STATE OF MINNESOTA

IN COURT OF APPEALS

No. A111137

NHF Hog Marketing, Inc.,

Appellant,

vs.

Pork Martin, LLP,

Respondent.

RESPONDENT'S BRIEF AND ADDENDUMS

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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 ISSUE

The issue before the Court of Appeals is whether the District Court erred in its application of the Uniform Commercial Code, in Minnesota Statutes, to the measure of damages owed by Pork Martin to Appellant, NHF Hog Marketing?

The Respondent agrees with the District Court that the Appellant is only entitled to its lost commission on the resale of the goods and is not entitled to the full contract damages under Minnesota Statute 336.2-713. The position of the Respondent is that the Appellant never expected to receive the monies which it is asserting it is entitled to. Further, it is the assertion of the Respondent that Minnesota Statute 336.1-305 is clear language and guidance to both the District Court and Appellant Court here in which it is stated that "the aggrieved party may be put in as good of position as if the other party had fully performed…" . The damages of the District Court reflect the best position that the Appellant could have achieved had the contract been performed.

INTRODUCTION

Respondent agrees with the facts as set forth by Appellant; save for the statement regarding the damages owed to Appellant on page 5 of its brief. Respondent asserts that the only damages owed are those as set forth by the District Court.

The Respondent also adopts the Index of the Appellant.

STANDARD OF REVIEW

This appeal is limited to whether the Trial Court correctly applied the law. A *de novo* standard of review by this Court is proper.

ARGUMENT

What is the proper measure of damages in the underlying matter?

The question of damages in the case at hand is whether Appellant is limited to "lost profits" on its contract agreements or actual damages under its contract with the Defendant.

Influencing this question is the Uniform Commercial Code. The measure of damage questions under the Uniform Commercial Code fall under UCC Section 2. In the matter before the Court, the relevant law is the Uniform Commercial Code. In particular, Minnesota Statute 336.2-713 **"Buyer's Damages for Non-Delivery or Repudiation"** is one of the controlling Statutes. Minnesota Statute 336.2-713 states:

> (1) Subject to the provisions of this article with respect to proof of market price (Section 336.2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this article (Section 336.2-715), but less expenses saved in consequence of the seller's breach.
>
> (2) Market prices to be determined as of the place of for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival. See Minnesota Statute 336.2-713.

The other Commercial Code Statute that is relevant to the matter at hand is 336.1-305 **"Remedies to be Liberally Administered."** Minnesota Statute 336.1-305 states:

> (a) The remedies provided by the Uniform Commercial Code must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal damages may be

had except as specifically provided by the Uniform Commercial Code or by the Rule of Law.

(b) Any right or obligation declared by the Uniform Commercial Code is enforceable by action unless the provision declaring it specifies a different and limited effect." See Minnesota Statute 336.1-305.

In the underlying case, the facts are clear that the Appellant did not seek any cover for like or similar goods in order to cover its contract with Swift. As such, the damages provided by Minnesota Statute 336.2-712 are not applicable. The question then before this Court is whether the Buyer's 2-713 Contract Market Differential should be limited by proof that the Buyer's expectation of gain from performance was less than the 2-713 Differential.

A case which is very similar in both form and facts to the case at hand is H-W-H Cattle Company, Inc. vs. Clayton vs. Schroeder, 767 F2d 437, 41 UCC 832 (8th Cir. 1985). In that case, H-W-H was an order buying cattle company which purchased cattle on commission for feed lots. H-W-H entered into a contract with Schroeder to purchase some 2000 steers. For its part, the Appellant in that matter would, in turn, sell the cattle to a customer, Western Trio Cattle Co. Schroeder breached his contract, and the Appellant H-W-H, asked for damages based upon the Western Trio contract rather than the contract which it had with the Defendant. Much like the case before the Court, H-W-H contended before the District Court, as well as before the Appellate Court that it was entitled to damages based upon the market price of cattle. This argument was rejected by the District Court finding that H-W-H had voluntarily limited its "market price" by agreeing to sell its cattle to Western Trio for $0.35 per hundred weight more than it paid for the cattle.

The 8th Circuit found that to adopt the Appellant's position in that case would result in granting a windfall and thus violate the general principal concerning remedies underlying Article Two of the Uniform Commercial Code. *Id.* Specifically, it was felt that the controlling authority was Section 554.1106 of the Iowa Commercial Code, which parallels Minnesota Statute 336.1-305. The Court determined "we read this admonition from the Code to suggest that a Court should look through the form of a transaction to its substance when necessary to fulfill the parties expectations expressed in the contract". See H-W-H vs. Schroeder. The Court found that the Appellant "only purchased cattle to meet a specific customer's needs. As an Order-Buyer, it thus never expected to receive more than its $0.35 commission on any transaction, including its order purchase for Western Trio". *Id.*

The Appellant in H-W-H argued that it should receive market price damages because it was liable to Western Trio for its failure to deliver the 603 cattle at hand and that Western Trio's damages would be measured as a market price differentiation with the contract price. The 8th Circuit noted "The District Court properly rejected this contention, noting that Western Trio had made no demand on H-W-H to fulfill the remainder of the contract." See H-W-H vs. Schroeder above.

Another case which is substantially on point to this matter is Allied Canners and Packers, Inc. vs. Victor Packing Co., 162 Cal. App.3d 905, 209 Cal. RPTR 60, 39 UCC 1567 (1984). In Allied, the Seller was a packer and processor of dried fruits. The Seller had made a contract to sell raisins to Allied. Allied, in turn, had made a resale contract with two Japanese Buyers for the dried fruit (raisins). See Allied Canners and Packers, Inc. vs. Victor Packing Co., (1984). Due to environmental market conditions, the raisin crop was severely damaged and Victor breached its contract for sale with Allied. Allied, under its contract, was to receive a commission, on a per pound basis, for all of the raisins sold to its foreign buyers. Allied elected not to cover and so never made any deliveries under its resale contracts with the foreign buyers. Allied stipulated at trial that the third party buyers never made suit or demand for the undelivered raisins at or before the time of trial. Allied argued that it was entitled to a Contract Market Differential of $150,281.25. The Court awarded $4,462.52 which was the expected resale profits and not the Contract Market Differential.

In this matter, Section 336.1-305 replaces the Contract Market Differential of 336.2-713 as the proper terms of damages. The Court in Victor noted that "It has been recognized that the use of the Market Price-Contract Price Formula under Section 2-713 (analogous to Minnesota Statute 336.2-713) does not, absent pure accident, result in a damage award reflecting the Buyer's actual loss. (Buyer's Remedies, supra, at pp 841-842; Remedies for Breach of Contracts, supra, at p. 259; Market Damages, supra at 92 Harv L. Rev. 1395 at Sec Et Seq.; White and Summers, Uniform Commercial Code, Supra, at p. 224)". See Allied Canners and Packers, Inc. vs. Victor Packing Co., 162 Cal. App.3d 905, 209 Cal. RPTR 60, 39 UCC 1567 (1984).

The Court in Allied concluded "We conclude that in the circumstances of this case – in which the seller knew that the buyer had a resale contract (necessarily so because raisins would not be released by RAC unless Allied provided it with the name of the buyer in its forward contract), the buyer has not been able to show that it will be liable in damages to the buyer on its forward contract, and there has been no finding of bad faith on the part of the seller – the policy of Section 1106, Subd. (1N), that the aggrieved party be put in as good a position as if the other party had performed requires that the award of damages to the buyer be limited to its actual loss, the amount it expected to make on the transaction". See Allied Canners and Packers, Inc. vs. Victor Packing Co., 162 Cal. App.3d 905, 209 Cal. RPTR 60, 39 UCC 1567 (1984).

Noted by White and Summers in Uniform Commercial Code, 5th Ed. §6-4 at p. 414, "...we think our overall position is more faithful to the idea that the contract Appellant should recover only his lost expectancy". This is the clearest statement of Appellant's losses.

Like these cases, the underlying case must ask and answer the question, "What did the Appellant, NHF Marketing, Inc. expect under the terms expressed in this Contract?" The clear expectation for what the Appellant was to receive under the Contract is expressed in Article 7, Price of the Contract, of Exhibit 2. Section 7.01 Base Price states

"The price for the market hogs supplied under this Contract shall be the sum of the "Base Price" (as defined below), plus or minus (as the case may be) the "Carcass Merit Adjustment" (as defined below). Once such base price is determined, the price paid producer shall be reduced by 33 cents ($0.33) per carcass weight. The base price shall mean "market price" (as defined below) plus or minus any adjustment required pursuant to Section 7.02 below. "Market Price" for a given week shall mean the previous week's average of the daily weighted average price determined as follows....The price for the excess market hogs supplied under this Contract shall be the Market Price plus or minus (as the case may be) the "carcass merit adjustment" (as defined below), less 33 cents ($0.33) per carcass weight". See Exhibit 2, Section 7.01.

As testified to by Robert Taubert, the Manager of NHF Marketing, Inc., the $0.33 cents represented the transactional commission that NHF was to receive under the underlying contract. This is the only expectation of profit for the Appellant. The Appellant did not make any cover in the open market and as such would not be subject to any cover damages. Because, like in H-W-H vs. Schroeder, the Appellant had limited its market damages to the $0.33 per carcass weight amount, the clear outcome under the facts of this case clearly point to the limitation of damages to being $0.33 per carcass weight for the animals not delivered utilizing the average weights as set out in Exhibit 4. The proper measure of damages is simply the amount of hogs that were to have been delivered times the average carcass weight called for under the contract times $0.33 per carcass weight.

The Appellant in its opening argument noted a concept of "windfall" in this matter. The Appellant argued that the Respondent in this matter received a windfall by not having to deliver under the Contract and thus sustained an ongoing loss. However, windfall is really not a practical question in this case for review of the Respondent's actions. The Uniform Commercial Code does not limit parties to their contracts. Breaches are known and understood as being part of normal commerce. White and Summers note, "Limiting the Appellant to expectation damages also preserves the possibility of what economists call efficient breach, an idea endorsed by one of your authors." See Uniform Commercial Code, 5th Ed. 6-4 p 414. The entire purpose of the Uniform Commercial Code, with regards to remedies is to place Buyers or Sellers into the position that they would have been in but for the breach. Had the breach not occurred, the Appellant, NHF, would have been limited to its $0.33 cent per carcass weight commission, receiving no more. The requested damages by the Appellant, some $396,647.75 are monies that they would never seen under any circumstances in this case. Any result which yields an award to Appellants in this amount is clearly a windfall in the greatest sense of the usage of that term. Limiting Appellants to recover their actual damages, the damages that reflect what they expected to gain in entering into this Contract with the Respondent, is the proper and practical measure of damages under both Case Law and Statutory Law.

Does the UCC 2-713 Remedy supersede the UCC 1-106 remedy?

In its Brief, the Appellant claims total damages of $439,844.95. This is allocated between $396,647.75 for failure to deliver under the Master Contract and $43,197.50 in lost commission damages. The damages are asserted to be wholly payable under UCC 2-713 by the Respondent, Pork-Martin. In support of its position, the Appellant cites to two cases. Tongish v. Thomas, 251 Kan. 728 (1992) and TexPar Energy vs. Murphy Oil, 45 F. 3d 111 (7th Cir. 1995).

These citing cases are similar to the case at hand in that a seller was selling to an intermediary who was then, in turn, selling under contract to a third party. In Tongish, the Kansas Appeals Court held that UCC 2-713 was a more specific Statute to the situation and thus was an overriding and superseding Statute. The TexPar Court (the 7th Circuit) cited and used Tongish as its support in its claim. Both Courts found that UCC 2-713 was the controlling Statute in terms of determining damages.

While the Respondent can understand the citations in this matter, it is important to note some significant differences in the cases. The buyers in both Tongish and Murphy were buyers who had independent obligations to purchase the products of the seller. That is to say whether or not the third party buyer performed or not, the buyer in Tongish and Murphy was still required to purchase the commodities sold by the breaching sellers. This is an important distinguishing factor between the case before the Court and the cases cited by the Appellant.

When a party has an independent obligation to make purchase of a seller's commodities, they must fulfill the Contract independent of the actions of the third party buyer. In this case before the Court, the Appellant, NHF Hog Marketing, had the ability to walk away from the Contract if the third party buyer, Swift, did not perform. In short, the only obligation between NHF and Respondent, in terms of NHF's action were Swift to stop buying, was simply to notify Pork-Martin of that fact. This would then rescind the Contract and Pork-Martin would have no further obligation to deliver to NHF. More to the point, NHF would have no obligation to buy Pork-Martin's livestock under the purchase price.

Unlike the Appellant's in Tongish and Murphy, NHF could never realize the claimed damages in this matter, unless it actually voluntarily performed on the Contract. It could not and would not be put in a position where it was forced to buy livestock from Pork-Martin independent of Swift's obligation. Therefore, and as asserted in the Respondent's Brief previously submitted, the $396,647.75 claimed as damages were not a damage amount which NHF would be in a position to ever realize.

In its Brief, the Appellant cites to concepts of windfall, specifically, the idea that the Appellant in this matter would not receive any windfall if the Court is to enforce the 2-713 damages.

Given the facts before this Court, the third party buyer, Swift, has made no claim for damages to NHF; did not intervene in the case; was not made a party to the case; and no evidence was provided whatsoever to that extent in Trial. In short, based on all the facts before this Court, if the Court awards damages to NHF under 2-713, NHF will receive $396,647.75 that it would have never received otherwise.

When the Court looks at the Tongish and Murphy decisions, the Court will note that those decisions turn on the concept that the Contract between the buyer and the third party buyer in that the buyer in our case, NHF, essentially would protect itself against market price fluctuations with the Swift Contract. But that does not hold true. The specific language in Tongish states "Neither Panhandle nor Baker involve the conflict between the two UCC provisions. The difference between the market price and the contract price place the non-breaching party in as good a position as that party would have been if the contract had been performed. The decision can be distinguished from this case, however, in that coop protected itself against market price fluctuations with the Bambino Contract". See Tongish v. Thomas, 251 Kan. 728 (1992); Panhandle Agri-Service, Inc. vs. Becker, 231 Kan. 291, 292, 644 P. 2d 413 (1982); Baker v. Ratzlaff, 1 Kan. App. 2d 285, 564 P. 2d 153 (1977). In our case, the contract with Swift did not act as a market price fluctuation protection for NHF because NHF required no such protection. Again, and as stated above, NHF had no duty to perform in the absence of Swift's performance. Therefore, NHF required no price fluctuation. They never were at risk for gaining or losing the $396,647.75 amount if the Contract were to be performed. The only risk of loss for NHF is the $43,197.50 in lost commission fees.

TexPar Energy is similar to Tongish in that its contract with Murphy Oil, the breaching seller, was an independent obligation from its third party contract. See TexPar Energy vs. Murphy Oil, 45 F. 3d 111 (7^{th} Cir. 1995). Again, the Court in this case was faced with the choice between a lost commission type of profit and a full damages case. Again, like Tongish, and unlike the case before the Court, the buyer, TexPar Energy, had an absolute independent obligation to buy from Murphy whether or not a third party contract which it had would be fulfilled. Further, this case is much unlike the case at hand because the third party purchaser entered into an agreement with the buyer which was a resolution to their matter in advance of Court.

Again, it is the position of the Respondent that the third party obligation and the independent obligation between the breaching seller and buyer in TexPar further distinguish it from the case before the Court.

One final note in this matter before the court: the Respondent, at the time of the breach, was significantly indebted due to market conditions. The evidence introduced before the District Court clearly showed that a continuation of the contract would have yielded an ongoing loss just based on market pricing alone. This loss is compounded with the input cost loss.

The Respondent did not simply stop delivery because there was a better price on the market which would gain a onetime windfall. The Respondent stopped delivery because continuing to deliver would have created indebtedness with other creditors which it simply could not pay.

CONCLUSION

It is the position of the Respondent that Appellant's demand far exceeds any realistic amount which could be called for under the facts and circumstances of this case. The Third Party Buyer, Swift Company, has neither initiated suit nor made demand for the undelivered hogs. The only damages which are a proper measure of Appellant's loss are as outlined above and as reasoned in cited cases. The Respondent prays that the Appellant's damages be limited to their actual damages and that Contract Market Damages not be considered as a reasonable or likely measure of damages in the above entitled case.

The Respondent, Pork Martin, maintains that in this action the correct measure of damages under the Uniform Commercial Code is found in Minnesota Statute 336.1-305, not 336.1-715. Given the facts and parties to this litigation, this measure of damages provides the Appellant with its most accurate remedy and puts the Appellant in the same position had the contract been performed. Ultimately, the court must ask if it is an unfair result to award the Appellant what it would have made under the contract. The answer is a resounding, "No."

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