AN ORAL AGREEMENT TO SELL GOODS IS ENFORCEABLE UNDER AN EXCEPTION IN U.C.C. § 2.201'S STATUTE OF FRAUDS WHEN THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT ADMITS IN PLEADING, TESTIMONY OR OTHERWISE IN COURT THAT A CONTRACT FOR SALE WAS MADE. AN AGGRIEVED BUYER LEARNS OF THE BREACH A COMMERCIALLY REASONABLE TIME AFTER LEARNING OF THE SELLER'S ANTICIPATORY REPUDIATION.

By Andrew Lang McKinnon*

Turner v. NJN Cotton Co., 485 S.W.3d 513 (Tex. App.—Eastland 2015, pet. denied).

In *Turner v. NJN Cotton Co.*, the Eastland Court of Appeals (the Court) affirmed the Dawson County District Court's (the Trial Court) judgment on a jury verdict for the buyer and against a producer of cotton for the crop year 2010.[1] Specifically, the Court held that the producer, Larry Turner (Turner), was contractually obligated under an oral forward contract to sell his 2010 cotton crop to the buyer, NJN Cotton Company (NJN).[2]

I. BACKGROUND

Buyers and producers of cotton typically implement two methods to transact the sale of cotton: "forward contracts" and "sales by bid after harvest."[3] Under a sale by forward contract, the producer and buyer agree to the sale and purchase of cotton before it is harvested.[4] The producer informs the buyer the number of acres available and the number of bales of cotton expected to be produced.[5] After entering an agreement with a producer, the buyer may enter into subsequent forward contracts with cotton shippers for future delivery.[6] Alternatively, if no forward contract is executed, the producer will send the harvested cotton to a cotton gin, and the gin will find buyers for it by sending information to potential bidders.[7]

Turner was a cotton producer in Dawson County who regularly contracted with NJN through its owner and operator, Judy Seely (Seely).[8] This business relationship spanned over a number of years, and each year, Turner and NJN orally agreed to the purchase and sale of Turner's cotton after harvest.[9] There had been one season where Turner and NJN executed a forward contract, and on that occasion they signed a written contract.[10] In April 2010, Turner

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1 Turner v. NJN Cotton Co., 485 S.W.3d 513, 517 (Tex. App.—Eastland 2015, pet. denied).

2 *Id.* at 519–21.

3 *Id.* at 517.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.* at 517.

9 *Id.* at 517–18.

10 *Id.* at 518.

contacted Seely to discuss contracting for the sale of his cotton.[11] In this conversation, Turner stated that he would contract the cotton to Seely if the cotton contract price rose to 1400 points over the government loan price per bale.[12] When the price rose to over 1400, Seely and Turner orally agreed for the purchase price of 1400 for Seely's forward purchase of Turner's cotton.[13] Notably, Turner testified that he understood the effect of the conversation to mean that at the end of the ginning season, Seely "would pay him money and he would deliver the cotton to her."[14] On April 12 after this conversation, Seely filled out a purchase contract form for her records.[15] Although Seely expected Turner to sign her contract, Turner neither requested nor expressed concern for a written contract.[16]

In October 2010, Seely sent Sparenberg Gin a list of producers with whom NJN had entered into sale contracts.[17] In November 2010, Sparenberg Gin informed Turner that he was on NJN's list of producers supplying cotton.[18] Suspecting he could get a better purchase price for his cotton, Turner obtained a copy of the contract from Seely so that his attorney could examine it.[19] Turner's attorney sent Seely a letter on November 16, 2010 notifying her that Turner would not be selling his cotton to NJN.[20] Seely, however, had already entered into a forward contract with a cotton shipper, Allenberg, partially in reliance on NJN's agreement with Turner.[21] The Allenberg contract called for NJN to deliver 7,500 bales of cotton, including 896 bales Seely thought she bought from Turner.[22] Consequentially, Turner's repudiation of his agreement with NJN partially caused NJN's inability to deliver 1,935 bales to Allenberg.[23] Thereafter, NJN brought suit against Turner alleging breach of contract.[24]

The jury at trial found that:

> Turner failed to comply with the agreement; Turner admitted in his testimony that he contracted with NJN for the sale of his 2010 cotton crop; Turner received confirmation of the contract and had reason to know the contents of it; and Turner did not give written notice of his objections to the contents of the confirmation within ten days after he received it.[25]

Accordingly, the Trial Court entered a judgment in favor of NJN in accordance with the

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[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id*. at 518–19.
[22] *Id*. at 519.
[23] *Id*.
[24] *Id*.
[25] *Id*. at 517.

jury verdict.[26]

II. TEXAS COURT OF APPEALS ANALYSIS

a. An informal agreement may create present and binding obligations.

On appeal, the Court first considered whether there was legally sufficient evidence to support the jury's finding that Turner admitted he and NJN made a contract for the sale of his 2010 cotton to NJN.[27] If so, that would prove an exception to the Texas U.C.C. statute of frauds[28] and avoid its prohibition.[29] The Court noted Seely's testimony that Turner had agreed to sell her his 2010 cotton crop for 1400 over the government loan price, Turner's deposition testimony that he agreed to sell his 2010 cotton crop to Seely for 1400 over the loan price, and testimony by Sammy Stevens that Turner said he had sold his crop to Seely, and the Court found this legally sufficient to remove the contract from the statute of frauds.[30]

Next the Court considered whether there was sufficient evidence that an enforceable contract existed.[31] Examining the elements of a valid contract the Court found there was legally sufficient evidence that an enforceable oral contract existed between Turner and NJN, noting that an oral contract exists when there is: (1) an offer; (2) acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; and (4) each party's consent to the terms.[32] The Court indicated it objectively considers circumstantial evidence, including "communications between the parties and the acts and circumstances that surround those communications," to determine whether there was a "meeting of the minds, therefore, an offer and acceptance."[33] The Court noted that the parties' intentions to subsequently reduce an informal agreement to writing does not prevent present [and] binding obligations.[34]

Accordingly, based on the testimony cited above the Court held there was legally sufficient evidence that there was an enforceable oral contract between Turner and NJN, stating:

> There was evidence from which both the jury and the trial court could find that there had been an offer, an acceptance in strict compliance with the terms of the offer, a

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[26] *Id*. at 519.

[27] *Id*.

[28] *Id.* at 519. TEX. BUS. & COM. CODE ANN. § 2. 201(c) (West 2009) read:

> A contract which does not satisfy the requirements of Subsection (a) but which is valid in other respects is enforceable . . . (2) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted.

[29] *Turner*, 485 S.W.3d at 520.

[30] *Id.*

[31] *Id.* at 521.

[32] *Id.*

[33] *Id.* (quoting Palestine Water Well Servs., Inc. v. Vance Sand & Rock, Inc., 188 S.W.3d 321, 325 (Tex. App.—Tyler 2006, no pet.)).

[34] *Turner*, 485 S.W.3d at 521 (citing Principal Life Ins. Co. v. Revalen Dev. LLC, 358 S.W.3d 451, 455 (Tex. App.—Dallas 2012, pet denied)).

meeting of the minds, and consent of each party to the essential terms of the agreement and that those terms constituted a contract between Turner and NJN. We hold that, on the record before us, the trial court did not err when it entered its judgment enforcing the oral contract between Turner and NJN.[35]

b. Award of damages under U.C.C. § 2.713 for non-delivery of the goods was a permitted remedy, and there was no duty to mitigate by making a covering contract.

Next, the Court considered whether NJN properly pleaded damages under the Texas Business & Commerce Code.[36] The Court found that Texas Business & Commerce Code (UCC) provides an aggrieved buyer alternative remedies when a seller fails to deliver goods.[37] Explicitly, a buyer may choose to "cover and collect damages," or "recover damages for non-delivery."[38] Notably, "a buyer is *always* free to choose between 'cover' and 'damages for non-delivery.'"[39] In this case, NJN sought damages for non-delivery,[40] thus NJN had no duty to mitigate by making a covering contract.[41]

c. An aggrieved party "learns of the breach" a commercially reasonable time after notification of an anticipatory breach.

The Court indicated that Section 2.713 measures damages for non-delivery as "the difference between the market price [of cotton] at the time when [NJN] learned of the breach and the contract price together with any incidental and consequential damages provided in Section 2.715, less any expenses saved as a result of the breach by the seller."[42]

On appeal, the Court considered whether the Trial Court correctly determined the date on which NJN "learned of [Turner's] breach."[43] This was essential because the date when NJN "learned of the breach" dictated the date to examine the market price of cotton.[44]

The Court examined Section 2.610 of the Texas Business and Commercial and found that during a situation of an anticipatory breach, a buyer may await performance for a commercially reasonable time before they choosing a remedy under Section 2.711.[45] This allows the breaching party an opportunity to retract the repudiation before the aggrieved party

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[35] *Turner*, 485 S.W.3d at 521.

[36] *Id*. at 523.

[37] *Id*.

[38] *Id*.; TEX. BUS. & COM. CODE, ANN. §§ 2.711, 2.713(a) (West 2009).

[39] *Id*.; *see also* UCC § 2.712(c) and cmt. 3.

[40] *Id*.

[41] *Id*.

[42] *Id*.; *see also* UCC § 2.713(a).

[43] *Turner*, 485 S.W.3d at 526–27 (noting that the Trial Court considered the market price of cotton during February of 2011 as opposed to November 2010 when Turner's attorney sent Seely notification that Turner would not sell NJN his cotton.).

[44] *Turner*, 485 S.W.3d at 527.

[45] *Id*.; *see also* UCC § 2.610.

decides on a remedy unless the aggrieved party has changed position or otherwise indicated the repudiation to be final.[46] The Court reasoned that if Section 2.713 stated "learned of the breach" to mean the date from which the seller first communicates the anticipated breach to the buyer, then this would undermine the purpose of Section 2.610.[47] Accordingly, the Court held that the correct date when an aggrieved buyer "learns of the breach" is "a commercially reasonable time after he learns of the seller's anticipatory repudiation."[48]

The Court found that NJN did not wait longer than commercially reasonable after receiving Turner's notice of repudiation before selecting its remedy.[49] Evidence at trial indicated that NJN believed Turner would deliver on his oral contract notwithstanding the Turner's letter sent in November 2010 stating otherwise.[50] Moreover, Seely testified that based on her prior dealings with Turner, she believed he would deliver under his oral contract because he had always done so.[51] The Court found it was not until February 2011 that Seely "finally realized that Turner was not going to deliver."[52] Consequentially, with all the information made available to her in February of 2011, she concluded that Turner had breached their contract.[53] Thereafter, Seely sent Turner's attorney a demand letter.[54] Thus, the Court held that NJN and Seely learned of the breach in February of 2011, applying the February market price of cotton accordingly.

d. Other evidence and procedural issues considered by the Court are omitted from this discussion as irrelevant.

There was no evidence offered to support a claim for tortious interference with contract or tortious interference with a prospective business relationship, thus the jury charge properly omitted such claims as well as certain definitions requested by Turner, and attorney fees were properly awarded to NJN.[55]

III. CONCLUSION

Practitioners should be cognizant of the parties' conduct surrounding a possible sale of goods. The *Turner* case illustrates that while parties may not formally contract in writing for a sale of goods, their communications and actions may give rise to present and binding

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46 *Id.*; *see also* UCC § 2.611(a).

47 *Turner*, 485 S.W.3d at 527 (stating that the buyer may await performance for a commercially reasonable time).

48 *Id.* (citing Cosden Oil & Chem. Co. v. Aktiengesellshaft, 736 F.2d 1064, 1072 (5th Cir. 1984)).

49 *Turner*, 485 S.W.3d at 527.

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Turner*, 485 S.W.3d at 523–28. The Court noted that although attorney fees are normally segregated by recoverable and unrecoverable amounts, "when discrete legal services advance recoverable and unrecoverable claims that are so intertwined, it is not necessary to segregate the fees in order to recover the entire amount." *Id.* at 528 (citing Verner v Cardenas, 218 W.3d 68, 69 (Tex. 2007) (holding that fees incurred while defending against defenses and counterclaims during a recovery on contract are "recoverable," and need not be segregated)).

obligations. These informal, oral contracts may not be evident initially, but courts consider circumstantial evidence as aforementioned to find whether an agreement was made. In addition, the *Turner* case interpreted UCC Section 2.610 to mean that an aggrieved buyer "learns of the breach" after a "commercially reasonable time from the anticipatory breach." While drafting the damages model, practitioners should be aware that the applicable market price of goods may differ from the time an aggrieved party anticipates the breach, and instead be when it finally learns of the breach.