants contend, and the defendants ask that the Court take a serious look at what they did,here.

Defendants Baum went to the Utah State Bar regarding this matter, but the Bar did no reprimanding. Defendants believe that any attorneys who do this sort of thing should be restrained from such behavior.

Also, to more fully see the picture why the plaintiffs brought the suit,

the defendants refer the Court to the Record at 183, lines 16-23, where plaintiff Glade Gillman makes the statement about Garn L. Baum: "We're gonna sue that S.O.B., close him out, and take over his plant."

The Gillmans and others, all cousins or brothers, wanted Baum's place. In 1973 when they thought they had it, they didn't get it, and when John Gillman an officer in the Dept. of Agriculture saw Baum's financial statement for the year ending 1973--when Baum applied for his 1974 license--and saw that Baum made money, John Gillman was incensed with anger because he thought it should have been he who made that money instead of Baum, and this man John Gillman felt it would have been he if Stan Farley hadn't foiled the Gillmans' takeover. John Gillman said Baum made too much money.

In 1974 the Gillmans and a few others still wanted Baum's place, and they sought to put him out of business. At the end of 1974 they filed this suit and used it as an instrument of excuse to get the Dept. of Agriculture to raise Baum's bond up to $100,000 again for the 1975 season. John Gillman had caused it to be raised to $100,000--higher than any other processor's--in the spring of 1974, and Peggy Baum had gotten it lowered to $50,000, which irked John Gillman.

The Gillmans were the big movers regarding the suit. Gillman Brothers, alone, financed it. McMullin was the natural attorney for the Gillmans to get to file the suit, because he was already John Gillman's attorney. Both John and McMullin being growers of large acreages of fruit and both serving on water boards shared common interests.

The paying of 21½ cents by Muir-Roberts, also a defendant party in the anti-trust case, was the cheapest way it could cause dissatisfaction among Baum's growers and help to destroy Baum's business, and get rid of the number one cherry processor in the state.

ooOoo

CONCLUSION

It is clear that the plaintiffs did not establish any proof as to their allegations, and the burden of proof rested on their shoulders. There were no witnesses of any kind to any alleged oral representation(s) and there was no written contract. Where the cherries were worth $500 or more, per each plaintiff, the alleged oral contract for a price better than 15 cents cannot be enforced.

It is clear, as well, that 15 cents was the price at which cherries were being traded between growers and processors in July 1973 when defendants purchased plaintiffs' cherries; thus 15 cents was the fair market price. Plaintiffs all received 15 cents--the fair market price. Muir-Roberts held its cherries and sold at much greater prices than the defendants, and paid some of its growers more than 15cents, but this did not alter the fair market price of 15 cents, as Muir-Roberts was not soliciting cherries at 21½ cents when defendants and Banquet Foods were making their purchases at 15 cents. Muir-Roberts' 21½ cent price was not established until March 22, 1974, eight months after defendants made their purchases.

Also, it is the contention of these defendants that this lawsuit was filed not to collect additional monies but for the purpose of trying to put Baum out of business. Too, the plaintiffs' Complaint, when examined closely, was found to be but a mere dry-boned skeleton without a fragment of meat.

Because of the foregoing points and supportive cited authorities and statutes, defendants' Petition for Rehearing should be granted, or in the alternative the Court's June 24, 1982 ruling should be automatically reversed

in favor of the defendants, in light of the Utah State Statute Of Frauds which provides that a contract for the sale of goods worth $500 or more must be in writing to be enforceable.

Dated this 28th day of July 1982.

PEGGY BAUM, APPELLANT PRO SE

GARN L. BAUM, APPELLANT PRO SE

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MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Brief of Defendants-Appellants Garn L. and Peggy Baum to Dallas H. Young, Jr. and Dave McMullin, Attorneys for plaintiffs, at their address: Ivie and Young, 48 North University Avenue, Provo, Utah 84601, and hand-delivered two copies to Robert N. Macri, 738 South 600 East, Salt Lake City, Utah 84102, on this 28th day of July 1982.

Peggy Baum