

1981

# Neil Jorgensen v. John Clay and Company, a Corporation, and Aetna Casualty and Surety Company, a Corporation : Brief of Appellants

Utah Supreme Court

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## Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

- - - - -

NEIL JORGENSEN,

Plaintiff-Respondent,

vs.

Case No. 17621

JOHN CLAY AND COMPANY, a  
corporation, and AETNA  
CASUALTY AND SURETY COMPANY,  
a corporation,

Defendants-Appellants.

- - - - -

BRIEF OF APPELLANTS

- - - - -

Appeal from the Judgment of the  
Sixth Judicial District Court, Sanpete County  
Honorable Don V. Tibbs

- - - - -

Arthur H. Nielsen  
Stephen L. Henriod  
Clark R. Nielsen  
NIELSEN & SENIOR  
1100 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111

Attorneys for Plaintiff-  
Respondent

Richard Stein  
Richard Campbell  
STEIN & CAMPBELL  
2650 Washington Blvd.  
Ogden, Utah 84401

Craig S. Cook  
3645 East 3100 South  
Salt Lake City, Utah 84109

Attorneys for Defendants-  
Appellants

FILED

AUG 14 1981

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Attorneys for Plaintiff-  
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Richard Stein  
Richard Campbell  
STEIN & CAMPBELL  
2650 Washington Blvd.  
Ogden, Utah 84401

Craig S. Cook  
3645 East 3100 South  
Salt Lake City, Utah 84109

Attorneys for Defendants-  
Appellants

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BRIEF OF APPELLANTS

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STATEMENT OF THE NATURE OF THE CASE

This is an action filed by Plaintiff against Defendant John Clay & Co. alleging a breach of a contract to supply sheep. Plaintiff alleged that he had been damaged in excess of \$160,000 by the failure of defendant John Clay & Co. to perform under a written contract for the purchase of approximately 6,000 sheep. In addition, Plaintiff sought damages against defendant Aetna Casualty & Surety Co. as a surety on a stock purchase bond. Finally, Plaintiff sought attorneys' fees as to both defendants and punitive damages as to defendant John Clay & Co.

DISPOSITION IN THE LOWER COURT

The Complaint of Plaintiff was filed in the Sixth Judicial District Court on July 12, 1979. (R. 1-4). On

September 17, 1979 Defendants filed a Motion for Change of Venue asking the case be transferred from Sanpete County to Weber County, the principal place of business of John Clay & Co. (R. 11). After extensive argument in the district court the Motion for Change of Venue was denied on November 6, 1979. (R. 44).

Thereafter, an Answer was filed by Defendant including a claim that venue had been improperly laid. (R. 39-41). In addition, a Counterclaim was filed against the plaintiff by defendant John Clay & Co. for its loss of commission.

A jury trial was commenced on June 23, 1980 with the Honorable Don V. Tibbs presiding. After five days of trial the jury returned a verdict in favor of the plaintiff in the amount of \$191,463.40 as general damages and \$1.00 as punitive damages. (R. 130). In addition, the jury found in favor of Plaintiff as to Defendant's Counterclaim. A judgment on the verdict was entered by the trial court on July 8, 1980. (Tr. 136-137).

On August 4, 1980 an appeal was filed to this Court from the judgment on the verdict. (R. 139). This Court in Case No. 17228 remitted that appeal to the district court since the appeal was not from a final judgment because the question of interest and attorneys' fees had not yet been resolved. (R. 154).

After remand, the matter of attorneys' fees and interest



was submitted to the trial court as a trier of fact. On January 27, 1981 the lower court entered its Findings of Fact and Conclusions of Law and concluded, based upon the jury verdict, that the actions taken by defendant John Clay & Co. were malicious, willful and oppressive and therefore assessed attorneys' fees against Defendant in the sum of \$21,400.00. In addition, the lower court assessed pre-judgment interest of \$14,822.37. (R. 195-200).

Defendants then filed a Notice of Appeal in the instant case from the judgment on the verdict, and from the order of the lower court awarding interest and attorneys' fees. (R. 209).

#### RELIEF SOUGHT ON APPEAL

Defendants seek a reversal of the lower court verdict and judgment and a retrial of this case in Weber County on the basis that venue was improperly laid. In the alternative, Defendants seek a remittur in the amount of the attorneys' fees and pre-judgment interest assessed by the lower court.

#### STATEMENT OF FACTS

The facts in this case are basically undisputed with the exception of several events which transpired concerning alleged interference by the plaintiff of the contractual obligations and the custom of the sheep industry concerning notification of the seller when lambs are to be transported.

Since this Court is obligated to view the evidence most favorably to the jury verdict and to the findings of the trial court Defendants will principally rely upon the evidence of the plaintiff throughout this brief.

The plaintiff Neil Jorgensen testified that he was a resident of Mt. Pleasant, Utah and was engaged in the livestock business of raising and storing lambs. (Tr. 50). He had been doing this for ten years and had been working with the defendant John Clay & Co. for a number of years. (Tr. 53-56).

John Clay & Co. is a Utah corporation with its principal place of business in Ogden, Utah. Its function is to purchase lambs from growers and to resell them to packers with the company receiving a commission for its efforts. (Tr. 694, 696).

Mr. Leon Sparrow was a lamb buyer for defendant John Clay & Co. who had dealt with the plaintiff for over ten years prior to the transactions involved in this litigation. (Tr. 53-54). In November of 1978 the plaintiff and Mr. Sparrow entered into a contract whereby John Clay & Co. would purchase 5,000 lambs at 65 cents per pound at a maximum "weight stop" of 120 pounds. (Exhibit 16). A "weight stop" is a device used in the industry which puts a weight limitation on each lamb so that any excess weight is not paid for by the buyer. (Tr. 63). There was no dispute as to

this first contract except as to whether 274 lambs subsequently purchased were properly included under the terms of this contract or should have been included under the terms of the subsequent 10,000 sheep contract.

The 10,000 sheep contract was entered into between the parties John Clay & Co. and Plaintiff on December 13, 1978. (Defendant's Exhibit 1; Plaintiff's Exhibit 1). This agreement, also in writing, called for an additional 10,000 lambs to be purchased by John Clay & Co. at 70 cents per pound with no weight stop limitation.

Since this contract will be discussed in detail during the Argument portion of this brief further elaboration as to the details is unnecessary at this point except for the fact that the sheep designated in that contract were pastured in Blythe, California. (Tr. 67).

At the end of December in 1978 the plaintiff called Leon Sparrow and informed him that because of severe weather conditions in Blythe, California causing an inadequacy of feed, it was necessary for him to move the majority of his herd if they were to survive. (Tr. 71, 306). Sparrow said he would see if he could find a place to move the lambs until they were ready for delivery under the contract. (Tr. 307).

Subsequently, Sparrow called the plaintiff and informed him that a feed yard in Ault, Colorado could accomodate

Plaintiff's herd. (Tr. 71). The parties agreed to transport the sheep to the Marvin Weber feed yard in Ault, Colorado with John Clay & Co. paying the additional freight at the time of final delivery. (Tr. 73). This location was particularly convenient since defendant John Clay & Co. had resold the 10,000 lambs to a packer known as Monfort of Colorado which had its packing plant within six miles of the feed yard location. (Exhibit 17; Tr. 72).

During January of 1979 the plaintiff made arrangements for the transportation of the 10,000 lambs to the Weber feed yard. Simultaneously, he was shipping lambs pursuant to the 65 cent contract from a Cedar City herd and from the Blythe, California herd as to those lambs which were ready for slaughter. (Tr. 76-77).

On or about February 10 the plaintiff received a call from Sparrow informing him that approximately 2,400 lambs had been shipped out on February 5, 6 and 7 to the Monfort Packing Plant and giving Plaintiff various weights and dollar figures. (Tr. 77, 321-323). It was undisputed by the parties that the plaintiff became very upset upon learning about this shipment and told Sparrow that the plaintiff should have been notified as to the shipment date which was customary in the industry so that he could be there if he desired. (Tr. 324).

A dispute developed in the testimony of the witnesses

as to whether Plaintiff had agreed that the packer Monfort could take the sheep at its discretion without notification to the plaintiff or whether the customary notification had to be made. Sparrow stated that he reminded the plaintiff of the prior agreement upon receiving the phone call but that Plaintiff kept insisting that he was entitled to notification. (Tr. 324). Plaintiff, on the other hand, denied that there was ever any agreement that he would not be notified when the lambs were to be taken. (Tr. 68).

In any case, it was undisputed that Sparrow agreed to notify the plaintiff as to the dates of the next shipment. (Tr. 324). The plaintiff also called Weber, the feed lot operator, and told him that the plaintiff would notify Weber when the lambs were to be shipped. (Tr. 83). The plaintiff also stated that he called Wadlington, the lamb buyer for the packer Monfort, and told him not to ship the lambs without the plaintiff being present. (Tr. 83).

Mr. Weber testified that during that same conversation Plaintiff told Weber not to ship the lambs out since he did not feel they weighed enough until the week of February 20th. (Tr. 426). Wadlington testified that he received a call from Plaintiff to the same effect that Plaintiff should have been notified before shipment and that he did not want any more lambs of his taken out before February 20th. (Tr. 591). Plaintiff denied telling either Weber or Wadlington

not to ship the lambs out until February 20th and stated that he only asked that he be advised as to when the shipments were to be made. (Tr. 757).

On the 13th of February the plaintiff made a personal trip to Colorado with his family to check on the sheep. As they were driving by the Monfort Packing Plant the plaintiff recognized Wadlington and pulled over and talked to him. The plaintiff testified that Wadlington apologized for not notifying the witness about the shipment of lambs and said he would make sure that the plaintiff would be notified in the future. The plaintiff then went to the Weber feeding lot in Ault, Colorado and saw that the lambs were in good condition. (Tr. 86-88).

On February 21 the plaintiff received a call from Sparrow informing him that the lambs had been taken to the packing plant for the past several days. Sparrow told the plaintiff that 695 lambs had been shipped during the preceding days. Again, the plaintiff proclaimed that he should have been notified about the prior shipments and told Sparrow that it was a poor way to run a business in not notifying the seller. (Tr. 89). Sparrow testified that he did not apologize on this occasion for not notifying the plaintiff since the plaintiff had set his own shipping date and that it was his own fault for not being there because the plaintiff knew the lambs were going out the week of the 20th. (Tr. 326-327).

Immediately after talking to Sparrow the plaintiff called Weber, the feed lot operator, who informed the plaintiff that according to his records 1,096 sheep had been shipped out. (Tr. 89). Plaintiff then called Wadlington who confirmed the 695 figure. (Tr. 90).

The witness called Weber and told him not to ship out any more sheep until the plaintiff arrived at the feed yard the next morning. He immediately made a reservation to fly to Greeley, Colorado. (Tr. 90). On the following morning, however, because of a blizzard, the plaintiff was unable to catch the plane and called Weber and told him to ship the lambs even without the plaintiff being present. (Tr. 91, 133).

Shortly thereafter, the plaintiff called the Monfort Packing Plant and requested the number and weight of the sheep shipped during the week of February 20. The secretary who answered the phone told him that 1,096 sheep had been sent but told him that she could not give him the weights of the lambs. The plaintiff told her that he would contact the government agency supervising packer houses to obtain the information if necessary. (Tr. 94-96).

It is uncontroverted that after the shipment of lambs during the week of February 20 no further lambs were removed from the Weber feeding yard pursuant to the 10,000 lamb contract. Plaintiff testified that on March 3 he received

a call from Sparrow that Defendant could no longer accept the lambs which were remaining at the feed yard. Sparrow told the witness that the packer, Monfort, had refused to accept any more lambs because of the interference in the shipping dates caused by the plaintiff. (Tr. 100,391). Plaintiff immediately contacted his attorney, Clark Nielsen, and a letter was sent to defendant John Clay & Co. warning that it would be held accountable for any failure to perform under the contract. (Plaintiff's Exhibit 6).

Sparrow suggested that he and the plaintiff go to Colorado and meet with the Monfort people to see if the matter could be resolved. Accordingly, the plaintiff and his son met Sparrow and drove to the Monfort Packing Plant. When they arrived Bob Quam, the vice president in charge of lamb procurement for Monfort, was not present. They left and returned the following day. (Tr. 101-102).

At that time Quam stated that there had been too much interference in the shipment of the lambs and that the company could not afford to continue under the present agreement. He said a new deal would have to be made among the parties. (Tr. 332). Quam also told the plaintiff that any deal was with John Clay & Co. as far as Monfort was concerned and not with the plaintiff. (Tr. 103). Sparrow and the plaintiff left the meeting with no deal having been worked out.



The next day Raymond Williams, a co-owner of defendant John Clay & Co., and Frank Rynders, the manager and secretary-treasurer of the defendant, arrived in Colorado to assist in working out the problem. Upon arrival, a meeting was held at which time it was decided that Williams and Rynders should go to the Monfort Packing Plant to see what could be resolved. (Tr. 715).

Williams returned from the plant and said that Monfort was willing to purchase the lambs at 60 cents per pound with a 120 pound weight stop since the lambs were now heavier than commercially desirable. (Tr. 106, 757). The witness said that he would not accept this price since had had a contract with John Clay & Co. and was entitled to receive 70 cents with no weight limitation. (Tr. 107).

Subsequently, Mr. Rynders telephoned the plaintiff when he returned home and said that Monfort would agree to pay 63 cents and John Clay would pay 3 more cents making a total of 66 cents with a 120 pound stop. (Tr. 107, 757). No mention as to a release was made at that time. (Tr. 107).

Plaintiff stated that he told Williams and Rynders that if they wanted to honor their contract they would have to call the next morning or otherwise he would sell his sheep to R. H. Rock Co. (Tr. 108). When he did not receive a call from the defendant he entered into a deal with Rock Co. to sell the remaining 6,283 sheep. Plaintiff claimed

that as a result of that sale and the failure of Defendant to proceed with its contract he suffered a loss of \$166,566.81 (Plaintiff's Exhibit 10). Plaintiff admitted, however, that had he taken the offer made by defendant Clay & Co. he would have received substantially more money. (Tr. 140-142).

The above statement of facts is a synopsis of the testimony during the five-day trial. Additional issues were raised at the trial concerning the accuracy of the various records, the method of shipping the sheep, the custom and practice of notifying the seller when shipment is to be made, and other issues not germane to the present appeal. In addition, Defendants offered evidence that the interference by Plaintiff in the shipment dates of the sheep impaired the ability of Monfort to schedule its daily kill and allowed the sheep to become too heavy for commercial acceptance.

The matter was submitted to the jury which obviously concluded that Plaintiff had not interfered with the performance of the contract and held John Clay & Co. liable for the difference in the price obtained for the remaining lambs, for the cost of freight to the Colorado area, and for the difference in price as to 274 sheep between 65 cents a pound and 70 cents a pound. The jury returned a verdict of general damages for \$191,463.40. (Tr. 130). In addition, the jury returned a verdict of \$1.00 against Defendant for punitive damages. It was agreed that defendant Aetna Casualty

& Surety Co. was liable up to the extent of its \$75,000.00 bond in the event that liability was assessed against John Clay & Co.

After the jury verdict was returned and after remand from this Court, Judge Tibbs heard argument as to whether attorneys' fees should be assessed against the defendants and whether pre-judgment interest should also be assessed. The lower court entered its own Findings of Fact and Conclusions of Law and awarded an additional \$21,400.00 in attorneys' fees and \$14,822.37 in pre-judgment interest. (R. 216-220).

It is from the jury verdict and the lower court judgment that this appeal is now taken.

#### ARGUMENT

#### POINT I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR  
IN REFUSING TO CHANGE VENUE AND TRIAL TO  
WEBER COUNTY.

The Complaint in this matter was filed on July 12, 1979 in the Sixth Judicial District Court of Sanpete County. The Complaint alleged that Plaintiff was a resident of Sanpete County and that defendant John Clay & Co. was a corporation organized under the laws of the State of Utah with its principal place of business in Ogden, Utah. (R. 1).

On September 17, 1979 defendant John Clay & Co. moved for a change of venue based upon the affidavit of Lewis E.

Harper and upon the attached agreement which was the basis of Plaintiff's Complaint. (R. 11-14). No other responsive pleading had been filed prior to the Motion for Change of Venue. The parties argued this question extensively in the lower court and on November 6, 1979 the Honorable Don V. Tibbs entered an order denying Defendant's motion. Subsequently, an Answer was filed on behalf of defendant John Clark & Co. also raising the question of improper venue. (R. 40).

The venue laws of Utah have remained substantially unchanged since Utah became a territory in the late 1800's. This Court has recognized that the failure to transfer venue when the facts are clear and when properly demanded is a substantial right and that it is reversible error to deny such a transfer. Buckle v. Ogden Furniture & Carpet Co., 216 P.2d 684, 686 (Utah 1923).

The laws of Utah regarding venue are divided into two distinct classes. First, those cases mandating transfer under specific conditions and, second, those cases in which the discretion of the court is invoked. In the first class of case a court must transfer venue in certain actions respecting real property, in actions involving public officers in actions against a county, in actions on written contract and in certain transitory causes of action. See §§78-13-1, U.C.A. through 78-13-6, U.C.A.

The second class of venue statute involves discretion

in cases where the court believes that an impartial trial cannot be had, where a change is required because of the convenience of witnesses and the ends of justice, or where all parties stipulate such a change should be made. §78-13-9, U.C.A. In such cases a great deal of discretion is left to the trial court. Mooney v. Denver & Rio Grande Railway Co., 221 P.2d 628 (Utah 1949).

In the instant case defendant John Clay & Co. moved to transfer venue to Weber County, its principal place of business, on the basis of the mandatory provisions of §78-13-4, U.C.A. and §78-13-7, U.C.A. These sections state the following:

78-13-4. Actions on Written Contracts. When the defendant has contracted in writing to perform an obligation in a particular county of the state and resides in another county, an action on such contract obligation may be commenced in the county where such obligation is to be performed or in which the defendant resides.

78-13-7. All Other Actions. In all other cases the action must be tried in the county in which the cause of action arises, or in the county in which any defendant resides at the commencement of the action; provided, that if any such defendant is a corporation, any county in which such corporation has its principal office or place of business shall be deemed the county in which such corporation resides within the meaning of this Section.

This Court in a series of decisions beginning in 1923 has interpreted these sections in such a manner that there can be no doubt that venue in this case was improperly laid.

The foundational case concerning this type of venue

problem is Buckle v. Ogden Furniture & Carpet Co., 216 P.2d 684 (Utah 1923). In that case the plaintiff, a resident of Salt Lake County, brought an action against a resident of Weber County for collection of a debt on an oral contract. After a trial had been held in Salt Lake County and a verdict rendered in favor of the plaintiff the defendant appealed.

This Court interpreted the predecessor of the two above stated sections and concluded that for §78-13-4 (then §6528) to be applicable there must be a written contract in effect. If there is no written contract then §78-13-7 (then §6531) is applicable. The court noted that in such cases it is mandatory to try the action at the residence of the defendant since the words "where the cause of action arises" are referrable "to cases not on contracts, because the venue on actions on contracts, in respect of where they arise, is disposed of by §6528, as above interpreted." Id. at 686.

This Court stated the policy reasons behind the venue statutes and why they must be narrowly construed in favor of bringing an action at the residence of the defendant. This Court stated:

Requiring persons sued to defend legal actions at places remote from where they reside exposes them to an expense and disadvantage manifestly unjust, and to avoid such mischief the general modern tendency is to fix the venue

of transitory actions at the residence of the defendant. By giving a sensible and effective meaning to all the provisions of the statutes, and considering them together, the only rational conclusion is that the Legislature intended to establish the general right of persons sued to have the action tried in the county where one of them resides, and that the action which may be tried elsewhere are limited and restricted to those which the statute itself excepts from the general rule. Id. at 685-686.

The next case of substance was decided by this Court in 1934. In Atlas Acceptance Corp. v. Pratt, District Judge, 39 P.2d 710 (Utah 1944) an action was brought by an automobile dealer against a buyer of an automobile for a balance owing upon the car. The contract sued upon was in writing. The defendant argued that he was entitled to be sued in his own county. The Court agreed and stated:

When an action is brought in a county other than the county of the defendant's residence, he is entitled to a change of venue to the county of his residence, unless the case comes within the exceptions enumerated in the statute, one of which is that when the defendant contracted in writing to perform the obligation in a particular county of the state and resides in another county. In such case to bar the defendant from having the case transferred for trial to the county of his residence it must expressly or by necessary implication be made to appear on the face of the contract itself that the obligation was to be performed in the county where the action was brought. Id. at 285. (Emphasis in original).

The court went on to define the term "necessary implication" as so strong a probability of intention that an intention contrary to that which is imputed cannot be supposed.

Shortly thereafter this Court in Floor v. Mitchell,

41 P.2d 281 (Utah 1935) affirmed a transfer of venue from Salt Lake County to Iron County. The court upheld the transfer to the defendant's residence. This Court stated that in order for a suit to be brought in Salt Lake County it was necessary for the plaintiff to show that the written contract on its face required performance in Salt Lake City. This Court stated, "Mere reference to residence or place of business having no reference to performance is not sufficient." This Court then stated:

The contract sued upon was for a "Talking Picture Reproducing Equipment" to be installed in Parowan, Iron County, Utah. The contract itself is silent as to where it was made. Performance as to the executory part of installation was to be at Parowan. The place of business of the National Filmphone Corporation is shown to be in Salt Lake City. The contract is also silent as to the place of payment. The contract does not expressly state the place of performance, nor within the four corners of the contract is there any reference to place of performance from which by necessary implication the place of payment may be determined. With such situation the only alternative is the defendants were entitled to have the action brought at or transferred to the place of their residence. Id. at 284.

An examination of the contract sued upon in this case is no different from that mentioned in the Floor case. The contract states that John Clay & Co. "of Ogden, Utah" and Neil Jorgensen "of Mt. Pleasant, Utah" agree for \$20,000 down and \$.70 per pound to the purchase and sale of 10,000 lambs. It then continues that "the lambs are



on pasture in the Blythe, California area. They are to be sorted at daylight the morning of delivery, loaded on the trucks and weighed on the trucks at their scale. Delivery to be F.O.B. truck subject to buyer being able to bill through to destination between the 1st day of January, 1979 and the 15th day of March, 1979." The contract then contains the signature of both parties.

An examination of Exhibit 1 shows that it does not either expressly or by necessary implication appear on the face of the contract itself that the obligation was to be performed in Sanpete County. There is no mention whatsoever in the contract as to where payment would be made. While the sheep were kept in Blythe, California there is no indication that this area was deemed as the county of performance. Thus, the contract itself is ambiguous since the buyer is from Ogden, Utah, the seller is from Mt. Pleasant, Utah, and the sheep are maintained in Blythe, California. As such, the defendant was entitled to a venue change to Weber County, its principal place of business.

This contention is further supported by other cases of this Court. In Palfreyman v. Truman, 142 P.2d 677 (Utah 1943) an action was commenced in Weber County against the defendant who had contracted in writing with the plaintiff to pay them for certain work done as to cement foundations. The defendant resided in Utah County. The lower court denied the

defendant's motion to transfer venue. Upon appeal, this Court reversed.

This Court analyzing the facts of that case stated:

The Complaint in the instant case is based on an alleged failure of defendant to make a proper accounting and to pay to plaintiff the net proceeds due him under the contract. In reading the contract it appears that no particular place is specified where the accounting is to take place nor where the payment is to be made. If respondent is to prevail it must be because the necessary implications of the express terms of the contract show that the accounting or payment are to be made in Weber County.

As shown above, plaintiff's obligations were contemplated by the contract to be performed at or near Ogden, Utah, and an office was to be maintained at or near the place of construction. It is from these two terms that the necessary implications must stem that the accounting and payment, which were defendant's obligations, were to take place in Ogden, Utah. Id. at 679.

In concluding that the maintenance of an office and the performance of the work in Ogden, Utah was insufficient to show or imply the place of performance this Court stated:

Offices are maintained for a variety of reasons and not every office is a place where payment or accounting must necessarily be made. There is nothing on the face of the contract from which it can be determined where the separate banking account was to be opened. It is just as reasonable to infer that said account was to be opened in a bank located in the county in which defendant resides or any other place as it is to infer that it is to be opened in Weber County. Because the terms of the contract do not expressly provide the place where defendant is to perform his obligations and since there is nothing in the terms from which it must necessarily be implied that they be performed in any particular place, it follows that the court should have granted the motion for a change of venue. Id. at 679.

The action in Palfreyman was for an accounting of profit. The action in the present case was for the loss of a contract bargain. In both cases the contracts did not specify where the accounting or where the payments were to be made. Thus, venue is proper in the defendant's county.

The case of Simmons v. Hoyt, 167 P.2d 27 (Utah 1946) is remarkably similar to the instant case. In that case a note was executed in St. George, Washington County, Utah between the plaintiff and the defendants. The note stated that the plaintiff lender was "of Cedar City, Utah" and listed "P. O. St. George, Utah" next to the signature of the borrowers-defendants.

An action was commenced in Washington County against defendants who moved to transfer venue to Utah County, the place of their residence. The defendants alleged that venue in Washington County was improper since the note on its face did not expressly provide for payment in a particular county.

In concluding that the case should be transferred to Utah County this Court reviewed the previous decisions mentioned above and stated the following:

In the case at bar, however, the implications that respondent would have us apply is not one arising out of any necessary intentment of the terms of the note. At the bottom of the note the following words appear: "P. O. St. George, Utah Phone 184." The only other reference to place is the recitation of the residence of J. J. Miller, the payee: "J. J. Miller of Cedar City, Utah." From neither of these can it be said, as a factual implication, that it

was necessarily intended that performance in a particular county was within the contemplation of the parties. If the place of performance is of importance to the parties, they will not leave the evidence of their belief in its importance to a legal fiction founded upon the acts of contracting parties generally. Id. at 28. (Emphasis added).

More recently, this Court in Olympia Sales Co. v. Long, 604 P.2d 919 (Utah 1979) reaffirmed the statutory venue scheme and held that a defendant, as a matter of right, was entitled to transfer a lawsuit against him to his residence in an action involving an oral contract. This Court reviewed the previous cases and cited together with §78-13-7 and §78-13-4, U.C.A. and reaffirmed the previous holdings of this Court that venue should be transferred to the defendant's residence unless a clear exception was indicated.

Finally, as recently as May 20 of this year in Walker Bank & Trust Co. v. Walker, No. 17101 (May 20, 1981 Utah) this Court reversed a change of venue from Salt Lake County to Cache County when it was established that the contract itself showed "defendant's contract performance (payment) was due at the plaintiff's main office in Salt Lake City." The court concluded that since the plaintiff had the option of suing in either the defendant's residence or at the place of performance it was erroneous for the lower court to transfer venue from Salt Lake County when that had been the place of payment and performance.

The preceding cases amply illustrate that the lower court erred in refusing to initially transfer this matter from Sanpete County to Weber County. There is no doubt that except for Plaintiff having his residence in Sanpete County there is nothing in the contract even referring to Sanpete County. Since Plaintiff is seeking money damages for an alleged breach of contract in failure to make payment it is clear that unless the contract specifically provided where payment was to be made that the general rule allowing a defendant to be sued in his own county should have prevailed.

In the instant case Defendants maintained that Plaintiff had unnecessarily interfered with the performance of the contract by delaying the delivery of the sheep to the packer. This in turn caused the packer to breach its obligation with defendant John Clay & Co. in refusing to take any further lambs because of their excessive weight. Plaintiff, on the other hand, maintained that he never delayed any shipments and only asked to be notified when shipments were to be made so he could be present.

The jury in this case (in the plaintiff's county) concluded that Plaintiff was telling the correct version of the story and therefore found fully in favor of Plaintiff's claim. Defendant, however, was entitled to have these same questions submitted to a jury in its own county and, while the verdict is no doubt supported by the evidence in the

record, it would be equally supportable for a jury in Weber County to have found the opposite result.

Since defendant John Clay & Co. was deprived of a substantial right to trial in Weber County and since it timely and consistently moved for removal to the correct county, it is now proper for this Court, just as in the initial Buckle v. Ogden Furniture case, to reverse the existing judgment and to order a new trial in the proper county.

#### POINT II

ASSUMING ARGUENDO THAT VENUE WAS PROPER, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY AND IN SUBSEQUENTLY AWARDING ATTORNEYS' FEES WHEN THERE WAS NO EVIDENCE OF MALICIOUS OR WILLFUL INTENT ON THE PART OF DEFENDANT JOHN CLAY & CO.

Plaintiff in his Complaint made the following allegations:

Said acts and conduct of defendant John Clay & Co. were willful, malicious and deliberate and done with the purpose of harrassing and intimidating plaintiff to accept less than the full amount of the purchase price for said lambs for which plaintiff is entitled to recover punitive damages in the sum of \$100,000 together with attorneys' fees and costs of this action. (R. 3).

At the conclusion of the evidence Defendant's counsel moved to strike any claim for punitive damages on the basis that there was no evidence justifying such an award and no evidence of any tortious act causing any wrong justifying punitive damages. (Tr. 764). The motion was denied. In addition, defense counsel objected to the giving of

Instruction No. 4 by the court concerning punitive damages and the submission of the issue to the jury. (Tr. 769).

The jury verdict found in favor of the plaintiff and against the defendants in the amount of \$191,463.40 for general damages and "\$1.00" for punitive damages.

The trial court subsequently heard arguments and received evidence as to the propriety and amount of attorneys' fees claimed by Plaintiff's lawyers. In its "Amended Findings of Fact and Conclusions of Law" the trial court found that "the conduct of the defendant John Clay & Co. and its officers and employees was willful, malicious and oppressive as found by the jury. By reason of the willful, malicious and oppressive conduct of defendant John Clay & Co. and its officers and directors, plaintiff is entitled to a reasonable attorneys' fee for prosecuting this action." (Emphasis added). (R. 216-217).

The court further found that an attorneys' fee of \$21,400.00 was reasonable which included "the sum of \$1,400.00 of costs and expenses incurred for airline and automobile travel, hotel and motel expense in connection with the trial and the taking of depositions in Greeley, Colorado." (R. 217).

Thus, based upon an award of \$1.00 in punitive damages the trial court assessed attorneys' fees and litigation costs of \$21,400.00. The judgment as to the attorneys' fees,

litigation costs and to the \$1.00 punitive damage cannot be substantiated in the evidence and must be reversed.

It is the contention of Appellants-Defendants that the question of punitive damages should never have been submitted to the jury based upon the evidence adduced at trial. This Court on numerous occasions has defined the purpose and elements of punitive damages. In one such instance this Court stated:

In considering the problem of punitive damages and the arguments thereon, it is well to have in mind the purpose of punitive damages. They are: a punishment of the defendant for particularly grievous injury caused by conduct which is not only wrongful, but which is willful and malicious so that it seems to one's sense of justice that mere recompense for actual loss is inadequate and that the plaintiff should have added compensation; and that the defendant should suffer some additional penalty for that character of wrongful conduct; and also that such a verdict should serve as a wholesome warning to others not to engage in similar misdoings. Kesler v. Rogers, 542 P.2d 354, 359 (Utah 1975).

See also, Holdaway v. Hall, 505 P.2d 295 (Utah 1973); Elkington v. Foust, 618 P.2d 37 (Utah 1980).

Punitive damages are frequently awarded in intentional tort cases or matters involving fraud and deceit. See, e.g., Terry v. Zions Co-Op Mercantile Institution, 605 P.2d 314 (Utah 1980); Kesler v. Rogers, 542 P.2d 354 (Utah 1975); and Nash v. Craigco, Inc., 585 P.2d 775 (Utah 1978).

If in a contract action, however, the conduct is found to be wrongful in that it is a contravention of the contract



but is not willful or malicious then punitive damages cannot be awarded. Eliason v. Watts, 615 P.2d 427 (Utah 1980). It is generally necessary, in a breach of contract case, to show an underlying tort for punitive damages to lie. See Allred v. Wick Construction Co., 614 P.2d 321 (Alaska 1980); Tomen v. Kent Brown Chevrolet Co., 605 P.2d 944 (Kan. 1980); Curtiss v. Aetna Life Ins. Co., 560 P.2d 169 (N. M. App. 1976); Z. D. Howard Co. v. Cartwright, 537 P.2d 345 (Okla. 1975).

This Court has recently held that under the Uniform Commercial Code all remedies for injuries are to be applied solely for compensation of actual losses and that no punitive award are permitted. First Security Bank v. Utah Turkey Growers, Inc., 610 P.2d 329 (Utah 1980). In the same vein, this Court has found that poor workmanship in an aluminum siding contract did not justify the imposition of punitive damages and reversed an award given to an aggrieved plaintiff. Palombi v. D & C Builders, 542 P.2d 325 (Utah 1969).

A review of the evidence in this case shows that there is no justification whatsoever for submitting the question of punitive damages to the jury. Since there was no contractual provision allowing for attorneys' fees, this Court's reversal of the jury award of \$1.00 punitive damages would automatically vacate the finding of the lower court awarding \$21,400.00 in attorneys' fees. See Lyman Grazing Assn. v.

Smith, 473 P.2d 905 (Utah 1970); DeBry & Hilton Travel Service, Inc. v. Capitol International Interways, Inc., 583 P.2d 1181 (Utah 1978).

Viewing the evidence most favorably to the submission of punitive damages to the jury reveals the following: There was evidence showing that the defendant had promised to notify the plaintiff of the shipments of sheep to the Monfort Packing Plant but failed to do so on several occasions. Upon protest about not receiving notification, Plaintiff testified that Defendant's vice president stated he would take Plaintiff's "God damn lambs whenever he wanted to." (Tr. 82).

After the packing plant had notified defendant John Clay & Co. it was not going to receive any further lambs a meeting was held in Colorado between Mr. Sparrow, Mr. Williams and the plaintiff. Plaintiff testified that Williams told him that he should take his losses and forget about it if he wanted to maintain his business relationship with the defendant (R. 105).

The plaintiff's son, Jeff, testified that during this meeting Williams appeared to be threatening his father to sue him or get him in trouble. (Tr. 255). He stated that his father upon being told this replied that the defendants were dealing with the wrong men and that they should go to hell and walked out of the room. (Tr. 272).

After a careful review of the transcript in this case, Defendants are unable to find any other testimony which even remotely goes to Plaintiff's claim that he was intimidated or harrassed to accept a lesser amount for his sheep than was originally agreed. Instead, both parties voiced their beliefs as to responsibility and attempted to compromise the crisis using various suggestions. Defendants challenge Plaintiff in his forthcoming brief to produce any evidence of active intimidation or harrassment. It is clear, from the preceding evidence, that such conversation and assertion of legal rights do not give rise to the type of conduct punitive damages were intended to prevent.

On the other side of the coin, there is ample evidence to show the good faith of the defendant John Clay & Co. It is undisputed that upon learning of Plaintiff's trouble because of the feed situation in California, the defendant's agent Sparrow made all the arrangements to move the sheep to the Denver feed yard.

After the packer had informed defendant John Clay & Co. that it refused to take any more sheep, Sparrow arranged for a meeting in Colorado and attempted to compromise the problem with the packer's agent Bob Quam. (Tr. 101-102). Upon failing to do so Mr. Williams and Mr. Rynders, both executives in the defendant's company, also flew to Colorado in an attempt to work out the problem. (Tr. 103).

After being unable to persuade the packer Monfort to honor its contract with John Clay & Co., Defendant was able to obtain an additional 3 cent offer per pound from Monfort and agreed to put in 3 cents itself for a total of 66 cents per pound in order to minimize Plaintiff's damages. (Tr. 107).

Even after the plaintiff had rejected the offer of Defendant for the lambs, Plaintiff called Sparrow to see if he could help him in finding another buyer for the lambs. Plaintiff stated that Sparrow said he would help him as much as he could. (Tr. 183-185).

Sparrow even told the plaintiff that he should sue John Clay & Co. for breaching its contract and that John Clay would then have to sue Monfort who actually caused the loss. (Tr. 339).

The evidence, even assuming Plaintiff's version of the facts to be correct, unequivocally shows that at most, John Clay & Co. breached its contract to accept Plaintiff's sheep at the price of 70 cents per pound with no stop weight but that it attempted to minimize Plaintiff's losses as much as possible since the cause of such breach was the packer Monfort's failure to honor its contract with defendant John Clay & Co. Thus, defendant Clay & Co. was caught in the middle between the packer which refused to take Plaintiff's lambs and Plaintiff which had 6,000 lambs in a rapidly

declining market.

It was erroneous for the lower court to submit the question of punitive damages to the jury. In spite of this, however, the jury itself saw no actions justifying punitive damages as evidenced by the \$1.00 award it gave. The trial court, however, felt justified in awarding over \$24,000 in attorneys' fees and travel costs because of the finding of this \$1.00 award.

Defendant does not dispute that in appropriate cases of punitive damages, attorneys' fees can be considered as an element of damages. DeBry & Hilton Travel, supra. However, this Court in a similar contract action, has reversed an award of only \$200 attorneys' fees in a case where there was no basis for an award of punitive damages. Dahl v. Prince, 230 P.2d 328 (Utah 1951). Moreover, this Court has vacated an award of attorneys' fees in a declaratory judgment action where the controversy was bona fide and brought in good faith. Western Casualty & Surety Co. v. Marchant, 615 P.2d 423 (Utah 1980). And finally, this Court has noted that the amount of punitive damages must not be so grossly excessive and disproportionate to the injury that the verdict can be said to have been arrived at by passion or prejudice. Terry v. ZCMI, supra.

Thus, even if it were assumed arguendo that the \$1.00 award for punitive damages was proper the subsequent judgment

of the lower court awarding some \$24,000 in attorney's fees and travel costs based upon this \$1.00 verdict was so excessive and unreasonable that the amount alone cannot be sustained. Any award of attorneys' fees and expenses must be based upon the proportion of punitive damages actually suffered rather than allowing the \$1.00 award to open the door to any claim and any amount of attorneys' fees and expenses.

In summary, there is no evidence in this record justifying the submission of punitive damages to the jury and even the award of \$1.00 should be vacated. Because the parties did not contractually agree to pay attorneys' fees in this matter the award of attorneys' fees and litigation costs would then be automatically vacated. In the alternative, however, if punitive damages were justified then the amount of attorneys' fees and litigation expenses should be drastically reduced in proportion to the punitive damages found by the jury.

### POINT III

ASSUMING ARGUENDO THAT VENUE WAS PROPER, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN AWARDING PRE-JUDGMENT INTEREST AS TO THE AMOUNT RECEIVED FOR THE REMAINING 6,283 LAMBS.

The lower court entered Findings of Fact awarding 6% per annum interest from March 24, 1979 to the date of the jury verdict or a total of \$14,822.37.

Defendant does not dispute that pre-judgment interest was proper as to that portion of the award made by the jury regarding freight charges between California and Colorado and the difference in price between 274 lambs at 65 cents compared to 70 cents per pound. In both instances these amounts were fixed and readily ascertainable.

However, as to that portion of the interest award regarding the remaining 6,283 lambs and their subsequent sale the award was erroneous. This Court has held that for pre-judgment interest to be awarded two factors must be established. First, the injury and consequent damages must be complete as of a date certain prior to trial and cannot be of a continuing nature; second, the damages must be ascertainable as of a date certain in accordance with fixed rules of evidence and known standards of value. Fell v. Union Pacific Railway Co., 88 P. 1003 (Utah 1907).

This Court has subsequently held that pre-judgment interest can be awarded if "the amount of the loss . . . can be measured by facts and figures" and "calculated with mathematical accuracy," but may not be awarded if "the amount of the damages must be ascertained and assessed by the trier of fact at the trial." Bjork v. April Industries, Inc., 560 P.2d 315, 317 (Utah 1977). See also Uintah Pipeline Corp. v. White Superior Co., 546 P.2d 885 (Utah 1976); Jack B. Parson Construction Co. v. State, 552 P.2d 107 (Utah 1976)

and State Farm Fire & Casualty Co., 582 P. 101 (Utah 1978).

The price paid for the sheep in this case under Exhibit 1, the contract of December 13, 1978, depended upon the average weight of the sheep. Thus, while it was agreed to pay 70 cents per pound the total amount depended upon the cumulative weight of the sheep at each time of taking. It is undisputed that the amount paid to the plaintiff varied each time since the weight of the lambs upon each occasion also varied.

Defendant claimed that because Plaintiff had forbidden the shipment of the lambs during two occasions the packer was forced to take lambs which were heavier than commercially feasible and that it was for this reason the packer declined to take any further lambs. Had the jury found that Plaintiff had unduly delayed the shipment of these lambs such finding would have excused any breach on the part of Defendants or, in the alternative, would have fixed the damages to the weight which would have been obtained had Plaintiff not interfered with the shipping procedure.

The contract in this case allowed the buyer John Clay & Co. to take the sheep anytime between January 1, 1979 and March 15, 1979. The contract between Clay and Monfort allowed the same dates. There was testimony throughout the trial that when a lamb reaches over 120 pounds it becomes much more difficult to commercially market because of the



extra fat on the various cuts of meat. (Tr. 508). As the weight goes above 120 pounds the meat becomes increasingly more difficult to sell and a discount must usually be given to the purchasers of the meat.

Plaintiff calculated his damages in this case by totaling the 6,283 sheep and their cumulative weight and multiplying it by 70 cents. Plaintiff's Exhibit 10 shows that Plaintiff "should have received" \$607,773.30. Plaintiff then subtracted the "amount received" from Rock Co. of \$441,166.60 resulting in a "loss" of \$166,566.40.

These figures clearly were not ascertainable until arrived at by the jury. As to the "amount should have received" Defendant argued that it was only liable up to 120 pounds which would have been the price taken had Plaintiff not interfered with the contract. An analysis of the actual weight of the lambs sold to Rock Co. from March 11 through March 24 shows that the lowest weight was 131 pounds and the highest weight was 147 pounds. (Plaintiff's Exhibit 9). Thus, Defendant was being charged for numerous pounds over the 120 pound mark which it claimed it was not liable for because of Plaintiff's interference. It was a jury question as to whether Defendant's defense was valid or not.

Likewise, the "amount received" was also not "fixed" until the jury verdict was decided. This amount was based upon a contract with R. H. Rock Livestock based upon a sliding

scale accoring to the weight of the lambs. (Plaintiff's Exhibit 8). Defendants maintained that this contract was not the commercially reasonable amount required to mitigate damages and that, in fact, the offer of Defendants at 66 cents a pound with a 120 pound weight stop would have produced a greater amount. (Tr. 107, 141-142). It was thus necessary for the jury to determine whether this was a reasonable price to receive for these lambs under the circumstances then existing.

Because the amount of money due to Plaintiff varied by the weight of the lambs upon their taking there was no fixed or ascertainable formula which could be utilized for the assessment of pre-judgment interest. It was therefore erroneous for the lower court to award pre-judgment interest as to the damages claimed from the breach of the defendant in failing to purchase the some 6,000 sheep of Plaintiff. This matter should therefore be remanded to the lower court for entry of pre-judgment interest as to the freight and 274 lambs only.

#### CONCLUSION

The purpose of the venue statutes is to insure the underlying policy that a defendant should be tried in his own county unless there is a specific reason for allowing the trial elsewhere. In contract cases it is a simple matter to include in the agreement any exception to this general

rule by merely stating where any suit can be brought. The decisions of this Court clearly establish the rule that absent such a showing on the face of the contract, defendants are entitled to defend the action in their own county. The lower court committed prejudicial error in refusing to transfer venue.

Likewise, while punitive damages can justify attorney fees, there must be a showing that (1) punitive damages were justified and (2) that the attorney fees assessed are proportioned to the punitive actions of the wrongdoer. Here there was no evidence justifying either punitive damages or \$20,000 attorney fees and \$1,400 costs and expenses.

Finally, pre-judgment interest should only be imposed when the amount is liquidated and submission to a trier of fact is unnecessary. Here, both the amount Defendant was liable for and the amount Plaintiff finally received were highly questionable and required a jury determination. In such a case pre-judgment interest was improper.

For the preceding reasons, therefore, the judgment below should be vacated and a new trial ordered. In the alternative, the award of punitive damages, attorney fees and pre-judgment interest should be vacated.

Respectfully submitted,

Richard Stein  
Richard Campbell  
STEIN & CAMPBELL

Craig S. Cook

Attorneys for Defendants-  
Appellants

MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Appellants to Arthur H. Nielsen, Stephen L. Henriod and Clark R. Nielsen, NIELSEN & SENIOR, Attorneys for Plaintiff-Respondent, 1100 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111 this \_\_\_\_\_ day of August, 1981.

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