IN THE SUPREME COURT OF THE STATE OF OREGON

PEACE RIVER SEED CO-OPERATIVE, LTD., dba Peace River Seed Co-Op, Ltd., a Canadian corporation,

Plaintiff-Appellant,
Respondent on Review,

vs.

PROSEEDS MARKETING, INC., an Oregon corporation,

Defendant-Respondent,
Petitioner on Review.

Marion County Circuit Court
No. 03C15778

CA A144564

S060957

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

SECOND SUPPLEMENTAL EXCERPT OF RECORD AND APPENDIX

On Petition for Review of the decision of the Court of Appeals dated December 5, 2012, on appeal from a General Judgment and Money Award dated January 7, 2010, of the Circuit Court for Marion County, The Honorable L.E. Ashcroft, Judge

Before Ortega, P.J., Sercombe, J., Hadlock, J.

June, 2013

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I. INTRODUCTION.

This case requires the court to construe the statutory remedies available under Article 2 of the Uniform Commercial Code to an aggrieved seller against a breaching buyer, when the seller has resold the goods that were the subject of the contract. Defendant breached contracts to purchase seed from plaintiff. Plaintiff resold the seed and sued defendant for the difference between the contract price and the amount plaintiff was able to recover in the resale. At trial, plaintiff changed its theory on the measure of damages, asserting that it was entitled under ORS 72.7030 and 72.7080 to recover the difference between the contract price and the market price of the seed at the time and place for delivery, regardless of whether that formula would result in a greater recovery than the amount plaintiff originally had sought, and ultimately received, under a contract/resale price differential. The trial court ruled that plaintiff could recover the lesser of the amounts generated by the two formulas, consistent with the principle that a party may not recover damages in an amount greater than actually incurred.

Plaintiff also argued that it was entitled to recover its attorney fees as the prevailing party based on a contractual term that the "charges for collection" would be "for the Buyer's account" if the buyer did not pay in full and

immediately when due. The trial court ruled that the contract term was ambiguous and construed it as not providing a right to recover attorney fees.

Plaintiff appealed. The Court of Appeals reversed and remanded, holding that plaintiff had an unconditional right to recover damages under ORS 72.7080 measured by the difference between the contract price and the market price for the seed at the time and place for delivery. The Court of Appeals also decided that the trial court erred in the process it followed to construe the parties' contracts with respect to the availability of attorney fees and remanded that matter to the trial court for fact-finding.

Defendant sought review in this court to correct the Court of Appeals' errors and establish the following rules of law.

II. LEGAL QUESTIONS PRESENTED ON REVIEW AND PROPOSED RULES OF LAW.

QUESTION 1: Does Oregon's version of the Uniform Commercial Code ("UCC") grant an aggrieved seller who resells goods, which a buyer wrongfully has rejected, an unconditional choice between damages measured by the difference between the contract price and market price pursuant to ORS 72.7080 or damages measured by the difference between the contract price and resale price pursuant to ORS 72.7060?

RULE OF LAW 1: Under the UCC, an aggrieved seller who resells goods that a buyer wrongfully rejected may not recover more than the difference between the contract price and the resale price, plus the costs of resale, when that measure of damages puts the seller in as good a position as if the other party had fully performed.

QUESTION 2: When a contract allows a seller to recover "charges for collection" from a breaching buyer, may the trial court construe the contract as entitling the seller to recover attorney fees in the absence of clear evidence that the parties intended the phrase to include attorney fees?

RULE OF LAW 2: When determining whether a prevailing party may recover attorney fees, a contractual right to recover "charges for collection" may not be construed to include attorney fees, especially in the absence of clear evidence that the parties intended that phrase to include attorney fees.

III. NATURE OF THE ACTION, RELIEF SOUGHT AT TRIAL AND NATURE OF THE JUDGMENT.

This is an action seeking damages for breach of contract for the sale of goods, which is governed in large part by the Uniform Commercial Code. The trial court entered a general judgment in favor of plaintiff in the principal amount of $240,400.00 Canadian, based on a "resale" measure of damages. Defendant does not assign error to the trial court's finding that defendant

breached its contracts with plaintiff, and has paid the judgment that was entered against it.[1] Plaintiff appealed in pursuit of a larger award of damages.

IV. CONCISE STATEMENT OF MATERIAL FACTS.

The Opinion of the Court of Appeals adequately states the facts pertinent to this case. For the convenience of the court, a brief summary follows.

Plaintiff Peace River Seed Co-operative, Ltd. is a Canadian corporation and Defendant Proseeds Marketing, Inc. is an Oregon corporation. ER-1 (Third Am. Compl ¶ 1); ER-3 (Second Am. Answer ¶ 1). In 1999 and early 2000, plaintiff and defendant entered into a number of contracts through which defendant was to purchase large quantities of grass seed from plaintiff. ER-21-22 (2/5/09 Opinion Letter); ER-16 (Tr. Ex 3) (example of contract). Such contracts were for "total production" from a set number of acres, with a stated poundage estimate. ER-21-22 (2/5/09 Opinion Letter); ER-16 (Tr. Ex 3) (example of contract).

In order to fulfill its obligations under the contracts, plaintiff contracted with various growers for their grass seed production. SSER-10-13 (Excerpts of

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[1] Defendant has confessed error in the trial court's application of the exchange rate to calculate the amount of damages reflected in the general judgment, which will result in the payment of additional damages by plaintiff.

Perpetuation Depo. of Ernie Kobbert).[2] Plaintiff understood that the seed had to come from those specific fields and growers. SSER-4-6 (Excerpts of Perpetuation Depo. of Brian Wilson). The seed from each field could be identified because it was stored in a specific numbered bin upon delivery to plaintiffs' facility. SSER-7-25 (Excerpts of Perpetuation Depos. of Brian Wilson, Ernie Kobbert, David Wuthrich, and Gordon Hill).

As the time for delivery of the seed approached, a number of issues arose between the parties. Defendant ultimately refused to provide shipping instructions, plaintiff canceled the contract, and the parties proceeded to litigation. ER-22-23 (2/5/09 Opinion Letter).

The contracts between the parties do not mention attorney fees specifically. Plaintiff asserts an entitlement to recover attorney fees under "NORAMSEED rules" that were incorporated into the parties' contracts. ER-37 (8/28/09 Opinion Letter). NORAMSEED Rule XIV, relating to payment for seed, provides in relevant part as follows:

> "[T]he charges for collection of payment shall be for the Seller's account unless the Buyer does not pay in

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[2] Defendant has selected a few documents from the trial court file that are important to understanding the factual background of this case and the arguments advanced on appeal. Those documents are compiled in the Second Supplemental Excerpt of Record ("SSER").

> full and immediately when due, in which case they will be for the Buyer's account."

ER-15 (Tr. Ex 1).

The rule provides further that, if the buyer does not pay within three working days of the due date, "he shall pay the charges for collection" as well as interest. ER-15 (Tr. Ex 1). The NORAMSEED rules do not define the term, "charges for collection." *See* ER-16 (Tr. Ex 3); SER-1-10 (NORAMSEED rules).

V. SUMMARY OF ARGUMENT.

Consistent with the common law of contracts, "[t]he 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 * * *." ORS 71.3050(1) (formerly ORS 71.1060(1)). An aggrieved party to a contract also has a duty to mitigate its damages. Taking those two rules together and applying them to the facts of this case, plaintiff may not recover damages that exceed the difference between the amount plaintiff received upon a resale of the seed and the amount it would have received under the contracts, plus any expenses incurred by plaintiff in storing and reselling the seed. The trial court correctly applied the applicable legal principles to that effect, but the Court of Appeals erroneously held that plaintiff could recover a greater amount of damages under ORS 72.7080.

The Court of Appeals also erred in concluding that fact finding is necessary to determine whether the parties intended to provide the prevailing party with a contractual right to recover attorney fees, where the contracts provide that "charges of collection" will be "for the Buyer's account." There is no common law right to recover attorney fees, and any exceptions to that rule are narrowly construed. To recover attorney fees pursuant to contract, the right must be expressly authorized by the contract. In this case, the context of the agreements demonstrates that the parties did not intend to provide a right to recover attorney fees. Furthermore, it should follow from the presumption against the right to recover attorney fees, coupled with the requirement that any right be "expressly" stated, that an ambiguous contract terms is insufficient to create a right to recover attorney fees.

Should the court nevertheless determine that it is necessary to resolve an ambiguity in the parties' contracts, it will find no clear evidence in the record demonstrating that the parties understood "charges for collection" to include attorney fees. In those circumstances, the legal presumption against the right to recover attorney fees again should lead to the conclusion that they are not available in this case. The Court of Appeals mistakenly decided that the matter of attorney fees should be remanded to the trial court for consideration of the parties' intent.

VI. ARGUMENT.

This case presents two distinct issues for review, one involving the measure of damages in contract disputes governed by Article 2 of the UCC, and one involving the right — or lack of a right — to recover one's attorney fees in litigation. The trial court correctly decided both issues, albeit for the wrong reason with respect to attorney fees. As explained below, the Court of Appeals' decision to reverse the judgment and remand the case for further proceedings is contrary to two fundamental principles of law: (1) contract damages are to be calculated in a way that puts the non-breaching party in as good a position as if the breaching party had performed, but no better; and (2) a prevailing party is not entitled to recover its attorney fees from the non-prevailing party in the absence of an express statutory or contractual right to such a recovery, with such exceptions to be narrowly construed.

A. The trial court properly limited plaintiff's damages to the difference between the net proceeds of the resale and the amount plaintiff would have received under the contracts.

After defendant breached its contractual obligation to accept delivery and pay for seed, plaintiff sold the seed in question to other buyers at prices that were lower than the price provided in the contract between plaintiff and defendant. ER-3 (Third Am. Compl. ¶ 10). Plaintiff also incurred additional expenses to store and resell the seed. ER-13 (Transcript of hearing). The trial

court awarded damages that compensated plaintiff for the difference between what it was entitled to receive from defendant under the contracts and what it was able to recover from other buyers for the same seed, plus the incidental costs of storage and resale. ER-26 (2/5/09 Opinion Letter).

Plaintiff argues that it has the right under ORS 72.7080 to recover more than what the trial court awarded. That statute provides an alternative measure of damages generally based on the difference between the market price of the goods at the time and place for tender and the unpaid contract price. Plaintiff's position has superficial appeal, in that ORS 72.7030 identifies the recovery of damages under ORS 72.7080 as one of the remedies an aggrieved seller "may" pursue in the event of a buyer's breach. When one construes the statutes in the context of the entire UCC and applicable common law, however, it becomes evident that plaintiff is not entitled to recover windfall damages under a formula that would generate a greater award of damages than necessary to put plaintiff in the position it would have been had defendant fully performed the contract.

1. The purpose of contract remedies, particularly those provided under the UCC, is to put the non-breaching party in as good a position as if the other party had fully performed.

Before returning to the specific facts of this case, it is instructive to consider the general purpose of contract remedies as expressed in the common law and the Uniform Commercial Code. This court holds that "[t]he purpose of

the remedy of damages for a breach of contract claim is to compensate the plaintiff for the loss incurred as a result of the defendant's breach." *Zehr v. Haugen*, 318 Or 647, 658, 871 P2d 1006 (1994). Compensation "may be accomplished by placing the aggrieved party in the position that he or she would have occupied had the contract been fully performed, that is, by compensating the party according to his or her 'expectation interest.'" *Id*. (citing *Nelson Equip. Co. v. Harner*, 191 Or 359, 369, 230 P2d 188 (1951) (in an action for breach of contract, the law attempts, by means of a judgment for money, to place the party injured by the breach in the position that the party would have occupied if the other party had performed)).

The *Restatement* similarly emphasizes protection of the parties' expectation interests:

> "Subject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by
>
> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
>
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
>
> (c) any cost or other loss that he has avoided by not having to perform."

Restatement (Second) of Contracts § 347 (1981). The Restatement commentary further provides:

> "Ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract. It does this by attempting to put him in as good a position as he would have been in had the contract been performed, that is, had there been no breach. The interest protected in this way is called the 'expectation interest.'"

Restatement at § 344 comment a (1981).

Compensation placing the aggrieved party in the position it would have occupied in the absence of a breach is not only a *measurement* of damages, it is a *limitation* on damages. *See Timberline Equipment Co., Inc. v. St. Paul Fire and Marine Ins. Co.*, 281 Or 639, 646, 576 P2d 1244 (1978) ("When a contract is breached the injured party is entitled to receive what he would have if there had been no breach; he is not entitled to receive more.").

This case is governed by Article 2 of the Uniform Commercial Code, relating to the sale of goods. When interpreting a statute, Oregon courts generally examine the statutory text in context and in light of any pertinent legislative history offered by the parties. *State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610–11, 859 P2d 1143 (1993). Comments to the UCC "are actually statements

of the purpose of each section" and "[t]he legislative intent behind the UCC can therefore be derived from the language of the statute itself and the language of the comments." *Security Bank v. Chiapuzio*, 304 Or 438, 445 n 6, 747 P2d 335 (1987). Because the UCC is a uniform law, case law from other states and discussions by scholars in the field are also relevant. *Id*.

If the purpose of remedies under the UCC was different from the common law purpose of contract remedies, the UCC would control. ORS 71.1030(2) ("Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity * * * supplement its provisions."). But that is not the case. The UCC's approach to remedies is entirely consistent with Oregon common law:

> "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 consequential damages, special damages or penal damages may not be had except as specifically provided in the Uniform Commercial Code or by other rule of law."

ORS 71.3050(1). Under the UCC, as under Oregon common law, placing the aggrieved party in the position it would have occupied in the absence of a breach is both a measurement of, and a limitation on, damages. UCC § 1-305 comment 1 ("[C]ompensatory damages are limited to compensation. They do

not include consequential or special damages, or penal damages, and the Act elsewhere makes it clear that damages must be minimized.").

The obligation to mitigate one's damages bolsters the UCC's emphasis on limiting damages to that which is necessary to put the aggrieved party in as good a position as if the other party had fully performed. The duty to mitigate applies to disputes governed by the UCC because, as noted above, "principles of law and equity" supplement the UCC "unless displaced by the particular provisions of the [UCC]." ORS 71.1030(2); *see also* Lary Lawrence, *Anderson on the Uniform Commercial Code* §1-106:18 (2012 update) ("The duty of an aggrieved party to mitigate damages continues under the UCC."). To comply with the duty to mitigate damages, an injured party is "required to do what reasonable care and business prudence would dictate in order to minimize his loss." *Schafer v. Sunset Packing Co.*, 256 Or 539, 542, 474 P2d 529 (1970).

Encouraging parties to avoid damages is the primary policy rationale for the duty to mitigate. By design, fulfilling the duty to mitigate accrues to the benefit of a breaching party in the form of reduced damages. *See Restatement* at § 350 comment a (explaining the rationale behind the duty to mitigate is to encourage the injured party to attempt to avoid loss); Michael B. Kelly, *Living Without the Avoidable Consequences Doctrine in Contract Remedies*, 33 San Diego L Rev 175, 178 (1996) (explaining that the duty to mitigate prevents the

overcompensation of a plaintiff who fails to take reasonable steps to avoid his or her losses). Courts also have recognized that the duty to mitigate is rooted in and limited by the implied contractual duty of good faith, reasonable cooperation, and fair dealing. *See, e.g., Summers & Lewis v. Sanderson*, 7 Tenn App 624, 1928 WL 2060 (1928) (citing plaintiff's mitigation duty as related to rules of "common sense and fair dealing").

Considering the text of the UCC and its official commentary, supplemented by the duty to mitigate, it should be understood that "liberally administer[ing]" the remedies under the UCC involves striking a balance between the goals of protecting an aggrieved party's expectation interests and minimizing the damages that are imposed on the breaching party. The UCC's purposes and policies do not include the punishment of breaching parties or maximizing recoveries for aggrieved parties. *See* ORS 71.1030(1).[3]

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[3] ORS 71.1030 provides as follows:

> "**Construction to promote purposes and policies; applicability of supplemental principles of law.** (1) The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies, which are:
>
> "(a) To simplify, clarify and modernize the law governing commercial transactions;

2. The remedy ordered by the trial court put plaintiff in as good a position as if defendant had fully performed.

Plaintiff's pleadings emphasized the fact that it had resold the goods under contract and thereby complied with its duty to mitigate. ER-3 (Third Am. Compl. ¶ 10) ("Peace River reasonably mitigated its damages by selling much of the undelivered seed to others at the then current market prices."). Consistent with that pleading, plaintiff sought damages measured by "the difference between the relevant contract prices and the amount it was able to sell the relevant seeds for, plus prejudgment interest * * *." SSER-1 (Compl. ¶ 6); SSER-2 (First Am. Compl. ¶ 4).[4] Thus, for almost all the time this case was

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> "(b) To permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and
>
> "(c) To make uniform the law among the various jurisdictions.
>
> "(2) Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy and other validating or invalidating cause, supplement its provisions."

[4] After the trial court granted defendant's motion to make more definite and certain the allegation regarding measurement of damages, plaintiff filed a Second Amended Complaint specifying the dollar amounts it alleged it was entitled to recover under each contract, without stating the formula for

pending before the trial court, plaintiff conducted this litigation consistently with the well-established legal principles described in the preceding section of this brief.

On the eve of trial, plaintiff filed a trial brief contending that ORS 72.7030 and 72.7080 allowed it to claim damages based on the difference between the contract price and the market price for the seed, without regard to resale. SSER-26-27 (Pl's Tr. Brief at 28–29). Plaintiff's argument is straightforward. ORS 72.7030 provides that, when a buyer wrongfully rejects the delivery of goods under contract,

> "the aggrieved seller may:
>
> > "(1) Withhold delivery of such goods.
> >
> > "(2) Stop delivery by any bailee as provided in ORS 72.7050.
> >
> > "(3) Proceed under ORS 72.7040 respecting goods still unidentified to the contract.
> >
> > "(4) Resell and recover damages as provided in ORS 72.7060.

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calculating those damages. Still, all of plaintiff's pleadings retained the allegation that it had mitigated its damages by resale. SSER-3 (Second Am. Compl. ¶ 8).

> "(5) Recover damages for nonacceptance as provided in ORS 72.7080 or in a proper case the price as provided in ORS 72.7090.
>
> "(6) Cancel."

Plaintiff argues that it simply chose option 5 — recover damages under ORS 72.7080 — as it was allowed to do. Under ORS 72.7080, "the measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price * * *." The Court of Appeals agreed that plaintiff could be awarded damages measured under ORS 72.7080, regardless of whether plaintiff would thereby receive more money through the combination of resale and damages than it could have expected under the contracts. *Peace River Seed Co-Op., Ltd. v. Proseeds Mktg., Inc.*, 253 Or App 704, 711-17, 293 P3d 1058, 1064 (2012), *rev allowed,* 353 Or 533 (2013).

Setting aside the statutory command that the UCC's remedies be liberally administered to put an aggrieved party in the position it would have occupied had the contract been fully performed, and without considering that plaintiff had a duty to mitigate its damages, one can understand how the Court of Appeals might adopt plaintiff's mechanical approach to the operation of ORS 72.7030 and 72.7080. The trial court, however, recognized that its task of fashioning an appropriate remedy was not as simple as plaintiff suggests.

The trial court understood that ORS 72.7080 applied and allowed plaintiff the opportunity to prove damages measured by the difference between market and contract prices. ER-26 (2/5/09 Opinion Letter). But the court also recognized that mechanically applying that measure of damages in this case, where plaintiff had recovered compensation through resale of the seed, potentially would lead to a windfall for plaintiff by allowing it to recover more than necessary to place it in the position it would have been in had defendant fully performed the contract. ER-26 (2/5/09 Opinion Letter). Therefore, the trial court capped plaintiff's recovery under ORS 72.7080 at the amount plaintiff would have recovered under ORS 72.7060: "the difference between the resale price and the contract price together with any incidental damages."

To understand the trial court's reasoning, one must first understand the "expectation interest" that plaintiff reasonably had when it entered into the contracts with defendant. Plaintiff could reasonably expect only one thing from defendant if defendant had fully performed its obligations under the contracts: full payment of the amounts promised. By reselling the seed, plaintiff recovered a portion of that amount from third parties. If defendant paid the difference in compensatory damages, plus incidental damages in the amount of additional expenses incurred by plaintiff in the resale, plus prejudgment

interest, plaintiff would be made whole. Plaintiff would have the benefit of the contracts.

Any amount recovered by plaintiff in excess of the resale/contract price differential, through ORS 72.7080 or otherwise, would constitute a windfall. In this regard, it bears noting that the market/contract price measure of damages under ORS 72.7080 ordinarily is a fallback remedy for a seller who fails to resell goods in a commercially reasonable manner. The official comment to the UCC notes that, when a seller is unable to show that goods have been resold in a commercially reasonable manner, such failure deprives the seller of the resale remedy and "relegates" it to the damages under UCC § 2-708. UCC § 2-706 comment 2. The use of the more pejorative term "relegate" implies that this remedy is a poorer substitute that, to avoid a forfeiture, is nevertheless available when a seller fails to prove that he or she has acted reasonably in conducting a resale. Lawrence, *Anderson on the UCC* at §§ 2-703:1, 2-703:13-15; William D. Hawkland & Linda J. Rusch, *Uniform Commercial Code Series* §2-706:2 (2013 update) (APP-4-6); *see also Tesoro Petroleum Corp. v. Holborn Oil Co. Ltd.*, 547 NYS2d 1012, 1016, 145 Misc2d 715, 720 (S Ct NY County 1989) (reasoning that the use of the term "relegates" implies that contract-market recoveries under section 2-708 would be less than the contract-resale differential authorized in section 2-706).

This issue has not escaped the notice of scholars. White and Summers pose the question of whether a "greedy seller" might seek a windfall under UCC section 2-708 when a good had been resold and the recovery under section 2-708 would exceed that under UCC section 2-706. James White, Robert Summers & Robert Hillman, *Uniform Commercial Code* § 8:13 (6th ed.). APP-11-17. The authors pose an example of a good with a contract price of $6,000 that was resold for $4,000, but the market price was $3,000. *Id.* After some discussion of the UCC and the commentary, and noting contrary authority, they conclude that "a seller who has resold at the time of trial should not be permitted to recover more under 2-708(1) than he could recover under 2-706." *Id.* Anderson's UCC treatise similarly notes that a seller barred from recovery under Section 2-706 may recover under Section 2-708, but not if he is made whole under Section 2-706. Lawrence*, Anderson on the UCC* at §§ 2-706:6-7 ("[T]he seller is only entitled to his actual damages. To the extent that the seller is made whole under UCC § 2-706, the seller may not also recover under UCC § 2-708."). APP-8-9. Lawrence specifically points out that a seller of grain who did not resell in good faith under Section 2-706 may recover under Section 2-708, but cannot recover more than if it had complied with Section 2-706. *Id.* at § 2-706:36. APP-10. Indeed, it would be inappropriate, in the face of a resale, to consider an alternative "market price," since the resale would

conclusively establish such figure. Hawkland & Rusch, *UCC Series* at § 2-708:1. APP-21.

The commentators recognize one exception to the rule that a seller may not use the market/contract measure of damages to receive more than would be recovered under the resale/contract measure of damages: the "lost volume seller." *See, e.g.,* White, Summers & Hillman, *UCC* at § 8:13. APP-11-17. A lost volume seller is generally recognized as one "whose ability to supply its goods exceeds the demand and who, if one buyer breaches, will have permanently lost a sale in its total market." *Trienco, Inc. v. Applied Theory, Inc.*, 102 Or App 362, 365, 794 P2d 1239 (1990). As discussed in defendant's Answering Brief in the Court of Appeals at pages 23-24, plaintiff did not argue or prove in the trial court that it was a lost volume seller, although the concept was mentioned in post-trial briefing. Instead, plaintiff argued that defendant had the burden of proving that plaintiff was *not* a lost volume seller. The Court of Appeals did not address plaintiff's argument on appeal regarding lost volume sellers. *Peace River Seed Co-Op., Ltd.*, 253 Or App at 712 n 5. Should plaintiff continue to press this issue, defendant relies on its argument at pages 30-36 of its Answering Brief in the Court of Appeals. There, defendant explains why it did not have the burden to prove the negative as to whether plaintiff was a lost volume seller, and why the evidence in the record was

sufficient for the trial court to rule as it did. *See also Kulm v. Coast-to-Coast Stores Cent. Org., Inc*., 248 Or 436, 441–42, 432 P2d 1006 (1967) (recognizing that plaintiff bears the burden of proving damages for breach of contract).

Pertinent, but not controlling, Oregon authority takes an approach consistent with the commentators. In *Coast Trading v. Cudahy Co.,* 592 F2d 1074 (9th Cir 1979), cited to but not by the Court of Appeals, the court applied Oregon law when dealing with a case factually similar to this one. *Cudahy* involved a sale of barley, a fungible commodity, and the anticipatory breach by the buyer. *Id.* at 1076. The plaintiff claimed damages under UCC section 2-706 based upon reasonable resale. *Id.* at 1080. However, it did not prove that all such resales were conducted in a commercially reasonable manner and with proper notice. *Id.* at 1080–81. The defendant thus argued that plaintiff could not recover for the grain which had been improperly resold. *Id.* The court did find that some resales were not properly conducted and that the plaintiff could not recover under section 706. *Id.* at 1081. It concluded that a remedy under section 2-708 was available, but, relying on the official comments, and the White and Summers treatise, concluded that the recovery under section 2-708 could not exceed what could have been recovered under section 2-706. *Id.* at 1081–83. To allow such recovery would result in a windfall to the plaintiff, which the court found was not a "volume seller." *Id.* at 1081.

The cases cited by the Court of Appeals do not clearly reflect its perceived split of authority on this topic. *Tesoro Petroleum Corporation v. Holborn Oil Company Limited* was consistent with *Cudahy,* and denied a seller of oil from obtaining windfall profits by claiming contract/market damages under section 2-708 when they exceeded actual losses when the product was resold. 547 NYS2d 1012.

B & R Textile Corp. v. Rothman Industries Ltd. was a case in which the trial court was affirmed when it found that the price obtained at resale was the best indicator of market price. 420 NYS2d 609, 101 Misc2d 98, *aff'd* 1979 WL 30097 (NY Sup App Ct 1979). Thus, although the case does have language to the effect that the aggrieved seller could elect between section 2-706 damages and section 2-708 damages, and that the election to resell did not prevent it from measuring damages under section 2-708, such reasoning is not dispositive, because the court found that the resale and market values were the same. *Id.* at 610. The case does not stand for the proposition that a seller may recover contract/market damages when they exceed those resulting from resale.

Finally, *Roye Realty & Development, Inc. v. Arkla, Inc.* involved a very particularized "take-or-pay gas purchase contract" utilized in oil and gas producing states. 863 P2d 1150, 1153–54 (Ok 1993). The issue in that case was what alternative measure of damages set forth in the contract should be

utilized, not whether the seller could claim contract/market damages exceeding those arising from resale. *Id.* at 1153. The court's observation, that the comment to section 2-708 "notes that the UCC does not require the seller to resell upon repudiation by the buyer, but if the seller elects to resell, damages are measured by § 2-708," is dicta. *Id.* at 1154. It also appears to be wrong. The comment to UCC section 2-708 has no such language.[5]

Thus, neither the parties nor the Court of Appeals identified a single persuasive precedent that sustained an award of damages based on the contract/market differential when such damages exceeded those actually suffered on resale, unless the seller is a "lost volume seller."

The source of the Court of Appeals' error might be found in the concluding paragraph of its analysis. There, the court recites the fact that plaintiff was left with substantial quantities of grass seed following defendant's breach of the contracts, and took it upon itself to resell the seed. *Peace River Seed Co-Op., Ltd.*, 253 Or App at 717.[6] The court found those facts to be

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[5] *See* UCC at § 2-708.

[6] The Court of Appeals adds a caveat that "there is no indication that, in conducting those resales, Peace River particularly identified those sales as referring to the broken contracts with Proseeds." *Peace River Seed Co-Op., Ltd.*, 253 Or App at 717. That is not entirely correct; plaintiff alleged that it mitigated its damages by selling the undelivered seed. ER-3 (Third Am.

"especially persuasive" in support of its view that plaintiff could recover whichever measure of damages it chose, concluding: "We are unpersuaded that [Defendant] Proseeds should be entitled to the benefit of [Plaintiff] Peace River's efforts, over several years, to find purchasers for the substantial quantities of grass seed with which it was left following the breach." *Id.* The Court of Appeals' apparent concern about plaintiff's hardship appears to have obscured the fact that plaintiff did nothing more than what it was legally required to do: mitigate its damages. By reasoning that plaintiff's resale of the seed supported its decision to allow plaintiff to recover more damages rather than less, the Court of Appeals got it exactly backwards. If Oregon law is to continue to recognize the legal duty to mitigate damages, then the act of mitigating damages must, by definition, have consequences that accrue to the benefit of the breaching party.

As the Court of Appeals observed, Article 2 of the UCC "rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach." UCC § 2-703 comment 1. But it remains true that whether a particular remedy is available to an aggrieved seller depends on the

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Compl. ¶ 10). It is undisputed that plaintiff resold the same seed that it was prepared to deliver to Proseeds under their contracts.

circumstances of the particular case. *Id*. The UCC rejects the idea that an aggrieved party is entitled to windfalls and that breaching parties may be punished for their actions beyond what is necessary to compensate the non-breaching party. UCC § 1-305 comment 1. The duty to mitigate bolsters those principles, emphasizing the point that damages should be minimized, not maximized. The trial court correctly concluded that a measure of damages that would allow plaintiff in this case to recover more than the difference between the contract price and what it recovered in resales, plus the incidental costs of storage and resale and prejudgment interest, would overcompensate plaintiff in contravention of Oregon law. This court should reverse the Court of Appeals and affirm the trial court's judgment.

B. A contractual right to recover the "charges of collection," without more, cannot be construed to include a right to recover attorney fees.

The Court of Appeals correctly determined that the trial court used faulty analysis when it determined that plaintiff had no contractual right to recover its attorney fees. The trial court reasoned that any ambiguities in construing the operative phrase, "charges of collection," should be resolved against plaintiff because it wrote the contracts. In fact, plaintiff did not write the contracts.

Although the trial court's analysis was erroneous, it is not necessary to remand this issue to the trial court for fact-finding. The text and context of the

pertinent contract terms demonstrate that it does not include attorney fees. And if the relevant contract terms arguably are ambiguous, it cannot be held that they "expressly authorize" the recovery of fees.

If this court were to delve into the traditional method of resolving ambiguities, it will learn that the record is devoid of clear evidence that the parties intended their contracts to allow for the recovery of attorney fees. Applying the presumption against the right to recover such fees, it would be appropriate for this court to affirm the trial court's judgment, albeit for a different reason.

1. Oregon law presumes that a party does not have a right to recover its attorney fees from the opposing party, and exceptions are narrowly construed.

Under Oregon law, there is no common law right to recover attorney's fees from an adversary in litigation. *Cash Flow Investors, Inc. v. Union Oil Co. of California*, 318 Or 88, 91, 862 P2d 501 (1993). Any right to attorney fees must arise by virtue of a statute or contract "expressly authorizing the allowance of attorney's fees," and any exceptions to the general rule are narrowly construed. *Id*. Oregon law rejects the "English rule" of "loser pays" attorney fees that is followed in Canada and which plaintiff asserted was the governing law of these contracts. Defendant concurs with and adopts the

reasoning of the Court of Appeals' decision that Oregon law governs. *Peace River Seed Co-Op., Ltd.*, 253 Or App at 721–23.

2. A contractual term allowing the recovery of "charges of collection" is not an express authorization for the recovery of attorney fees sufficient to defeat the presumption against the recovery of such fees.

The contract provision to be construed is found in NORAMSEED rules that were incorporated into the contracts between the parties. SER-1-10 (NORAMSEED rules). NORAMSEED Rule XIV, relating to payment for seed, provides in relevant part as follows:

> "[T]he charges for collection of payment shall be for the Seller's account unless the Buyer does not pay in full and immediately when due, in which case they will be for the Buyer's account."

ER-15 (Tr. Ex 1); *see also* SER-1-10 (complete NORAMSEED rules). The same term, "charges for collection," is found in other parts of the rules. The NORAMSEED rules do not define the term, and the Court of Appeals found the term to be ambiguous. *Peace River Seed Co-Op., Ltd.*, 253 Or App at 724.

Before engaging in the typical analysis for construing contracts, the court should first consider whether the contractual terms in question can possibly meet the requirement that a right to recover attorney fees be "expressly authorized." The court should hold that a right to recover attorney fees - something disfavored by law, requires something more than an ambiguous

contract term in order to be expressly authorized. *See Kenner v. Watha*, 115 Mich App 521, 529-30, 323 NW2d 8, 12 (1982) ("An express authorization [of entitlement to attorney fees] is one that is clear and definite, that is, set forth explicitly in words that are neither dubious nor ambiguous."). That result is especially compelling in the circumstances of this case, where, as described below, the record contains no evidence indicating that the party against whom the claim is asserted intended the term to include a right to recover attorney fees.

If the court follows its normal process for construing contracts, the result would be no different. This court established a three-step process for construing contracts in in *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997). First, the court examines the text of the disputed term, in the context of the contract as a whole. If the provision is clear, the analysis ends. *Yogman*, 325 Or at 361. If a provision is ambiguous, in that it can be given more than one meaning in context, the trier of fact will "ascertain the intent of the parties and construe the contract term consistent with the intent of the parties." *Id*. at 363-364 (internal quotation marks omitted). The trial court may receive and consider extrinsic evidence of the parties' intent at that step. *Id*. "If the meaning of a contractual provision remains ambiguous after the first two steps

have been followed, the court relies on appropriate maxims of construction." *Id*. at 364.

As noted above, the Court of Appeals found the operative term, "charges for collection," to be capable of multiple meanings. *Peace River Seed Co-Op., Ltd.*, 253 Or App at 724. According to the court, "charges" could mean anything from the administrative costs of billing to all costs of subsequent litigation. *Id*. Defendant respectfully disagrees that the term, in context, can be subject to such widely varying interpretations. The contract term begins with the provision that the "charges for collection of payment shall be for the Seller's account unless the Buyer does not pay * * *." ER-15 (Tr. Ex 1). In other words, Seller bears the charges of collection if the parties perform the contract. No dispute, let alone litigation, is contemplated in that clause, which indicates that the referenced "charges" refer to the administrative costs of billing. The second clause of the contract term shifts those same charges to the Buyer in the event of a breach ("in which case they will be for the Buyer's account"). The same phrase in the same sentence cannot reasonably be construed to mean two different things. In context, "charges of collection" must mean the administrative costs of billing.

Perhaps more fundamentally, the question of whether a contractual term can be construed as providing for the recovery of attorney fees by a prevailing party is colored by the general state policy against such recoveries. When interpreting statutes, "it is generally held in [cases dealing with recovery of attorneys' fees from an adverse party] that the terms 'costs' or 'expenses,' * * * do not include attorneys' fees." *Gleason v. Thornton*, 210 Or 666, 674, 313 P2d 776 (1957) (citing *Garrett v. Hunt*, 117 Or 673, 676, 244 P 82, 245 P 321 (1926)). Likewise, Oregon's court rules distinguish attorney fees from costs and disbursements. ORCP 68A. In the context of the contract and applicable law, "charges for collection" do not include attorney fees.

Should this court nevertheless conclude that "charges of collection" can possibly be construed to include attorney fees, it would be appropriate to consider the extrinsic evidence that was offered to prove the parties' intent — if any exists. The Court of Appeals decided that the case should be remanded to the trial court to conduct that inquiry, which ordinarily would be appropriate. *See Hammond v. Hammond*, 246 Or App 775, 783, 268 P3d 691 (2011) ("Determining the meaning of * * * extrinsic evidence is * * * a factual inquiry to be performed by the factfinder in the first instance.").

In this case, however, there is no extrinsic evidence in the record that sheds light on the parties' intent. The Court of Appeals found two pieces of evidence it believed would relate to the parties' intent:

> "Peace River 'urge[d the trial court] that the "tradition"' in the industry treated the NORAMSEED rules as entitling the prevailing party to attorney fees. Furthermore, there was testimony from the manager for Peace River that expenses, including legal fees, were 'just the cost of collection' and that it was customary to be able to recover those expenses after litigation."

Peace River Seed Co-Op., Ltd., 253 Or App at 725. The cited testimony was insufficient to establish that the parties in this case intended "charges for collection" to include attorney fees. Plaintiff is a Canadian company and contended that this dispute was governed by Alberta law, which allows the prevailing party in litigation to collect its attorney fees from the loser. It is accustomed to those legal rules. And while plaintiff might have had its own subjective expectations of what its rights might be, the undisclosed thoughts or opinions of one party reveal nothing about the meaning of a contractual term. "The law of contracts is not concerned with the parties' undisclosed intents and ideas. It gives heed only to their communications and overt acts." *Kitzke v. Turnidge*, 209 Or 563, 572–73, 307 P2d 522 (1957).

With no evidence that the parties intended "charges of collection" to include attorney fees, the analysis should return to the legal presumption against the recovery of attorney fees as, in a sense, a maxim of construction. Just as a statute providing for the recovery of costs is not construed as providing for the recovery of attorney fees, *Gleason*, *supra*, nor should a contract providing for the recovery of "charges" be construed as providing for the recovery of attorney fees.

The trial court's analysis of the attorney fee question was appropriately found lacking by the Court of Appeals. Still, the trial court's ultimate conclusion was correct. In no circumstances could the court conclude that the parties had contractually bound themselves to pay the attorney fees of a prevailing party in litigation between them. That decision should be affirmed.

VII. CONCLUSION.

The remedies provided under the UCC are not to be applied mechanically. Courts are bound by statute to administer its remedies liberally to ensure that a party receives what it was entitled to receive under its contract, but nothing more. The trial court complied with that mandate by limiting plaintiff's damages to the amount that would make up the difference between what plaintiff was entitled to receive under the contracts and what plaintiff had recovered through resale in mitigation of its damages.

Although its analysis was lacking, the trial court also was correct when it determined that plaintiff had no contractual right to recover its attorney fees from defendant. In context, "charges for collection" do not include attorney fees. No extrinsic evidence in the record would support a different conclusion, even if it were appropriate to conduct factfinding to resolve a perceived ambiguity.

The decision of the Court of Appeals should be reversed and the trial court's judgment should be affirmed.

Respectfully submitted this 6th day of June, 2013.

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(D)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b), and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7,660 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING AND SERVICE

I certify that on June 6, 2013, I caused to be electronically filed the foregoing **BRIEF ON THE MERITS OF PETITIONER ON REVIEW** with the Appellate Court Administrator by using the eFiling system.

I further certify that on said date I served two true and correct copies of said document on the party or parties listed below, via first class mail, postage prepaid, at Portland, Oregon, and addressed as follows:

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