

APPELLATE COURT CASE NUMBER
A08-0279

STATE OF MINNESOTA
IN COURT OF APPEALS

Gerald Wayne Lindgren,

Appellant,

vs.

Glacial Plains Cooperative,

Respondent.

APPELLANT'S REPLY BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

The legal issues as set forth in the Respondent's Brief (RB) at page 4 appears to capture the essence of this case and this reply will relate to those issues.

STATEMENT OF FACTS **(REPLY)**

The Respondent appears to focus on Appellant's education and long experience as a farmer. However, there is nothing within this focus or evidence which would indicate that Appellant had acquired any particular knowledge or skill relating to his alleged status as a "merchant".

His education shows he had acquired primarily agricultural classes and a couple of business classes, all of which constituted less than two years of full academic work. His experience, while being over many years a farmer, produces no indication that Lindgren ever held himself out as having the "knowledge or skill" of a merchant, either by word or deed.

Bebler Education Experience

Keith Bebler who is employed by Glacial Plains Cooperative (GPC) has a "two-year degree" in "Ag Business management"; he writes newsletter articles relating to "... relevant information of the market". He considers himself to be a "grain merchandiser", worked for GPC as a grain merchandiser "since 2001". He worked, prior to GPC, for "Cenex Harvest States" for "three years". It appears Keith Bebler himself does not have a "grain buyer's license" but GPC, his employer, does. (Appendix pp. 234-235)

Keith Bebler meets the definition of a “merchant” in every respect. He buys and sells grain for profit.

This is contrasted with Lindgren whose primary business is producing grain and selling only the grain which he produces.

Respondent’s allegations and replies

“Cargill had a policy that required farmers to sign grain contracts at their facility before Cargill would consider the contracts valid [A-117; 150]. Lindgren recognized that to do business with Cargill, it was necessary to actually sign the contract, but Harvest States and Glacial Plains did not have the same policy [A-117; A-155; A-176].” (RB at page 6)

Stating that Glacial Plains did not have the same policy begs the question: What is Glacial Plains policy? Or, do they have a policy? And if so, has it been disclosed to Lindgren? It appears unknown as to the first and second and no as to the last.

Continuing:

“By signing the Cargill contracts Lindgren represented and warranted that he was ‘a MERCHANT (as that term is used in the UCC) with respect to’ corn (emphasis in the original) [A-197-200].” (RB at page 6)

Because the Cargill contract was entered into after contemplation of litigation arose within this case, it has no bearing herein whatsoever. The terms and conditions set forth within the Cargill contract relate to the Cargill contract and not to any other.

There is, likewise, an anomaly contained within this provision which renders it moot, which is: if the contract is signed, “merchant status” has no application and if unsigned it was never agreed to.

Continuing:

“He further stated in an affidavit that he is a ‘professional producer of grain’ [A-211]. Lindgren has been a grain farmer for forty years and has been aware of ‘Fixed Future Contracts,’ ‘Basis only contracts’ and ‘Hedge to Arrive Contracts’ for approximately 10 years [A-210].” (RB at page 6)

The Respondent fails to state how being a “professional producer of grain” or being aware of the nomenclature of three types of contracts would make him a “merchant”.

The Respondent states:

“At the time that Lindgren delivered the corn to Glacial Plains, he believed the Delivery Contract was valid and he had to perform [A-176]” (RB at page 9)

While it may be true that Lindgren “believed” he had an obligation to deliver but upon discovering the “contracts” which are being enforced required signatures and were lacking required signatures, he, therefore, believed they were unenforceable.

The flip side of this case appears to establish that GPC likewise “believed” the contracts required signatures to be enforceable.

The “contracts” in question were produced by GPC, bear GPC’s name across the top and the documents are labeled “contracts”. GPC did not notify or inform Lindgren that these contracts represented anything other than contracts, requiring signature to become valid and enforceable.

GPC provided within the contract a place for signature, sent a yellow post-it note requesting signature, provided copies for signature and return. **(Appendix 24-25)**

Relating to “Hedge to Arrive Grain Purchase Contract”, it states below the signature line “sign original and return to Buyer”. (**Appendix page25**)

Keith Bebler stated in his deposition that “contract” did contain the statement “sign original and return to buyer” and its purpose was “for validation”. (**Appendix pp. 240 and 244**) Bebler also stated “we sent out the documents for signature, yes.” (*Ibid.*) Bebler continued asserting that they (GPC) again sent documents for signature “when it became apparent you (Lindgren) were not delivering at that time, correct.” (*Ibid*)

In a letter dated November 27, 2006, from GPC to Lindgren (“Gerald”) wherein it stated:

“The originals were sent to you earlier requesting that you sign and return one copy to Glacial Plains. To date, you have not returned either contract with your signature. We request that you do so immediately.” (**Appendix page 28**)

Also, within the same letter:

“I have discussed the contracts with my Board and they have told me to resolve through the courts if necessary.” (**Appendix page 28**) (also, Appellant’s Brief (AB), pp. 2-4)

To be noted here is the fact that prior to this letter, the alleged contracts were regarded by GPC as contracts in want of signature to be valid and subsequent to this letter the contracts began there transformation from contracts to confirmations in contemplation of litigation. In like fashion, Lindgren was transformed from a farmer and producer into a merchant.

While the Respondent speaks of “orally” entering into the alleged contracts (RB at

page 6) which relates only to parts of the written contract, it was the formal written contracts into which the Respondent intended to enter, not any alleged oral contract. (See admissions (**Appendix pp.32-36**))

Neither the lower court or the Respondent removed the bar imposed by the UCC pursuant to Minn. Stat. § 336.2-201(1) relating to these alleged contracts in want of signature to be valid. (See AB at pp. 9-11)

ARGUMENT

1. The trial court did not err in concluding that the parties entered into two enforceable contracts

(Reply)

The Respondent's Brief at page 14 begins with "To prevail in a breach of contract action, 'plaintiff' must show that a contract has been formed. *Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 232 (Minn. App. 2006)" Also in *Cargill, supra*, as previously argued in Appellant's Brief (at pages 20-21) and restated here:

"Cargill argues that because Jorgenson Farms did not respond to the written confirmation of the contract that Cargill signed and mailed in July 2003, it acquiesced to the formation of the contract. But the confirmation indicates, on its face, that it must be signed and returned to Cargill and provides a signature line. It also states: 'Please sign and date the original and attached copy of this contract. The original must be returned to Buyer at the above-referenced address, and the copy should be retained for Seller's records.' Jorgenson did not sign or return the contract; thus, under the express terms of the document, no contract was formed." (*Cargill Inc. v. Jorgenson Farms, supra*, 719 N.W.2d 226 (Minn. App. 2006), at page 232)

There is not a scintilla of evidence within the instant case which would indicate the

contracts that GPC is attempting to enforce were anything other than formal written contracts in want of signature to become valid and enforceable. (See

Admissions:(Appendix pp. 33-36)

As set forth in Bebler's deposition he states in substance that signatures are required "For validation, yes." and "We sent out the documents for signature, yes."

(Appendix pp. 240 and 244)

The Respondent states:

"Although a contract for the sale of goods over \$500 normally must be in writing to be enforceable, a contract that is not in writing may nonetheless be enforced against a party that 'admits in pleading, testimony or otherwise in court that a contract for sale was made.' M.S.A. § 336.2-201(3)(b)." (RB at page 14)

The Respondent herein is stating, or at least implying, they are attempting to enforce an unwritten contract. To the contrary, the Respondent identifies the "contracts" by number and name (Hedge to Arrive). (RB at page 7). Respondent "admits" the written contracts are the contracts they "intended to enter" (**Admissions (Appendix pp. 33-36)**)

The Appellant objects to the erroneous use of the term "confirmatory documents".

(Appendix pp. 54-55) This objection was not answered or rebutted. Relating to this "confirmatory" terminology was also discussed in Appellant's Brief at pages 4-7.

These contracts are wholly governed by the requirement of Minn. Stat. 336.2-201(1) in the following particulars: 1.) They are contracts in excess of \$500; 2.) They must be written; 3.) And they must be "signed by the party against whom enforcement is sought".

Again relating to the contracts in question as being “confirmatory” in nature: Bebler, an agent of and acting for GPC, at no time prior to “contemplation of litigation” asserted or disclosed to Lindgren in any manner that the “contracts” were “confirmatory documents”; did not require his signature to become valid “unless written notice of objection to its contents is given within ten days after it is received”; (Minn. Stat. § 336.2-201(2); or “Notification of objection ... is given within a reasonable time...”. (Minn. Stat. § 336.2-207 (1)(c))

It is herein asserted that the Respondent’s Brief failed to answer, respond to, or rebutted the fact that GPC repudiated the application of the “10 day objection period” which would equally apply to objection within a reasonable time. (See AB at pages 8-9 and Opposition of Plaintiff’s Motion, (**Appendix p.54 @ pp 59-60**))

The failure of GPC to recognize the application of this rule (objection period) or disclose the application or non-application effectively removes “between merchants” or merchant status as a criteria of any form to this alleged transaction.

Relating to the alleged soybean contracts, numbers 18347 and 18348, (RB at page 7 and page 11) which alleged by Respondent to have been “...fully performed on ...” (RB at page 11) are not relevant here because no controversy arose from these alleged contracts as to their ability to be enforced.

“Unenforceable contracts are those which have some legal consequences but which may not be enforced in an action for damages or specific performance in the face of certain defenses such as the Statute of Frauds ...” (Calamari and Perillo on CONTRACTS, 5th Edition, 2003, page 21) (**Appendix pp. 258 - 259**)

Because these alleged contracts did not become subject to scrutiny or controversy as to their ability to be enforced, they become moot and irrelevant to the instant case.

In addition to the foregoing, the alleged “hedge to Arrive Grain Purchase Contract” (**Appendix p.36**) is subject to the requirements of Statute of Frauds, Minn. Stat. § 513.01(1) making it mandatory that an agreement which by “its terms is not to be performed within one year” must be “subscribed by the party charged therewith.” See also (**Appendix pp.65-66**).

In the Respondent’s Brief, it is stated that “Lindgren has not presented any legal argument to now void the four contracts that were orally agreed to on April 20, 2006.” (RB at p. 15) The Respondent has provided no evidence the alleged contracts which are the subject of this dispute (**Appendix pp.32-36**) were at anytime orally agreed to. In addition, these contracts are not subject to being made “void” because lacking signatures “...under the express terms of the document, no contract was formed.” (*Cargill, Inc. v. Jorgenson Farms, supra*, 719 N.W.2d 226 @ 233)

The Respondent continues (RB at p 15):

“Additionally, even without his admission of entering into the contracts, Lindgren is bound by the terms of the written confirmatory contracts pursuant to the Uniform Commercial Code.”

Contrary to Respondent’s assertion, Lindgren never admitted entering into the alleged contracts which are the subject of this litigation and he is not bound by the alleged “written confirmatory contracts”. In fact, within this case there is no such document

which identifies itself as a “confirmatory contract”.

The contracts herein, on their face, indicate they are in fact contracts in want of signature to become valid and enforceable.

There are no terms, conditions or implications contained within these contracts which would subject their enforcement to any extraneous undisclosed policy of GPC, are subject to any prior agreements or admissions, are subject to a “10 day” objection period, are subject to objection within a reasonable time, are subject to the “merchant status” of either party, and, finally, these documents do not express or imply they are confirmations of anything.

The whole of the ability to enforce these contracts are contained within the confines of Minn. Stat. § 336.2-201(1) which provides:

“...a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought ...”

While there are exceptions contained within this section, the contracts in dispute herein facially do not admit to or make available any of these exceptions, either by express or implied terms or conditions.

Therefore, Lindgren did not by word, deed or action enter into any enforceable contract with GPC as alleged here by the Respondent.

2. The trial court did not err in concluding Appellant Lindgren was a “merchant” as defined by the Uniform Commercial Code.

(Reply)

In the determination of whether a person is a merchant or not, it is necessary to look at the plain meaning of the statutes. “[b]etween merchants’ means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants. M.S.A. §336.2-104(3). The UCC defines ‘merchant’ as ‘a person who deals in goods of the kind or otherwise by occupation holds out as having knowledge or skill peculiar to the practices or goods involved in the transaction ...’ M.S.A. §336.2-104(1)” (RB at Page 16)

Definitions: **“Merchant.** One whose business is buying and selling goods for profit;” (See Black’s Law Dict., 7th ed. 1999, p. 1001, col. 1) (Emphasis added) This definition also explains: “The definition of ‘merchant’ in [UCC] Section 2-104(1) identifies two separate but often interrelated criteria: Does the seller ‘deal in goods’ of that kind or does the seller ‘otherwise by his occupation’ hold himself out as having special knowledge with respect to the goods?” (*Ibid.*) (Emphasis added)

Relating to ‘deal in goods’, *supra*,: **“deal** 1. An act of buying and selling; the purchase and exchange of something for profit <a business deal>.” (Black’s Law Dict. *supra*, at p. 405, col. 1)

Also in Black’s Law Dictionary, 7th ed., 1999 at p. 1001, col. 1, the **“merchant exception”** is addressed pursuant to UCC § 2-201(2) relating to inter alia the “10 day

objection period”.

It appears clear that Lindgren is not a “merchant” by definition because he does not “buy and sell” for profit and, therefore, does not deal in goods of a kind.

The Respondent, in addition to relying on the statutes, *supra*, which are not applicable to Lindgren by definition, turns to judicial precedent for support: “Farmers that enter into grain contracts, including hedge to arrive contracts, have been found by Minnesota courts to be merchants that deal in goods of a kind for purposes of the UCC. *See In Re Grain Land Co-op*, 978 F.Supp. 1267, 1279 (D. Minn. 1997), and *Thofson v. Redex Indus., Inc.*, 433 N.W.2d 901 (Minn. App. 1988) (farmers are merchants under the UCC).” (RB at p. 16)

Upon reading *In Re Grain Land*, *supra*, in conjunction with *Thofson v. Redex*, *supra*, it appears the Federal District Court *In Re Grain Land* did not fully ventilate the question of the merchant status and limited this status to the producers within the case at bar. “Moreover, the Producers here are undoubtedly merchants for purposes of the U.C.C. *See, e.g., Thofson v. Redex Indus., Inc.*, 433 N.W.2d 901 (Minn.Ct.App. 1988) (finding farmers to be “merchants” for purposes of U.C.C.). Specifically, the parties indisputably deal in the “goods of the kind,” i.e., grain. Minn. Stat. § 336.2-104 (1).” (*In Re Grain Land Coop*, 978 F.Supp. 1267, 1279 (D. Minn. 1997) *supra*, at West page 1279). The court did not cite any specifics in *Thofson v. Redex*, *supra*, and in *Thofson* there was no controverted issue relating to “merchant status” or issues relating to

transactions “between merchants”.

This court is not bound by *In Re Grain Land, supra*. “... state courts are bound only by decisions of the United States Supreme Court.” (*Northpoint Plaza v. City of Rochester*, 457 N.W.2d 398 (Minn.App. 1990) at page 403. See also *Jendro v. Honeywell, Inc.*, 392 N.W.2d 688 (Minn.App. 1986) @ 691.

The Respondent continues on pages 16 and 17 of Respondent’s Brief by citing several cases relating to the sufficiency of documents purporting an indication of confirmations of oral contracts or that a contract existed. None of these are applicable here because by the Respondent’s own admissions it is a formal written “contract” in want of signature to become valid and enforceable that the Respondent is attempting to enforce. (**Appendix pp. 32-36**). It is by the Respondent’s own admission that the contracts require signatures. (**Appendix p. 244**) The Respondent with knowledge and intent repudiated the substantive basis for the application of “merchant status”, i.e., the “10 day objection period”.(AB, pp. 8-9) This repudiation by Respondent succinctly indicates the Respondents did not recognize Lindgren’s status as that of a merchant.

The Respondent continues by citing *Huntting Elevator Co. v. Biwer*, 1998 WL 747170 (Minn. App.) (**Appendix p. 228**) for the proposition that Lindgren is a merchant by stating the court indicated “that the ‘producer acted as a merchant in selling his grain products to the grain elevator.’ *Id.* At 3” (RB at p. 17) However notwithstanding the statute does not recognize “acting” (Minn. Stat. § 336.2-201(1)(2)). *Huntting, Id.* relies

on *In Re Grain Land*, 978 F.Supp. 1267, 1279 (D. Minn. 1997) *supra*, and is not applicable for the same reasons as argued, *supra*. **(Appendix p.230, Section II)**

Respondent continues the focus on *In Re Grain Land* which has been discussed, *supra*.

The Respondent expends much effort puffing Lindgren's experience and education. (RB at pp. 18-19) However, in reality, Lindgren has less than two complete years of college (mostly agriculture which is his present business) and a couple of business classes, none of which is preparatory to becoming a merchant or merchandiser. He has been farming for approximately 40 years, raises grain and sells the grain to a local elevator for cash and, from time to time, on forward delivery contracts for cash, which are necessary and ancillary to the production of his crops. Lindgren does not buy and sell grain for any third parties or for himself on the "futures market".

The Respondent in citing *Bennett v. Jansma*, 329 N.W.2d 134 (S.D. 1983) at 136 asserts that Lindgren is more comparable to *Bennett v. Jansma* than the farmer in *Terminal Grain Corp. v. Freeman*, 270 N.W.2d 806 (SD 1978). In *Bennett v. Jansma*, the court states: "In *Terminal Grain Corp.*, *supra*, we held that a farmer with no particular knowledge or experience in dealing in future commodity transactions and who sold only the crops he raised to local elevators for cash or placed his grain in storage under a federal loan program, is not a merchant." *Bennett v. Jansma*, *Id.* at page 136. This statement is an exact match relating to Lindgren. While some of the alleged contracts are for future

delivery, they are all for cash upon delivery and involve no “buying and selling for profit” on the part of the farmer.

The Respondent discounts the application of *Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226 (Minn.App. 2006), on the grounds there was no underlying “oral” agreement which appears to be true. However, as in this case, it was not an “oral” agreement *Cargill* was attempting to enforce; it was an alleged written “confirmation” which, as in this case required a signature to become valid and enforceable pursuant to the “express terms of the document, no contract was formed.” (*Cargill Inc. v. Jorgenson Farms, Ibid.*, at page 233)

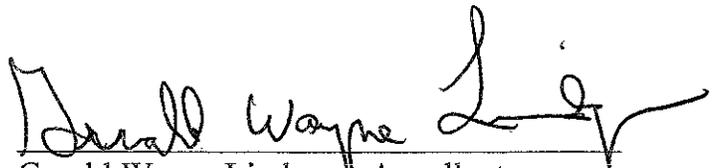
There is nothing within the alleged “confirmatory documents” or the, in fact, “contracts” which informs Lindgren that the contracts are enforceable under any exception established pursuant to the statute of frauds, Minn. Stat. § 336.2-201. Therefore, the statute of frauds does apply.

CONCLUSION

Because the lower court failed to remove the contracts in dispute herein from application of the Statute of Frauds as evidenced by the lack of required signatures to become valid pursuant to and in conjunction with Appellant's arguments contained herein, the trial court's Order for Summary Judgment should be reversed.

Respectfully submitted,

4/30/08
Date



Gerald Wayne Lindgren, Appellant

In Pro Per

30759 360th Avenue

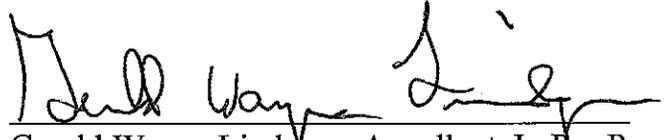
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn.R.Civ.App.P 132.01, subdivision 1 and 3, for a brief produced with a proportional font. The length of the brief is 3,506 words. This brief was prepared using WordPerfect Office, Version X3.

Dated: 4/30/08



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STATE OF MINNESOTA
COUNTY OF SWIFT

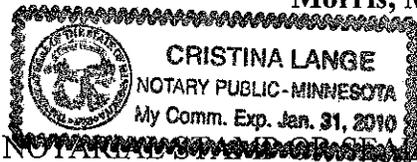
APPEALS COURT NO. A08-0279
Gerald Wayne Lindgren vs. Glacial Plains
Cooperative
Trial Court No. 76-CV-07-263

Anita L. Lindgren, being duly sworn, says that on the 30th day of
April, 2008, he/she served:

APPELLANT'S REPLY BRIEF AND APPENDIX

in the above entitled case upon the following named individual by mailing to them two (2) copies
thereof, enclosed in an envelope, postage prepaid, and by depositing same with the United States
Mail in the county of Swift, State of Minnesota.

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Anita L. Lindgren
(SIGNATURE)

Cristina Lange
SIGNATURE OF NOTARY PUBLIC

(OR OTHER TITLE RANK)

Subscribed and sworn to before me
This 30th day of April,
2008.