**IN THE COURT OF APPEALS09/17/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 93-CA-01037 COA**

**DAWKINS & COMPANY APPELLANT**

**v.**

**L & L PLANTING COMPANY, JAMES P. LOVE,**

**JR., THE ESTATE OF J. P. LOVE, THE ESTATE OF**

**CLYDE GOSNELL, LOVE & LOVE FARMS, INC., J.**

**P. L. FARMS, INC. AND GOSNELL FARMS, INC. APPELLEE**



TRIAL JUDGE: HON. GRAY EVANS

COURT FROM WHICH APPEALED: HOLMES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: L. CARL HAGWOOD

ATTORNEY FOR APPELLEE: JOHN WILLIAM BARRETT

NATURE OF THE CASE: BREACH OF CONTRACT

TRIAL COURT DISPOSITION: J.N.O.V. GRANTED FOR DEFENDANT

MANDATE ISSUED: 11/12/97

BEFORE FRAISER, C.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Dawkins & Company received a jury verdict in its suit for breach of a contract for the forward sale of cotton. The Defendants, collectively "L & L Planting," successfully moved for a judgment notwithstanding the verdict. Dawkins contends that the trial court erred in setting aside the verdict. We affirm, concluding that the trial court properly granted the J.N.O.V. Because of our disposition of this case, we do not address Dawkins' separate contentions concerning its entitlement to pre-judgment interest.

## FACTS

After doing business with each other for several years, Dawkins and L & L Planting made an agreement concerning the forward sale of cotton during 1986 through their respective principals, H. L. "Jim" Dawkins, Jr. and J. P. Love, Sr. Love called Dawkins on August 22, 1986, and agreed to sell cotton at 55.95¢ per pound to be delivered any time through January 15, 1987. The agreement was confirmed in writing by Dawkins. Dawkins, a cotton broker, then resold the cotton to a Japanese company, Sumitomo Corporation, which was to take delivery of the cotton before mid-December, 1986.

A Dawkins employee was sent to meet with Love and obtain his signature on a contract memorializing the agreement. Love had not signed and instead told the employee to meet with Love's son. That meeting failed to procure a signature. Love's son indicated that he needed to do further market research before he signed.

Love died on September 14, 1986, about three weeks after the phone call agreement. Dawkins made repeated efforts to contact Love's son to confirm that L & L Planting would honor its agreement. Dawkins finally reached the younger Love on October 8, 1986. The son told Dawkins that he would not deliver the cotton and that it had been sold to another entity.

Despite this news, Dawkins never attempted to cover his loss from the repudiated contract. Instead, he waited because he was concerned that L & L Planting might still hold him to the agreement. While he waited, the cotton market was exceptionally active. Under the apparent influence of a new farm bill and contrary to expectations, the price of cotton rose dramatically in the waning months of 1986. The results for Dawkins were severe in December 1986, when Sumitomo finally made demand on him for their cotton. Unable to provide Sumitomo with all of the cotton he had agreed to sell, Dawkins paid significant penalties.

Dawkins brought suit against L & L Planting for his damages. In 1989 the circuit court granted summary judgment to L & L based on the statute of frauds. The supreme court reversed, finding there to be genuine issues of material fact that precluded summary judgment on that question. *Dawkins & Co. v. L & L Planting Co.*, 602 So. 2d 838, 844 (Miss. 1992). After remand a two-day jury trial was held. On special interrogatories, the jury awarded Dawkins damages based on the market price of cotton in December when Dawkins was unable to deliver all the cotton he had contracted to sell to Sumitomo. The trial court granted a J.N.O.V. to L & L Planting.

*1. The Form of the Verdict*

While Dawkins has framed his appeal in terms of whether the jury was correct in concluding both that Love was competent to enter into the contract and that L & L Planting was a merchant within

the U.C.C., we consider some preliminary matters necessarily implicated by this case. The verdict was obtained by a combination of standard jury instructions and a set of special interroga-tories to the jury. The Mississippi Rules of Civil Procedure provide:

> The court, in its discretion, may submit to the jury, together with instructions for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers and to render a general verdict.

M.R.C.P. 49(c). In this case, the special verdict form is prefaced with several paragraphs of definitions and explanations. However, while the issue of Love's competency is the subject of one of the separate *general* instructions, competence is not an issue contained in the *special* verdict form for the jury to consider in its step by step answering of questions on liability and damages. Thus, we are faced with reconciling the absence of an express consideration of competency in the verdict form and the presence of general instructions explaining the law of competency.

The court gave a general instruction that provided Love would not be bound by a contract if he was not competent at the time of the phone call. This is not reiterated in the special interrogatories. In fact, the trial court gave the following instruction to the jury:

> Before I discharge you, I want to explain something to you. You have been given a set of interrogatories here; that is, a set of questions which we . . . have asked you to answer.

* * * *

> I suggest to you that you first consider[] all the testimony and all the other instructions applicable to this question, that you proceed to answer the interrogatories as set forth in this [i]nstruction . . . . I'm going to put that on top. You should proceed to answer the questions in sequence, one through five.

* * * *

> You should mark your answer in the appropriate space, knock on the door and come back before the Court and announce that decision.

If the jurors were listening, and we assume they were, this meant they should answer the special

verdict questions regardless of any other issues. In fact, the special verdict form was the only place for the jury to indicate a verdict.

It may be argued that the requirement that a finding of competence be made is implicit since the interrogatories require the jury to find that a contract had been formed on August 22 prior to examining the other issues in the case. Specifically, interrogatory number three appeared as follows:

> [D]o you find from a preponderance of the evidence that there was a contract for the forward sale of L & L Planting Company's 1986 Cotton Crop to Dawkins and Company entered into in the telephone conversation between J. P. Love and Jim Dawkin[s] on August 22, 1986?
>
> YES _____X_____ NO _____

However, the question does not refer the jury to the issue of Love's competency as a factor for determining whether a contract had been entered into.

To be sure, interrogatories are a useful tool for obtaining jury verdicts. However, in this case, without an express inclusion of the general instructions as a part of the jury's deliberations, the validity of the verdict itself as a reflection of all of the applicable law is questionable. We will not here reverse on an issue not presented to us by the parties. If they were satisfied with the form, we will be also for purposes of our decision. We consider the merits of the appeal.

*2. Standard of Review*

Our standard of review in examining granted motions for a J.N.O.V. is well-established.

> The motion for J.N.O.V. tests the legal sufficiency of the evidence supporting the verdict. It asks the court to hold, as a matter of law, that the verdict may not stand. Where a motion for J.N.O.V. has been made, the trial court--and this Court on appeal--must consider all the evidence--not just the evidence which supports the non-movant's case--in the light most favorable to the party opposed to the motion. The non-movant must also be given the benefit of all favorable inferences that may be drawn from the evidence. If the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable men could not have arrived at a contrary verdict, granting the motion is required. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the jury's verdict allowed to stand.

*Puckett Mach. Co. v. Edwards*, 641 So. 2d 29, 33 (Miss. 1994) (citations omitted). With this standard of review in mind, we must consider the correct law to be applied and then examine the

facts adduced at trial in that context. *American Fire Protection, Inc. v. Lewis*, 653 So. 2d 1387, 1390-91 (Miss. 1995) (citation omitted).

The trial court granted a J.N.O.V. because as a matter of law and overwhelming evidence it answered "no" to each of the following three questions: (1) was the elder Love competent to enter into a forward sale contract with Dawkins; (2) was Love a "merchant" within an exception to the statute of frauds; and (3) did Dawkins suffer any damages? If a jury issue existed on all of these issues, then the verdict was correct. If, however, the evidence was overwhelmingly in favor of concluding that the answer to any of the issues was in the negative, then the trial court appropriately entered a J.N.O.V. We conclude that, while there was sufficient evidence to support the jury's verdict on the issues of competence and the merchant's exception, the jury's damages award was contrary to the overwhelming weight of the evidence. We consider each issue.

*3. Competence*

Competence of the parties is a necessary element of a valid contract. *See Merchants & Farmers Bank v. State ex rel. Moore*, 651 So. 2d 1060, 1061 (Miss. 1995) (citation omitted). L & L Planting's answer to the Dawkins' complaint alleged that on August 22, 1986, the date on which Dawkins spoke to Love concerning the forward sale, Love was hospitalized and suffering from a terminal illness from which he would soon die. L & L Planting further alleged that because of Love's health and the medication he was taking, he was neither physically nor mentally capable of making any rational business decision or entering into any oral agreement.

In overturning the jury's verdict, the trial judge concluded that "the evidence was overwhelming, if not uncontradicted, the J. P. Love was mentally incompetent during the pertinent time frame due to medication and a terminal illness, from which he dies only a matter of days following his telephone conversation with Dawkins [in which he agreed to the forward sale]." The court further concluded:

> The uncontradicted testimony of all witnesses who were closely associated with J. P. Love during his fading days was that he was totally incompetent to make any rational business decisions. His personal physician, Dr. John Downer, frequently saw Mr. Love in the hospital as well as visits to his residence during the final weeks of his life, and Dr. Downer, who was in the best position to determine Love's mental condition, testified unequivocally that Love was "disoriented" and "quite confused" during the final weeks of his life. It is the opinion of this Court, therefore, that J. P. Love was incapable of contracting, and certainly incapable of meeting the standards of a merchant under § 75-2-201 by responding in writing to any written confirmation of a prior oral conversation with regard to the sale of his cotton.

On L & L Planting's motion for J.N.O.V., the trial judge was faced with determining whether the evidence was so overwhelmingly contrary to the verdict that a jury could not have found Love to have been competent. Our review of the record reveals that there was sufficient evidence from which a jury could properly have found competence. Dawkins and his employees testified that Love appeared to be competent and that he had a thorough command of his business affairs. Love's son himself testified that Love was able to attend to some business in his final days. Love called Dawkins

to initiate the agreement to sell his cotton crop. Accordingly, the jury's verdict, implicitly finding competence, was not contrary to the overwhelming weight of the evidence. There was, in sum, adequate evidence for the jury to have reached either conclusion. *See, e.g., Mullins v. Ratcliff*, 515 So. 2d 1183, 1190 (Miss. 1987) (citations omitted) (considering competency to execute deeds).

*4. Merchant's Exception to Statute of Frauds*

The statute of frauds requires that certain agreements be reduced to a signed writing to be enforceable. Miss. Code Ann. § 75-2-201(1) (1972). Recognizing the realities of certain business transactions, the statute excepts from this requirement agreements made between "merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know of its contents . . . ." *Id.* § 75-2-201(2). In this case, Love called Dawkins on the telephone and offered to sell his cotton crop on a forward sale basis. Dawkins accepted the offer and reduced the agreement to a writing that was delivered to Love and his son in a reasonable time. The question remains, does the evidence support the jury's conclusion that Love was a "merchant"?

Mississippi defines a "merchant" as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." Miss. Code Ann. § 75-2-104 (1972). Farmers are not excluded from the class of persons who may be "merchants." *Vince v. Broome*, 443 So. 2d 23, 25 (Miss. 1983). As the supreme court noted:

> [S]ome farming operations are worth millions of dollars. These farmers are engaged in multi commercial transactions and are generally considered to be agribusiness persons. It would stretch the imagination to conclude that all these operations were exempt from coverage under the Commercial Code.
>
> On the other hand, some farming operations are performed by such casual and inexperienced sellers that they would not be included within the merchant definition.

*Id.* We conclude that the jury properly followed the weight of the evidence. Love was not a casual and inexperienced seller. Far from it.

Love had been in the cotton business for many years. He operated a large farm of over one thousand acres and had been actively involved in researching the market for his crop. Testimony at trial indicated that he had long been involved in efforts to sell directly into the market without the necessity of losing profits through cotton brokers. This evidence strongly supports the jury's conclusion that Love was a merchant. Consequently, a signed writing was not necessary to validate an agreement between L & L Planting and Dawkins.

*5. Damages*

Having concluded that the jury's verdict on the issues of competence and the statute of frauds was supported by the evidence, we go further to consider whether the damages award to Dawkins properly accounted for its obligations under the Uniform Commercial Code to mitigate its losses. The J.N.O.V. was in part based on a conclusion that the jury's finding of damages was unsupported by the evidence. In this latter respect, we agree with the trial court. The jury's award is inconsistent with the damages afforded to Dawkins under the U.C.C.

On October 8, 1986, when Love's son informed Dawkins that he was not going to honor the forward sale agreement and that he had sold the cotton to another buyer, Dawkins was faced with an anticipatory repudiation of the contract. Delivery was not yet due. The Mississippi Supreme Court has instructed that "in order to give rise to an anticipatory breach of a contract the defendant's refusal to perform must have been positive and unconditional." *Little v. Dalrymple*, 242 Miss. 365, 371, 135 So. 2d 403, 405 (1961). Here, Love's son not only said that he was not going to honor the contract, he told Dawkins that honoring the contract was impossible by virtue of his sale of the cotton to another buyer. Since this statement was both a positive and unconditional indication of his refusal to perform the contract, it is clearly an anticipatory repudiation. After October 8, the date of this phone call, it was no longer reasonable for Dawkins to wait for performance.

When a contract is irretrievably repudiated, the aggrieved party may select one of two options. *See*, Miss. Code Ann. § 75-2-610 (1972). He may seek cover by purchasing substitute goods on the market without reasonable delay. *Id.* §§ 75-2-711, 712(1) (1972). He may then seek damages from the breaching party calculated by subtracting the contract price from the cost of cover. *Id.* § 75-2-712(2). In this case, Dawkins did not seek to cover. Accordingly, he is not entitled to damages under section 75-2-712. However, he is not prevented from seeking damages for non-delivery under section 75-2-713. *Id.* § 75-2-712(3); *see*, *id.* § 75-2-713.

Under section 75-2-713, a buyer may seek damages from a seller for an anticipatory breach of a contract. His damages are calculated by subtracting the contract price from the market price at the place of tender *at the time the buyer learned of the breach*. *Id.* § 75-2-713(1); *Gooch v. Farmers Marketing Ass'n*, 519 So. 2d 1214, 1217-18 (Miss. 1988). As an Illinois court stated when a grower made an anticipatory repudiation of a futures contract for grain, when the repudiation is unequivocal and cover easily available, the time for the buyer to seek cover or have his damages measured is immediate. *Oloffson v. Coomer,* 296 N.E.2d 871, 874-75 (Ill. 1973). As that court said:

> [The buyer] knew or should have known on [the date of repudiation], the limit of damages he would probably recover. If he were obligated to deliver grain to a third party, he knew or should have known that unless he covered on [the date of repudiation], his own capital would be at risk with respect to his obligation to his own vendee.

*Oloffson,* 296 N.E.2d at 875. The court concluded that the buyer had a duty to cover or be limited to damages computed on the difference between the market price on the date of repudiation and the contract price. *Id.*

Dawkins responds in two ways, one factual and the other legal. Dawkins testified that Love might

still have delivered the cotton to him if the market price started to go down. However, the contract had been repudiated by Love's statement that a substitute contract had been entered into with someone else. Hypothetically, that substitute contract could itself later be repudiated, or perhaps Love did not really have another contract, and in either event Love physically still could have delivered the cotton. For Dawkins to argue that such possibilities allowed him just to wait and see what happened ignores the commercial reasonableness standard of section 75-2-610. As discussed in *Oloffson,* which we find persuasive, an unambiguous and unequivocal repudiation begins the other contracting party's obligations either to cover, or to be held to damages measured as of the date of repudiation.

The second argument Dawkins raises relies on language that when "a valid reason exists for failure or refusal to cover, damages may be calculated from the time when performance is due." *Cargill, Inc. v. Stafford,* 553 F.2d 1222, 1227 (10th Cir. 1977). The same authority holds that the general rule is that when "substitution is readily available and buyer does not cover within a reasonable time, damages should be based on the price at the end of that reasonable time rather than on the price when performance is due." *Cargill,* 553 F.2d at 1227. The date is important since the cotton market was rising from October through December. The unrebutted testimony is that "substitution" was readily available, that there was all the Mississippi Delta cotton in October that anyone would want to buy. October 9 remains the date to measure damages..

The damages on October 9 are computed by taking the difference between that date's market price and the contract price, together with any incidental and consequential damages. Miss. Code Ann. § 75-2-713 (1972). Dawkins presented no evidence of incidental or consequential damages, so the price differential is the only issue. Dawkins testified that, had he purchased cotton on the market in October, he would have lost $215,000.00. However, that is the amount of money he would have paid, not a measure of loss. The contract price appears in the agreement drawn up by Dawkins, but never signed by Love. Under a section labeled "price and other terms," the following appears:

> The prices to be paid for acceptable cotton shall be as follows: $10.00 per bale for C.C.C. Loan Equity. Example: a USDA 4134 premium mic. goes into the loan at 55.95¢ per pound. We deduct the necessary charges, such as storage, receiving, tax, Cotton Board, and Gramm-Rudman, then we put the cotton in the loan. After Seller signs all proper forms, we issue our check. *Gross sales price 55.95¢ for 4134 prem. mic. + $10.00 per bale equity = 57.95¢ less Gramm-Rudman, etc. as above.*

Dawkins himself testified on the market price, stating that he could have gone into the market on October 9 and bought cotton for 51.40 cents a pound. That was less than the contract price he was to pay Love, which was 57.95 cents per pound. Consequently, under the calculation of damages required by section 2-713, the jury could not have concluded that Dawkins had suffered any damages. In light of the absence of evidence supporting the jury's finding on damages, the trial court correctly granted a J.N.O.V. in favor of L & L Planting. Dawkins' measure of damages at the time of the repudiation of the contract was zero. He chose the option of relying on a damage award instead of seeking to cover. Under either option, he suffered no loss. Waiting is what caused the difficulty, and the U.C.C. states that the subsequent market changes are not L&L's liability.

**THE JUDGMENT OF THE HOLMES COUNTY CIRCUIT COURT IS AFFIRMED AND**

**ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.**