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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 46350-2018

JEFF GOOD,
Plaintiff-Respondent,

v.

HARRY'S DAIRY, LLC, an Idaho limited liability company,
Defendant-Appellant.

APPELLANT'S BRIEF

Appeal from the District Court of the Third Judicial District in and for the County of Owyhee
Case No. CV2016-967
The Honorable Thomas J. Ryan, presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This dispute involves the sale of moldy hay by Mr. Jeff Good to Harry's Dairy, LLC. Despite moldy hay being dangerous for cattle—and a nonconforming good under the Uniform Commercial Code—Mr. Good sold Harry's Dairy a supply of moldy hay to feed dairy cattle. Mr. Good, however, sued Harry's Dairy for breach of contact for failing to haul and pay for this hay. On summary judgment, numerous issues of fact existed—a scenario that is not uncommon under the UCC's flexible doctrine governing contracts for the sale of goods. When confronted with issues of material fact, the district court must deny summary judgment. But here, the district court weighed the evidence on summary judgment and decided that Harry's Dairy had breached the contract, and Mr. Good had not. The district court held a trial on damages, which of course resulted in a judgment in favor of Mr. Good. This Court must reverse the decision of the district court, because numerous issues of material fact prevent summary judgment. Harry's Dairy is entitled to its day in court to prove its own claims and defend against Mr. Good's, and is asking this Court to reverse the summary judgment decision of the district court, and remand for a trial on the merits.

B. Statement of Facts

Appellant Harry's Dairy is a dairy located in Idaho. R. Vol. I, p. 181. Harry's Dairy is owned and operated by retired attorney Harry DeHaan. R. Vol. II, p. 578. Mr. DeHaan acquired his first dairy over fifteen years ago. R. Vol. I, p. 180. In October 2015, Harry's Dairy was operating two facilities—one in Wendell and another in Buhl. R. Vol. I, p. 181.

Trent and Jennifer Cummins are the owners of a hay dealer called "Hay Now, LLC." R. Vol. I, p. 183. Ms. Cummins is Mr. DeHaan's daughter. R. Vol. I, p. 180. Hay Now would find hay and negotiate prices on behalf of Harry's Dairy. *Id.* Despite Hay Now's recent formation (in 2014), Ms. Cummins has an extensive background in hay and dairies. R. Vol. I, p. 355, L. 13-14. She has many years of experience in feeding hay to dairy cattle, buying hay for dairy cattle, and in understanding the general hay quality needs and issues associated with dairy cattle. R. Vol. I, p. 410.

Jeff Good is, since 2012, a hay farmer and supplier in Murphy, Idaho. R. Vol. I, pp. 353-54, L. 1-2. Mr. Good is married to Vivian Good. R. Vol. I, p. 360, L. 63.

The relevant facts concerning this case occurred over a short period of time, between October 2015 and April 2016. In October 2015, in talking with Russell Dygert, a truck driver, Mr. Good learned that Hay Now was interested in purchasing hay. R. Vol. I, p. 354, L. 4-5. Mr. Dygert owns AgWorx, LLC, a trucking company that Ms. Cummins had used before to haul hay. R. Vol. I, pp. 410-11. Ms. Cummins was interested in buying Mr. Good's hay crop because its proximity to the Harry's Dairy facilities would save money on freight. *Id.* Harry's Dairy had previously been purchasing hay from Eastern Idaho, which was more expensive to ship to its facilities. R. Vol. I, p. 170.

Also in October 2015, Trent and Jennifer Cummins traveled to Mr. Good's farm to take samples of the hay harvested in 2015. R. Vol. II, p. 714, L. 3. Mr. Good had a sampling probe available for Ms. Cummins to use to take samples of the hay. R. Vol. I, p. 171. But, Ms. Cummins was "only able to obtain samples from bales on the outsides of the stacks as the inside

bales were not accessible to me." R. Vol. II, p. 714, L. 3. Ms. Cummins sent the samples to Dairyland Laboratories for a report on the nutritional content. R. Vol. I, p. 412. The tests showed that the "hay was fairly evenly split between what the dairy industry considers premium hay and what it considers feeder hay." *Id.* At this time, no testing for mold was performed, as it was not standard in the industry to do so. R. Vol. II, p. 714, L. 3.

After receiving the lab results, Mr. Cummins contacted Mr. Good to discuss purchasing the hay, and informed him it was for dairy cattle consumption. *Id.* At that time, Mr. Good demanded that he would only sell the 2015 crop if they would also take the 2014 crop, for a total of 3,000 tons of hay. *Id.*, L. 4. Due to the sensitivities of dairy cattle, Mr. Cummins expressed to Mr. Good his concerns about possible weather damage and mold in the older 2014 crop, and Mr. Good represented that there had been minimal weather in the past few years and thus the hay had not been exposed to weather that would result in damage or molding. *Id.*, L. 5, p. 719, L. 5.[1]

Based on Mr. Good's representation that the hay was not moldy, Ms. Cummins further sampled the 2014 hay crop, but only to determine the nutritional value, not mold content. R. Vol. II, p. 714, L. 3. While Mr. Good did not block testing of the hay, it was impossible to fully test it, as "we couldn't go cut the bales and find the mold." R. Vol. I, p. 187. And, the hay was stacked four bales high, four bales wide, and thirty to fifty bales long, preventing Ms. Cummins from obtaining samples from the inside of the stacks—only bales on the outside of the stacks were

[1] Mr. Good disputes that he made this representation. R. Vol. I, p. 163. But, despite his denials, Mr. Good would later admit that there was rain in October 2015, and that he had stacked the hay two bales high, instead of four, due to the weather that month. *Id.*, p. 164. Mr. Good also later informed Mr. DeHaan that he baled his hay wet. *Id.*, p. 188.

tested. R. Vol. II, p. 714, L. 3-4. She sent the second set of hay samples to Dairyland for nutritional testing. *Id.*, L. 4. Ms. Cummins testified that she never tested for mold because the industry practice was that farmers would keep any hay containing mold. *Id.*, L. 3. Harry's Dairy's nutritionist also stated that only when mold is visible will further testing be performed to identify the amount and type of mold and toxins present. R. Vol. I, p. 260.

Based on the nutritional testing, Hay Now negotiated a selling price of $128.00 per ton for the 3,000 tons of hay on the farm—both the 2014 and 2015 crops. R. Vol. I, p. 31. Harry's Dairy was responsible for paying the freight. *Id.* On December 11, 2015, Harry DeHaan sent a letter to Mr. Good memorializing the general terms of the agreement as follows:

Dear Jeff,

This letter agreement is intended to memorialize the agreement that my dairy operation, Harry's Dairy, LLC., made with you to purchase your 2014 and 2015 hay crops. If you do not agree with any of the below, please contact me at the above to discuss. If I do not hear from you, I will assume you agree to all of the following:

In October and early November, 2015, with your gracious help, the limited liability company through which Harry's Dairy, LLC. exclusively purchases hay – Hay Now, LLC. – took tests of your 2014 and 2015 hay crops. Your hay that Hay Now tested was the hay located at the farm-shop and in the field next to the farmhouse at your farming operation, Highway 78, Malta, Idaho. This is roughly 3,000 tons of hay.

Based on the results of those tests, we negotiated with you to purchase your hay. The agreed upon amount is $128/ton at the stack. Freight and freight rates will be handled separately through Russell Dygert. Russell will be in charge of all freight. We agreed to pay you in third's. We agreed that the hay we haul at any given time will be our decision.

As you know, the last half of 2015 has been especially difficult for the dairy business. Milk prices have taken a serious hit from their previous highs. I make an effort to run my dairy with as little debt from the bank as possible. But this means, since we talked, with the lower milk prices my cash flow has gotten tighter and I have to be extra disciplined. I have to spread the money out a little further, which means I need to pay you in smaller, but more frequent installments. That's why this enclosed check is for $25,000. We really like your hay and want to build a relationship with you so we can work together in the future. We think a big part of running a successful dairy is having good relationships with our vendors. We won't haul any hay we don't pay for and we hope this new arrangement will also work for you. If you have questions or concerns, please give me, Trent, or Jennifer a call.

Id. Mr. Good did not respond to the letter, but cashed the enclosed $25,000.00 check. R. Vol. I, p. 69, L. 9-10.

In December 2015, Harry's Dairy began taking deliveries of hay from Mr. Good. R. Vol. II, p. 531, L. 6. Shortly after receiving the shipments from Mr. Good, employees at both dairies began finding mold in the hay. *Id.* Harry's Dairy employee Francisco Aguirre noticed that the cattle were sick and began to exhibit decreased milk production. R. Vol. I, p. 256. Harry's Dairy's employees attempted to sort through the hay to determine what was usable. *Id.*, pp. 256-57. Harry's Dairy's veterinarian also viewed a moldy load of hay on the property on December 24, 2015, and strongly recommended it not be fed to the cattle and instead returned to the grower. *Id.*, p. 430.

On December 29, 2015, Harry's Dairy returned a load of hay to Mr. Good that was saturated with mold. R. Vol. I, p. 189. Harry's Dairy continued to take delivery of hay and continued to find mold. R. Vol. II, p. 715, L. 8-9, p. 717. This was frustrating for Harry's Dairy, as it was paying for the freight to haul the hay to the dairy, only to find that the bales were tainted when delivered and opened. *See* R. Vol. I, p. 522.

Ms. Cummins then went to the Good farm to oversee what was loaded onto the truck to minimize moldy hay being shipped to the dairy. R. Vol. II, p. 715, L. 7. Ms. Cummins watched as Mr. Good's employee was loading hay and saw visual molding throughout the stack. *Id*. Ms. Cummins discussed with Mr. Good that there was a systemic mold problem and it was dangerous for the dairy cattle. *Id*. When Ms. Cummins objected to this hay, Mr. Good informed her that his

practice was to load 50/50 good and bad bales, and Ms. Cummins stated that the moldy hay would only end up being returned. *Id.*[2]

Throughout the winter of 2016, Harry's Dairy continued to try to work with Mr. Good but continued to encounter mold in some of the loads. R. Vol. I, p. 189. Between December 17, 2015 and January 27, 2016, Harry's Dairy hauled 22 shipments of hay totaling 726 and a half tons of hay. *Id.*, p. 188. Harry's Dairy paid Mr. Good $112,978.49 of the total contract price. R. Vol. I, p. 361, L. 72. While there was a time during which Harry's Dairy was not hauling, it continued to take delivery of some hay until March 2016 despite continuing to encounter mold. R. Vol. II, p. 715, L. 9.

Harry's Dairy rejected another load of hay on March 4, 2016, but did not return the load as Mr. Good was not willing to pay the return freight, so the load remained at the Wendell dairy. R. Vol. I, p. 189. That moldy hay was set aside in a stack and tested later, in July 2016, for mold. R. Vol. I, p. 257. The tests showed high concentrations of Cladosporium and yeast. *Id.*, pp. 259-65. Mr. Jess Argyle, dairy consultant, explained that:

[2] Mr. Good admits remembering that Ms. Cummins did mention a mold problem at least once, although he contends that Ms. Cummins was speaking of oats not hay. R. Vol. I, p. 22, Deposition of Jeff Good, p. 165, ll. 16-21.

I received a phone call from Fransisco Aguirre (Dairy Manager) about a load of hay that was received from Jeff Good. I looked over the hay with Fransisco and my initial recommendation was that he not feed it to the milk cows because of the amount of mold that was visible on the hay. It was then decided to sort out the visibly moldy bales and set them aside even though most of the bales had some mold. The problem with mold is that is does not show up on a normal forage analysis. It is only when we see visible mold that we will then run further analysis to identify the amount and type of mold and toxins present.

Fransisco had also started to have some health issues showing up in the cattle that are related to mold in the feed, very loose manure, cattle off feed, dry matter intakes down, lower milk production and hemorrhagic bowel syndrome. Mold present in the feed makes the feed less palatable thus reducing intakes which leads to milk production loses. Another issue with mold is that it reduces the digestibility of the hay decreasing the energy content. Loses can be as high as 20% depending on the mold content. In this case the hay was later tested for mold concentration and identification. The analysis confirmed the presence of mold, Cladosporium, a dark blue-green to gray mold at a high concentration (1.9 million cfu/gm). The analysis also tested for yeast concentrations which was at 800,000 cfu/gm. Yeast is normally found in wet or ensiled feeds like corn silage. So finding a high level of yeast suggests that the hay was put up with an excess amount of moisture.

The hay that was received was not dairy quality and my recommendation is not to feed it to dairy cows.

Id., p. 260.

Due to the systemic mold problem and the difficulties in sorting the hay, during February 2016, Harry's Dairy had to cover by purchasing hay from other growers at higher prices. R. Vol. I, p. 414. Harry's Dairy spent on average $131.00 for this cover hay. *Id.*, p. 497, L. 5.

From January through March 2016, the Goods repeatedly demanded that Harry's Dairy haul hay (and pay for hay) faster, despite no requirement to haul hay with any particular frequency. R. Vol. II, pp. 715-16, L. 10. The Goods' bank was apparently pressuring them (R. Vol. II, p. 793) and the Goods in turn pressured Harry's Dairy to purchase and haul hay faster. R. Vol. II, pp. 715-16, L. 10. A lengthy string of text messages between Ms. Cummins and Ms. Vivian Good reveals the Goods' desire for Harry's Dairy to haul and pay as fast as possible. R. at Vol. I, pp. 229-48. These text messages do not mention the mold problem, but Ms. Cummins

explained that she did not want to rock the boat with Ms. Good and interfere with the parties' business relationship. R. Vol. I, p. 176. And, while the December 2015 letter mentioned pre-paying in thirds, ultimately the parties' course of dealing was that Harry's Dairy paid for the hay as it was hauled. *E.g.*, R. Vol. I, p. 191. Harry's Dairy was paid up for all loads that were hauled when it was sued in May 2016, although the parties disputed whether Harry's Dairy owed about $8,627.84 for two loads that Harry's Dairy believes were never delivered. R. Vol. I, pp. 24-25, L. 14, Vol. II, p. 540.

On April 21, 2016, counsel for Mr. Good wrote a letter to Mr. DeHaan, demanding that Harry's Dairy "make arrangements by April 27, 2016 to commence shipping the remaining hay from Jeff's farm to your dairy." R. Vol. I, p. 337. On April 25, Mr. DeHaan responded by email, stating that he would buy all conforming hay, but would not buy moldy hay. *Id.*, p. 525. He explained "[t]he bales were packed together in a way that would not allow inspection or testing of any but the outside of the stack. When we hauled almost a third of the hay, we got into mold problems. We sent some back, we mixed some with better hay, and generally tried to accommodate." *Id.* On April 28, 2016, Mr. DeHaan responded via a formal letter, explaining that he viewed moldy stacks of hay on Mr. Good's property, but offering to purchase all non-moldy hay, potentially using a third party to sort the hay before loading. *Id.*, pp. 522-24. Inexplicably, and despite contending that his hay was free from mold, Mr. Good refused Harry's Dairy's offer to purchase all non-moldy hay and to inspect each load before it was placed in the truck. R. Vol. II, p. 694. Harry's Dairy did not hear anything further from Mr. Good until he sued Harry's Dairy in May 2016. *Id.*, p. 22. Mr. Good sold the 2,000 remaining tons to Bob Barnes Trucking

and Felix Anchustegui for substantially less than the Harry's Dairy contract price. Tr. Vol. I, p. 62 (transcript p. 110, L 8-20). Bob Barnes, who also acted as Mr. Good's expert at trial, admitted that some of Mr. Good's hay was moldy. R. Vol. II, p. 799.

C. Procedural History

Less than a month after Harry's Dairy late April response, on May 16, 2016, Mr. Good filed suit in Owyhee County. R. Vol. I, p. 22. In his complaint, Mr. Good stated that Harry's Dairy entered into a contract with Mr. Good in which it agreed to purchase 3,000 tons of hay at $128 per ton plus costs of transporting hay to Harry's Dairy. *Id.*, p. 24. Mr. Good claimed that Harry's Dairy failed to pay him for $12,323.91 of hay already hauled but not paid for. *Id.*[3] Mr. Good also claimed that Harry's Dairy had failed to take delivery and pay for approximately another 2,000 tons of hay that remained on Mr. Good's property. *Id.*, p. 26. Based on these facts, Mr. Good alleged causes of action for breach of contract, unjust enrichment, and specific performance. *Id.*, pp. 26-27. Mr. Good claimed damages of $268,323.91. *Id.*, p. 27. At the time of the complaint's filing, Mr. Good had not resold the hay that remained on his property. *Id.*

Harry's Dairy answered the complaint (p. 34) and denied Mr. Good's causes of action. *Id.*, pp. 35-36. Harry's Dairy then counterclaimed for fraud, violation of express and implied warranties, and breach of contract. *Id.*, pp. 36-38. These causes of action were based on Mr. Good's representations that the hay was mold free, that Mr. Good knew that Harry's Dairy was

[3] Mr. Good would later acknowledge that the amount demanded did not reflect the credit for the December 2015 returned load, and the amount due for the loads delivered should be $8,627.84. R. Vol. II, p. 559. Harry's Dairy maintains that these loads were never delivered. R. Vol. II, p. 540.

not testing for mold, and that the mold would not be discovered until the bales were hauled. *Id.* Harry's Dairy alleged that the mold caused damage to its herd and milk production. *Id.* Harry's Dairy also was damaged by having to purchase cover hay on the open market. *Id.* Mr. Good filed an Answer to Counterclaim on July 19, 2016. *Id.*, p. 58.

After the parties engaged in discovery, Mr. Good moved for summary judgment on February 24, 2017. *Id.*, p. 127, *et seq.*. Mr. Good moved to dismiss Harry's Dairy's counterclaim for violation of implied and express warranties. *Id.*, p. 138, *et. seq.* Mr. Good claimed he did not make any representations that the hay was mold-free and gave Harry's Dairy access to the hay for inspection. *Id.*. Mr. Good also moved for summary judgment on the dueling claims for breach of contract, arguing that Harry's Dairy was in breach for failing to haul and pre-pay for hay. *Id.*

On summary judgment, the district court decided that there were issues of fact related to Harry's Dairy's warranty claims and each parties' breach of contract claim that had to be decided by a jury, but it did dismiss Harry's Dairy's express warranty claim. R. Vol. II, p. 576. Mr. Good moved for reconsideration. R. Vol. II, p. 674 *et seq*. Harry's Dairy also moved for reconsideration. *Id.*, p. 700. On reconsideration, the district court dismissed Harry's Dairy's counterclaims and entered judgment on liability for Mr. Good's claims. *Id.*, p. 837. Harry's Dairy moved again for reconsideration, and this motion was denied. *Id.*, p. 967 *et seq.*

The case went to trial before a jury in May 2018. R. Vol. III, p. 1059. The jury was informed that liability was already determined, and its job was to decide the issue of damages. *Id.*, p. 1071. The jury found that Mr. Good was entitled to damages in the amount of $144,000.00. *Id.*, p. 1091.

On June 1, 2018, Mr. Good's counsel moved for an award of attorney fees and costs. *Id.*, p. 1092 *et seq*. Mr. Good also moved for an award of prejudgment interest. *Id.*, p. 1111 *et seq.* The district court awarded fees and costs (*id.* p. 1155-57) and prejudgment interest (*id.* p. 1151). An amended judgment was entered on June 29, 2018. *Id.*, p. 1161-62.

Harry's Dairy moved for a new trial or, alternatively, to alter or amend the judgment. *Id.*, p. 1115. The order denying new trial was entered on August 3, 2018. *Id.*, p. 1184. The district court amended the judgment to reduce it by $3,686.40 to give Harry's Dairy credit for the returned moldy load of December 2015. *Id.*, p. 1192. An amended judgment as entered on August 8, 2018. *Id.*, p. 1194. Harry's Dairy timely appealed on September 13, 2018. *Id.*, p. 1197.

II. ISSUES PRESENTED ON APPEAL

1. Did the district court err in dismissing Harry's Dairy's cause of action for breach of contract on summary judgment?

2. Did the district court err in determining that Harry's Dairy was liable to Mr. Good for breach of contract on summary judgment?

3. Did the district court err in dismissing Harry's Dairy's cause of action for breach of express warranty on summary judgment?

4. Did the district court err in dismissing Harry's Dairy's cause of action for breach of implied warranty on summary judgment?

5. Did the district court err in deciding that Mr. Good had provided reasonable notice of sale to Harry's Dairy before reselling goods at private sales?

6. Was the jury verdict awarding damages supported by substantial and competent evidence?

7. Did the district court err in awarding attorney fees and costs?

8. Did the district court err in awarding prejudgment interest?

9. Is Harry's Dairy entitled to an award of fees and costs on appeal?

III. STANDARD OF REVIEW

A. Summary Judgment:

When reviewing the district court's ruling on a summary judgment motion, this Court applies the same standard used by the district court. *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 556, 212 P.3d 982, 986 (2009). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Regan v. Owen*, 163 Idaho 359, 362, 413 P.3d 759, 762 (2018). "If there is no genuine issue of material fact, only a question of law remains, over which this Court exercises free review." *Indian Springs LLC v. Indian Springs Land Inv.*, 147 Idaho 737, 746, 215 P.3d 457, 466 (2009) (quoting *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 307, 160 P.3d 743, 746 (2007)).

B. Jury's Award:

The jury's verdict on factual issues will generally not be disturbed on appeal. *Boel v. Stewart Title Guar. Co.*, 137 Idaho 9, 12, 43 P.3d 768, 771 (2002). "When reviewing a jury verdict on appeal the evidence adduced at trial is construed in a light most favorable to the party who prevailed at trial." *Garrett Freightlines, Inc. v. Bannock Paving Co.*, Inc., 112 Idaho 722, 726, 735 P.2d 1033, 1037 (1987). But, when it appears to this Court that the verdict is not supported by substantial and competent evidence or is against the clear weight of the evidence, then those issues become questions of law upon which this Court may review freely. *Boel*, 137 Idaho at 12, 43 P.3d at 771.

IV. ARGUMENT

A. The District Court Erred In Dismissing Harry's Dairy's Breach Of Contract Claim On Summary Judgment, and in Granting Summary Judgment on Mr. Good's Breach of Contract Claim.

On summary judgment, Harry's Dairy alleged that it rightfully refused to take delivery of the remaining 2,000 tons of hay due to the mold issue. R. Vol. II, p. 587. Harry's Dairy had to cover, resulting in damages because it had to buy hay on the open market for a higher rate. *Id.* Mr. Good argued that Harry's Dairy breached the contract for failure to pay for and haul the hay. R. Vol. I, pp. 150-52. The district court, after reconsideration, and despite originally finding issues of fact, granted summary judgment in favor of Mr. Good, dismissing Harry's Dairy's breach of contract action. R. Vol. II, pp. 845-47. This was in error, because there were numerous issues of fact preventing summary judgment on this claim—the district court was correct when it initially denied summary judgment. *Id.*, p. 587.

1. There is an issue of fact regarding whether this contract is an installment contract, and the rules that apply to installment contracts are different.

The district court's error begins with the failure to recognize that the Good-Harry's Dairy contract was an installment contract, which is governed by unique rules under the Uniform Commercial Code ("UCC"). Admittedly, this was not made clear to the district court—but, both counsels did argue this was an installment contract. Tr. Vol. I, p. 39 (transcript p. 19, L. 7), p. 44 (transcript p. 40, L. 3).[4]

[4] Harry's Dairy also requested a jury instruction related to breach of installment contracts. R. Vol. II, p. 689; *see also id.* pp. 696, 894.

Under the UCC, "[a]n 'installment contract' is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause 'each delivery is a separate contract' or its equivalent." I.C. § 28-2-612(1). This section "applies wherever a contract for multiple items authorizes the delivery of the items in separate groups at different times." *Midwest Mobile Diagnostic Imaging, L.L.C. v. Dynamics Corp. of Am.*, 965 F. Supp. 1003, 1010 (W.D. Mich. 1997), *aff'd sub nom. Midwest Mobile Diagnostic Imaging v. Dynamics Corp. of Am.*, 165 F.3d 27 (6th Cir. 1998). Whether a contract is an installment contract is a question of fact. *Arkla Energy Res., a Div. of Arkla, Inc. v. Roye Realty & Developing, Inc.*, 9 F.3d 855, 860 (10th Cir. 1993).

Here, the contract provided for the hauling of multiple loads of hay in separate lots whenever Harry's Dairy decided to do so. R. Vol. I, p. 31. At the same time, Harry's Dairy was purchasing the 2014 and 2015 hay harvests in bulk. *Id.* So, there was an important threshold issue of fact to be determined before the district court could apply the UCC. The failure to address this keystone issue led to a confused analysis on summary judgment. This error alone indicates that a reversal of the summary judgment order is appropriate.

2. If installment contract rules apply, there are issues of fact regarding whether prior moldy installments "substantially impaired the contract."

Application of the UCC installment contract provisions brings clarity to the question of whether either party could terminate the contract related to the remaining 2,000 tons of hay based on the prior performance of the opposing party. Section 28-2-612 explains when an installment contract is breached:

> (2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.
>
> (3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

I.C. § 28-2-612.

"Under § 2-612(3) the right to cancel does not arise unless the nonconforming [installments] substantially impair the value of the *entire* contract." *Midwest Mobile*, 965 F. Supp. at 1015 (emphasis in original). The purpose of this "substantial impairment" requirement is "to preclude a party from canceling a contract for trivial defects." *Emanuel Law Outlines, Inc. v. Multi-State Legal Studies, Inc*., 899 F. Supp. 1081, 1088 (S.D.N.Y. 1995). "Whether a breach constitutes 'substantial impairment' of the entire contract is a question of fact." *Midwest Mobile*, 965 F. Supp. at 1015 (citing *Bill's Coal Co. v. Board of Public Utilities*, 887 F.2d 242, 247 (10th Cir.1989)). Official comment six to Section 28-2-612 explains the substantial impairment doctrine further:

> Whether the non-conformity in any given installment justifies cancellation as to the future depends, not on whether such nonconformity indicates an intent or likelihood that the future deliveries will also be defective, but whether the non-conformity substantially impairs the value of the whole contract. If only the seller's security in regard to future installments is impaired, he has the right to demand adequate assurances of proper future performance but has not an immediate right to cancel the entire contract. It is clear under this Article,

> however, that defects in prior installments are cumulative in effect, so that acceptance does not wash out the defect "waived."

I.C. § 28-2-612, cmt. 6. "The most useful test of substantial value is to determine whether material inconvenience or injustice will result if the aggrieved party is forced to wait and receive an ultimate tender minus the part or aspect repudiated." I.C. § 28-2-610, cmt. 3.[5]

Even if the contract is not substantially impaired, an aggrieved party has the right to demand adequate assurances of future performance under I.C. § 28-2-609.[6] If the requested party fails to provide adequate assurances to a "justified demand" within 30 days, the party repudiates the contract. *Id.*, § 28-2-609(4). Whether a demand for adequate assurances is "justified," is a question of fact. *See Cassidy Podell Lynch, Inc. v. SnyderGeneral Corp.*, 944 F.2d 1131, 1148 (3d Cir. 1991).

Harry's Dairy provided ample evidence on summary judgment that mold existed in many of the installments and that non-conformity substantially impaired the value of the contract. Mr. DeHaan explained that: "it's clear, mold is poisonous to dairy cattle. We asked him about it. There is no question, you can't sell milk cow hay with mold in it. It's poison." R. Vol. I, p. 187.

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[5] Section 28-2-612 uses the term "non-conformity or default." Whether an installment of goods is nonconforming is a broader analysis than whether they conform to a warranty: "Goods or conduct including any part of a performance are 'conforming' or conform to the contract when they are in accordance with the obligations under the contract." I.C. § 28-2-106(2). Nonconformity "includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract." I.C. § 28-2–714, cmt. 2. The UCC allows extrinsic evidence of the terms of the agreement including "course of performance, course of dealing, or usage of trade." *Id.* § 28-2-202(a).

[6] A demand for performance as to future installments also reinstates an installment contract that has been substantially impaired. *Id.* § 28-2-612(3).

Harry's Dairy's veterinarian also viewed a moldy stack of hay on December 24, 2015, during his routine visit to the dairy. R. Vol. I, p. 430. He "recommended that this hay be immediately refused and returned to the grower." *Id.* Sorting moldy from non-moldy bales is "difficult at best, because even though the outside of the bale may appear acceptable, once the bale is opened, the inside of the bale may be badly damaged." *Id.* "Feeding moldy hay is very detrimental to cow health" and may ultimately result in death and disease. *Id.* "Therefore, feeding of moldy feed of any kind is to be avoided." *Id.*[7]

In addition, Harry's Dairy explained that continuing to handle moldy installments was practically impossible and materially inconvenient. Ms. Cummins noted that, due to the practical difficulties in determining the quality of large amounts of hay "its industry custom to work together and reject the bad, or moldy, bales that were not visually available upon testing. Thus, the bad bales are left to the farmer and the marketable bales are sent on to the dairyman. I assumed this industry custom and practice would also govern the Good hay." R. Vol. I, p. 413. "This is the first situation I've encountered wherein a farmer demands moldy hay be delivered regardless of custom or industry practices and regardless of the damages that inevitably will result from feeding moldy hay." R. Vol. I, p. 415. Mr. DeHaan also opined: "I have been in the dairy business for over a decade and it is customary that hay containing mold is returned or taken

[7] Despite Mr. Good's role in supplying the dairy industry, he testified at this deposition that he did not know what was fit for dairy cow consumption, and took no responsibility for the quality of the hay. R. Vol. I, p. 164. He stated: "I don't know anything about cows. You are the expert." *Id.* "Good has no idea what is considered hay fit for a dairy cow because he is not a dairyman and he does not know anything about cows." *Id.*, p. 355.

back by the seller, while non-contaminated hay continues to be purchased." *Id.*, p. 498. Indeed, the whole point of purchasing from Mr. Good, whose farm was located closer to the Harry's Dairy facilities, was to save money on freight. R. Vol. I, p. 410-11. If bales had to be delivered, broken open, assessed one by one, and then returned to Mr. Good, the whole point of the contract would be defeated from Harry's Dairy's perspective. Harry's Dairy offered to buy all non-moldy hay, using a third party to sort hay before it was loaded, but Mr. Good rejected this offer. *Id.*, pp. 522-24. An important factual question was therefore whether the non-conforming installments "substantially impaired" the contract from Harry's Dairy's point of view, allowing it to terminate the contract as to the remaining 2,000 tons of hay. This is particularly true in a circumstance in which Mr. Good and his counsel were demanding that all hay be delivered, to include known nonconforming and moldy hay.

Further, on summary judgment, the district court focused on Harry's Dairy's failure to give notice regarding the rejection of the remaining 2,000 tons of hay. R. Vol. II, pp. 843-44. However, Section 2-612, comment 7, gives the aggrieved party time to consider whether or not to cancel the entire contract based on nonconforming installments, and ultimately, the aggrieved party must give notice of cancellation within a reasonable time: "A reasonable time for notifying of cancellation, judged by commercial standards under the section on good faith, extends of course to include the time covered by any reasonable negotiation in good faith." I.C. § 28-2-612, cmt. 7. The lower court improperly took this issue away from the jury.

In April 2016, Mr. DeHaan indicated to Mrs. Good that he was considering cancelling the contract due to the mold issues, prompting Mr. Good's counsel to draft the demand letter. R.

Vol. I, p. 336. Before unequivocally canceling, however, Harry's Dairy opted to request adequate assurances that only conforming hay would be provided in the future. R. Vol. I, pp. 522-24. However, Mr. Good failed to respond to that letter, and simply filed suit less than 30 days later in May 2016. R. Vol. I, p. 22. If Harry's Dairy's demand for adequate assurances was "justified," Mr. Good's failure to provide adequate assurances in 30 days was a repudiation of the contract, entitling Harry's Dairy to damages. I.C. § 28-2-609(4). As a result of the repudiation, Harry's Dairy was forced to buy replacement hay at a higher cost than the contract price. Harry's Dairy is entitled to damages for the amount paid for hay over and above the contract price. I.C. § 28-2-713.

This Court must reverse and remand, to allow for a trial on whether the prior moldy installments substantially impaired the contract entitling Harry's Dairy to cancel the 2,000 remaining tons, whether Harry's Dairy made a justified demand for adequate assurances, whether Mr. Good repudiated by failing to respond to Harry's Dairy's request for adequate assurances within 30 days, and whether Harry's Dairy is entitled to damages for the cover hay.

3. If general UCC rules apply to Harry's Dairy's cause of action for breach of contract, issues of fact still prevent summary judgment.

Even if the non-installment contract rules of the UCC apply to the remaining 2,000 tons of hay, there are issues of fact that prohibit summary judgment, and the district court erred in dismissing Harry's Dairy's cause of action for breach of contract.

Under I.C. § 28-2-601, the buyer may accept or reject goods in part or in whole. *Id.; G & H Land & Cattle Co. v. Heitzman & Nelson, Inc.,* 102 Idaho 204, 209, 628 P.2d 1038, 1043

(1981). I.C. § 28-2-602(1) provides: "rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller." *Id.* "The question of what is a reasonable time for the rejection of nonconforming goods by a buyer depends upon 'the nature, purposes and circumstances' of the transaction." *G & H Land & Cattle Co*., at *id.* If a buyer rightfully rejects, the buyer has "no further obligations with regard to goods rightfully rejected." I.C. § 28-2-602(2)(c).

But, the buyer's duty to reject is not triggered until he or she has "reasonable opportunity to inspect the goods . . . ." I.C. § 28-2-606. A buyer's right to inspect the goods post-purchase is defined in I.C. § 28-2-513(1): where goods "are identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner." *Id.*; As Comment 9 states:

> Inspection under this section has to do with the buyer's check-up on whether the seller's performance is in accordance with a contract previously made and is not to be confused with the "examination" of the goods or of a sample or model of them at the time of contracting which may affect the warranties involved in the contract.

Id., cmt. 9.

Under this UCC framework, there are genuine issues of fact that preclude summary judgment. Before the obligation to reject arises, the buyer must be afforded the opportunity to inspect "in any reasonable manner." Harry's Dairy had a right to inspect the remaining, undelivered hay in April 2016 in such a manner as to identify conforming and nonconforming bales, yet was prevented from doing so. R. Vol. II, pp. 723-24, L. 9-10. Mr. DeHaan went to the

Good farm with an empty hay hauler and a blank check in April of 2016, but was never permitted to inspect the hay in such a manner that all moldy versus non-moldy bales could be properly sorted. *Id.*

But, whether or not Harry's Dairy had an opportunity to inspect, Harry's Dairy made a proper rejection of any non-conforming hay in the remaining 2,000 tons within a reasonable time. First, Harry's Dairy April 28 letter constituted a formal, written rejection of nonconforming, moldy hay in the remaining 2,000 tons. The letter stated in relevant part: "The dairy will accept the non-moldy hay" and "We will accept merchantable, fit for the purpose hay. We will not accept hay that will poison our cattle." R. Vol. I, pp. 522-24. That letter was a sufficient rejection of nonconforming goods in the remaining 2,000 tons. *Figueroa v. Kit-San Co.*, 123 Idaho 149, 158, 845 P.2d 567, 576 (Ct. App. 1992) (Buyer's formal letter denying liability, claiming that seller had misrepresented its product, supplied unsuitable bentonite, and that seller must make the bentonite conform to the oral contract or remove it was notice of rejection). Whether the rejection was timely may be a factual question. *Figueroa at id.* (rejection 200 days after first delivery of bentonite was timely rejection under the circumstances).

Second, Mr. Good had been on notice of a mold problem for several months. In addition to returning the December 2015 moldy load, and informing Mr. Good of the March 2016 moldy load, Ms. Cummins told Mr. Good that "moldy hay would only end up being returned." R. Vol. II, p. 17, L. 7. A reasonable jury could easily find that Ms. Cummins' statement to Mr. Good about moldy hay being returned was a timely rejection of future non-conforming deliveries. The district court is not permitted to weigh evidence on summary judgment.

Lastly, Harry's Dairy made a justified demand for adequate assurances under I.C. § 28-2-609, and when Mr. Good failed to respond, preferring to litigate, he repudiated the contract. This section applies whether the contract is or is not an installment contract. *See* Section A.2, *supra*.

In sum, Harry's Dairy offered the district court at least four times in which it potentially rejected the non-conforming hay. Whether these notifications constituted rejections and whether they were timely remain issues of fact. The district court therefore erred in granting summary judgment in this regard.

4. The District court erred in granting summary judgment on the liability portion of Mr. Good's breach of contract claim.

The district court erred in granting summary judgment in favor of Mr. Good on the breach of contract claim, because there are issues of fact related to the alleged breaches that prevent summary judgment. Mr. Good argued on summary judgment that Harry's Dairy breached the contract in two ways: by failing to haul hay at the frequency that Mr. Good desired, and failing to make payment for the remaining 2,000 tons of hay. R. Vol. I, p. 151. Harry's Dairy opposed the motion, arguing that Harry's Dairy did not breach the contract for failing to haul for and pay for the remaining 2,000 tons—rather it was exercising its rights to reject non-conforming goods under I.C. § 28-2-601. R. Vol. II, p. 538. On reply, Mr. Good reiterated that Harry's Dairy was in material breach for failure to haul hay between late January and early March 2016, and failure to pre-pay for hay. *Id.*, p. 556. In its initial summary judgment decision, the district court held that there were issues of fact related to which party breached the contract—

particularly where all facts should be construed in favor of the non-moving party, Harry's Dairy. *Id.*, p. 587.

Mr. Good moved for reconsideration of this ruling, arguing again that Harry's Dairy was in breach for failure to haul and pay for the remaining 2,000 tons of hay. *Id.*, pp. 679-80. Harry's Dairy opposed this motion, arguing again that it rightfully rejected the remaining 2,000 tons. *Id.*, pp. 695-97. On reconsideration, the district court evaluated the evidence, and decided that Harry's Dairy had breached the contract, finding that Harry's Dairy had failed to pay for and haul the remaining 2,000 tons of hay, and that moldy loads had not been properly rejected. *Id.*, pp. 845-46.

Harry's Dairy requested reconsideration of that ruling. *Id.*, p. 887. Harry's Dairy argued that there was no deadline in the contract for hauling hay. *Id.*, p. 896. "Nowhere as Good pointed to a delivery deadline that the Dairy violated." *Id.* Harry's Dairy also argued that the parties' course of performance altered the requirement that Harry's Dairy prepay or pay in thirds. *Id.*, p. 897. In its second reconsideration decision, the district court improperly weighed the evidence and found, although there were "accommodations" regarding payment terms, Harry's Dairy was in breach for failure to pay in thirds up front. *Id.*, p. 971. The district court did not address Harry's Dairy's argument that the contract contained no deadline to haul. *Id.*, pp. 970-71.

(a) The District Court erred in holding that Harry's Dairy had breached for failure to haul hay.

The district court erred in granting summary judgment by holding that Harry's Dairy breached the contract by failing to haul. The December 11, 2015 letter from Harry's Dairy to Mr.

Good memorializing the general terms of the agreement does not contain a time for performance, but states "[w]e agreed that the hay we haul at any given time will be our decision." R. Vol. I, p. 31. Without a specified time frame for performance, the UCC provides a gap filler: "The time for shipment or delivery or any other action under a contract if not provided in this chapter or agreed upon shall be a reasonable time." I.C. § 28-2-309(1). Further, I.C. § 28-1-204(2) "states the basic principle for interpreting what constitutes 'reasonable time' as follows: 'What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.'" *Anderson & Nafziger v. G. T. Newcomb, Inc.*, 100 Idaho 175, 181, 595 P.2d 709, 715 (1979). Importantly, the issue of "reasonable time" is one of fact. *Id.*

The parties' agreement was that the time for hauling was left to Harry's Dairy's complete discretion. R. Vol. I, p. 31. But, even if a reasonability standard is applied, Mr. Good did not provide *any* evidence on summary judgment as to the reasonable time for Harry's Dairy to haul, and did not show that it had breached that timeline. See R. Vol. I, pp. 127-575. Harry's Dairy had already hauled and paid for the substantial sum of $112,978.49 for the hay. R. Vol. I, p. 361, L. 72. There was a brief time between late January and early March 2016 when Harry's Dairy was not hauling before hauling resumed again, but whether this was a violation of a reasonable shipping time is a question of fact. Therefore, the district court erred in deciding that Harry's Dairy had breached for failure to haul hay.

Even if the failure to haul could be found to be a breach, the trier of fact would have to additionally decide that the failure to haul in a reasonable time was a substantial impairment to the contract, and thus a breach of the whole, whether Mr. Good reinstated the contract by

demanding performance as to future installments, and whether Harry's Dairy provided adequate assurances in response to Mr. Good's demand. I.C. § 28-2-612(3). The installment contract provisions of the UCC *also* apply to sellers. *E.g., Cassidy Podell Lynch, Inc. v. SnyderGeneral Corp*., 944 F.2d 1131, 1148 (3d Cir. 1991). Proving a substantial impairment to the contract due to the alleged failure to haul is an important prerequisite to Mr. Good obtaining a finding on liability and ultimately an award of damages.

(b) The District Court erred in holding that Harry's Dairy breached the contract for failure to pay for loads it had received and those it had yet to haul.

Similarly, there are issues of fact regarding whether Harry's Dairy breached the contract for failure to pay, and whether Mr. Good reinstated the contract by demanding future performance. I.C. § 28-2-612(3).

Mr. Good alleged that Harry's Dairy was behind on its payments by $8,627.84, and Harry's Dairy disputed that it had failed to pay for loads. See R. at 540. That is not a substantial impairment of the contract, particularly when Harry's Dairy had already paid $112,978.49. R. Vol. I., p. 361, L. 72. *See, e.g., National Farmers Organization v. Coast Trading Co., Inc*., 488 F.Supp. 944, 949 (D.C. Or. 1977) (Absent a showing that buyer's failure to pay substantially impaired value of contract for sale of grain, seller was not relieved of its duty to deliver the grain.); *Cassidy Podell Lynch, Inc. v. SnyderGeneral Corp*., 944 F.2d 1131, 1147-48 (3d Cir. 1991) (Buyer's failure to pay in thirty days of installment was not substantial impairment of contract.). Similarly, Harry's Dairy's alleged failure to pre-pay in thirds is not a substantial impairment of the contract, where Harry's Dairy was continuing to pay Mr. Good for the hay

hauled. And, there was an issue of fact regarding whether Mr. Good acquiesced in Harry's Dairy paying for the hay as it hauled it, and whether this operated as a waiver. R. Vol. II, p. 897; I.C. § 28-2-209; *Cassidy Podell Lynch, Inc*., 944 F.2d at 1147-48.

Further, whether or not the alleged failure to pay substantially impaired the contract, Mr. Good reinstated the contract when he requested adequate assurances in late April 2016. I.C. § 28-2-612(3).[8] Mr. DeHaan promptly replied and stated he would buy all non-moldy hay. R. Vol. I, p. 522. Thus the contract remained in full force and effect, and Mr. Good repudiated the contract when he failed to provide conforming hay, opting to sue instead.

Whether Harry's Dairy was behind in payment, whether the prepayment in thirds requirement had been waived, whether payment issues were a substantial impairment amounting to a breach of the whole, and whether Mr. Good had reinstated the contract by demanding future performance, are all issues of fact for the jury to decide.

5. The District court erred in deciding that Mr. Good had provided proper notice of resale before selling the hay at private sales.

The trial court, by its grant of summary judgment, took from the jury the question of whether Mr. Good provided adequate notice of sale before a private sale under I.C. § 28-2-706(3) via his April 21, 2016 demand letter. R. Vol. II, pp. 846-47. However, there were issues of fact related to whether some of the hay sales preceded the April 21st notice. R. Vol. II, pp. 574-75 (letter from counsel to district court providing cites to record of pre-April 21st sales). At

[8] Whether or not Mr. Good was entitled to make a just demand for adequate assurances is yet another issue of fact. *See Cassidy Podell Lynch, Inc. v. SnyderGeneral Corp*., 944 F.2d 1131, 1148 (3d Cir. 1991).

the very least, there was a load on April 9, 2016 that was admittedly hay tied to the Harry's Dairy contract. *Compare* R. Vol. I, p. 442 *with* p. 465. Indeed, Mr. Good's evidence at trial was conflicting regarding whether the hay sold was Harry's Dairy's hay or not, as more thoroughly explained below. Therefore, to the extent that the trial court found adequate notice based upon Mr. Good's written communication to Mr. DeHaan, that notice followed, rather that preceded, several of the sales to Mr. Barnes. The district court therefore erred in deciding that Mr. Good had provided proper notice of resale as to those preceding loads.

B. The District Court Erred In Dismissing Harry's Dairy's Breach Of Express Warranty Claim On Summary Judgment, As Mr. Good Expressly Warranted That The Hay Would Not Contain Mold.

Idaho Code § 28-2-313 ("Express warranties by affirmation, promise, description, sample") provides as follows:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> . . . .
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Id.

On summary judgment, Mr. Good moved to dismiss Harry's Dairy claim for breach of warranty on the grounds that there were no warranties applicable to the sale of the hay. R. Vol. I, p. 145-50. But, Mr. Good did not support the contention that there were no express warranties

with either legal authority or factual support. See R. Vol. I, pp. 127-575 (initial summary judgment proceedings). With nothing to oppose, Harry's Dairy did not provide argument in support of an express warranty. R. Vol. I, pp. 528-42. However, Harry's Dairy identified that "Mr. Cummins expressed concerns about weather damage and mold in the 2014 crop, and Plaintiff stated that there had been minimal weather in 2014 and thus the hay had not been exposed to weather that would result in damage." R. Vol. I, pp. 529-30. On reply, Mr. Good did not dispute this evidence. *Id*., pp. 545-50. However, Mr. Good stated in a conclusory fashion, with no support, that, despite Harry's Dairy not bearing the burden on summary judgment, "absent from Defendant's Opposition were any facts or argument supporting the existence of an expressed warranty as pled in the counterclaim. Therefore, Defendant's claim that Good violated an expressed warranty should be dismissed without need for further argument." *Id*., p. 552.

In its first summary judgment ruling (*id.*, p. 576 *et seq*.), the district court dismissed the express warranty claim. *Id.*, pp. 582-83. The basis for doing so was two part: 1) "The text of the written letter contract dated December 11, 2015 written by Harry DeHaan and sent to Jeff Good clearly does not contain any affirmation of fact or promise made by Good to Harry's Dairy relating to the lack of poisonous mold in the hay." And, 2) "there is no evidence to demonstrate that Good made any sort of oral affirmation of fact or promise relating to the lack of mold in the hay. In its briefing in opposition to the motion for summary judgment, Harry's Dairy does not argue the existence or breach of an express warranty." *Id.*

Harry's Dairy moved for reconsideration of this order, based on the factual assertions of Trent and Jennifer Cummins. *Id.*, p. 840. In his declaration, Mr. Cummins stated "We were

concerned weather damage in the 2014 hay may have resulted in mold. When I expressed this concern to Mr. Good he represented to me that there had been very little weather incidents in Melba over the past years and that the hay had not been exposed to weather that would result in damage or mold to the hay." *Id.*, p. 719. Ms. Cummins stated "My husband and I were concerned that weather damage in the 2014 hay may have resulted in mold. Mr. Good represented to Trent that there had been very little weather incidents in Melba over the past years and that the hay had not been exposed to weather that would result in damage or mold to the hay." *Id.*, p. 714.

The district court, on reconsideration, ruled that:

> A statement made in 2016 about the weather in 2014 does not rise to the level of an affirmation or promise made by Good about the quality of the hay. This Court does not believe it would be reasonable of Harry's Dairy to rely on Good's recollection of the weather two years prior to create party of the basis of the bargain. The Court believes that the alleged representation by Good did not constitute an express warranty.
>
> As such, the Court's conclusion is that Good's representation was nothing more than an opinion or commendation his believe of the quality of the hay. There was no affirmation or promise made by Good related to the quality of the hay, thus Harry's Dairy's breach of an express warranty counterclaim fails as a matter of law.

Id., pp. 840-41. In this regard, the district court weighed evidence and acted as trier of fact, particularly when it stated it would not be "reasonable" for Harry's Dairy to rely on the statement.

The district court erred because this Court has ruled repeatedly that "[w]hether a statement by the seller was an express warranty *is a question of fact*." *Keller v. Inland Metals All Weather Conditioning, Inc.*, 139 Idaho 233, 237, 76 P.3d 977, 981 (2003) (emphasis added). "In

order to create an express warranty, the seller need not use formal words such as 'warrant' or 'guarantee,' nor need the seller have a specific intention to make a warranty." *Id.* at 236, 76 P.3d 980. "An express warranty is not created by a seller's mere affirmation of the value of the goods or statement purporting to be merely the seller's opinion or commendation of the goods." *Id.* (*citing Jensen v. Seigel Mobile Homes Group*, 105 Idaho 189, 668 P.2d 65 (1983)). "[A]n affirmation of fact is assumed to become the basis of the bargain." I.C. § 28-2-313, cmts. 6, 8.

Here, district court took the issue from the jury when it decided that Mr. Good's statement was not an express warranty. Further, the district court's finding that the statement was an *opinion*, not a fact, is simply erroneous. The issue Harry's Dairy wanted addressed was whether the hay was subject to any conditions that would lead to molding, not the value, Mr. Good's opinion, or a commendation. *See Keller*, 139 Idaho at 236–37, 76 P.3d at 980–81. Mr. Good responded by making a factual statement that the hay had not been exposed to adverse weather that would cause molding or damage. This is not a statement that the hay was "excellent" or "the best around" or "very valuable." *See* 77A C.J.S. Sales § 434. This was a direct factual statement regarding the goods to be sold, and whether an express warranty was created is a jury question. *See, e.g., Tolmie Farms, Inc. v. J.R. Simplot Co.*, 124 Idaho 607, 611, 862 P.2d 299, 303 (1993) ("[C]onversations in which Simplot employees specifically told Tolmie Farms that Vapam, used as instructed, would control nematodes and improve the yield and quality of the potato harvest. . . . clearly could be viewed by a jury as constituting an affirmation of fact which relates to the goods."); *Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380 (Minn. Ct. App. 2004) (Evidence was sufficient to support jury's finding that feed producer

breached an express warranty regarding hog feed where feed producer representatives stated that quality corn would be used in the feed and that farmers' sows were harmed by substandard corn used in feed.).

Finally, the district court erred when it decided that the express warranty had to be in writing in the original letter. The UCC specifically allows that "any affirmation of fact or promise made by the seller become 'part of the basis of the bargain.'" I.C. § 28-2-313. And, parol evidence is allowed in the context of a sale of goods. I.C. § 28-2-202. For all these reasons, the district court erred in dismissing Harry's Dairy's claim for breach of express warranty on summary judgment.[9]

C. The District Court Erred In Dismissing Harry's Dairy's Cause Of Action For Breach Of Implied Warranties On Summary Judgment.

The district court erred in dismissing Harry's Dairy claim for breach of implied warranty, because there were issues of fact preventing dismissal. In his opening brief on summary judgment, Mr. Good argued that there were no warranties because they were not contained in the December 2015 letter, and that Harry's Dairy relied on Hay Now's expertise and inspection of the hay, so no warranties passed to Harry's Dairy. R. Vol. I, pp. 145-50. Harry's Dairy opposed by arguing that Harry's Dairy's pre-purchase inspection did not test for mold, and the industry standard for pre-purchase inspection does not include mold testing. R. Vol. II, pp. 536-38. In its first summary judgment decision, the district court held that there was no warranty for a

[9] Whether Harry's Dairy gave timely notice of the breach of express warranty, entitling it to damages, is also for the jury to decide. *See* R. Vol. II, pp. 585-86 (citing I.C. § 28-2-607(3)).

particular purpose under I.C. § 28-2-315, because Harry's Dairy was relying on Hay Now's expertise, not Mr. Good's skill or judgment. R. Vol. II, p. 583. But, the district court held there were issues of fact related to the implied warrant of merchantability under I.C. § 28-2-314, because there was an issue of fact related to whether the pre-purchase testing excluded mold. R. Vol. II, pp. 584-85.

On reconsideration, Mr. Good argued that the implied warranty of merchantability was excluded because Harry's Dairy *could have* and *should have* tested for mold. R. Vol. II, pp. 676-77. Harry's Dairy opposed the motion, arguing that the pre-purchase examination was only for nutritional testing, and in any event, it is impossible to inspect every bale while it is stacked at the farm, because "[u]ntil the outside bales are removed the tester does not have access to the bales on the inside of the stack." R. Vol. II, p. 696. The district court, on reconsideration, improperly weighed the factual evidence, and found that "Harry's Dairy was given the opportunity to inspect, and ought to have discovered the mold issues, if they existed." R. Vol. II, p. 845.

Under I.C. § 28–2–315, an implied warranty of fitness arises when the buyer "is relying on the seller's skill or judgment to select or furnish suitable goods." (emphasis added.) I.C. § 28-2-314 governs the implied warranty of merchantability: "Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." *Id.* I.C. § 28-2-316(3)(b) further provides that: "When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty

with regard to defects which an examination ought in the circumstances to have revealed to him." *Id.* Under this provision, "an examination will be effective to exclude warranties only if it occurred before the contract was made and *only if it is of such a nature that it ought to reveal the defects of which the buyer subsequently complains*." *Whitehouse v. Lange*, 128 Idaho 129, 135, 910 P.2d 801, 807 (Ct. App. 1996) (emphasis added). Further, "latent defects that are not discoverable by the pre-contract examination are not excluded by terms of I.C. § 28-2-316(3)(b)." *Id.* at 135, 910 P.2d 807.

In *Whitehouse*, the plaintiffs purchased a mare that they intended to use in a horse breeding business. *Id.* at 132, 910 P.2d at 804. At the time of purchase, a veterinarian examined the mare to determine if she was pregnant. *Id.* After purchase, the plaintiffs attempted to breed the mare, but she failed to become pregnant. *Id.* A subsequent examination showed that she had a susceptibility to a uterine infection that prevents conception. *Id.* The district court held that the defendant had breached the implied warranties. *Id.* The Court of Appeals agreed, holding that while the plaintiffs did not rely upon the defendant to select the particular mare, they did rely on the defendant "to furnish a mare suitable for the particular purpose of breeding." *Id.* at 134, 910 P.2d at 806. Therefore the implied warranty of fitness arose under I.C. § 28-2-315.

Further, the court held that the pre-purchase veterinarian examination of the mare did not exclude the implied warranties. *Id.* at 135, 910 P.2d at 807. The examination was only to determine whether the mare was pregnant, and "[t]here is no evidence in the record that such a pregnancy examination ought to have revealed the mare's susceptibility to uterine infections that occur only upon breeding." *Id.* The court noted that latent defects that are not discoverable by the

pre-purchase examination are not included. *Id.* And, official comment 8 provides: "A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a nonprofessional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe." I.C. § 28-2-316, cmt. 8.

Here, there are issues of fact regarding whether the implied warranties apply. As to the implied warranty of fitness, Mr. Good argued that Harry's Dairy relied on Hay Now, not Mr. Good, to furnish suitable hay. R. Vol. II, p. 583. But, nothing precludes Harry's Dairy from *also* relying on Mr. Good (and his status as a hay grower) in supplying suitable goods. The purchasers in *Whitehouse* relied on themselves to choose a mare with suitable bloodlines, but they *also* relied on the seller to produce a mare suitable to breeding. Harry's Dairy may have relied on Hay Now for nutritional testing, but ultimately relied on Mr. Good to provide non-moldy hay, as was industry standard. At the very least, whether the warranty of fitness attaches is a question for the trier of fact.

Further, there are issues of fact regarding whether either implied warranty survived the pre-purchase examination. There is no dispute that Hay Now tested for nutritional value not mold. The fact that Harry's Dairy had an opportunity to sample the hay does not negate the warranties. No pre-contract test was done to determine whether there was mold, and a matter of custom, hay is not tested for mold. Rather, the industry standard is that when mold is found, the seller keeps the moldy hay and the non-moldy hay is purchased. (R. Vol. II, p. 536). Even Mr. Good's hay dealer testified that it was not his practice to submit hay samples to be tested for

mold. R. Vol. I, p. 128. And, Harry's Dairy provided evidence that mold is a latent defect that cannot be fully seen until a bale is broken up, and internal bales within a stack cannot be analyzed at the time of purchase unless the outer bales are removed. R. Vol. II, p. 714, L. 3. So, the implied warranties related to mold should survive the pre-purchase nutritional testing. At the very least, there is an issue of fact regarding whether Harry Dairy should have tested for mold.

Additionally, whether Harry's Dairy notified Mr. Good in time of the breach, entitling Harry's Dairy to damages, is an issue of fact for trial. Harry's Dairy presented evidence that it informed Mr. Good of the mold problem at least four times—when the December 2015 load was returned, when Ms. Cummins went to the property to observe hay being loaded, when the March 2016 load was returned, and in the April 2016 emails and letters. Whether these amount to notification within a reasonable time under I.C. § 28-2-602(3)(a) is a question of fact. *Id.* ("where a tender has been accepted, the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach of be barred from any remedy. . . .") If so, Harry's Dairy is entitled to damages under I.C. § 28-2-715(2)(b) for breach of the implied warranty. The district court was correct when it originally decided that "[w]hen Harry's Dairy actually gave notice of mold and whether it occurred within a reasonable time are both questions for a jury to decide." R. Vol. II, p. 586.

D. The Jury's Verdict Awarding Damages to Mr. Good is Not Supported by Substantial and Competent Evidence.

Even if it were proper for the district court to grant summary judgment in favor of Mr. Good on liability, Mr. Good's evidence of damages at trial failed. Mr. Good's damages

testimony was based on a number he read from a document (not admitted into evidence) that his counsel provided. Further, Mr. Good failed to prove that the hay sold was the Harry's Dairy hay, or that the hay sales were commercially reasonable. Without substantial and competent evidence of identification to the contract and commercial reasonability, Mr. Good was not entitled to damages under I.C. § 28-2-706.

1. The evidence presented at trial was insufficient to establish damages because Mr. Good's testimony was mere conjecture, based entirely on a single flawed document.

Idaho law is well established that all damages must be proved with reasonable certainty. *See Eagle Equity Fund, LLC v. TitleOne Corp*., 161 Idaho 355, 361, 386 P.3d 496, 502 (2016). Although reasonable certainty does not require "absolute assurance nor mathematical exactitude" the factfinder "may not determine damages by mere speculation and guesswork, and there must be a reasonable foundation established by the evidence from which the factfinder can calculate the amount of damages." *Id*. (citations omitted). Under Idaho law, damage awards based upon speculation and conjecture are prohibited. *Id*.

During trial, Mr. Good was called to testify about the damages he sustained from Harry's Dairy's alleged breach. Mr. Good testified that in an attempt to mitigate damages, he resold hay to Bob Barnes Trucking and Felix Anchustegui Trucking ("Anchustegui"), at a price substantially lower than the price called for in the parties' agreement. Tr. Vol. I, p. 106, L. 22-25, p. 107, L. 1-2. While on the stand, Mr. Good was unable to remember how much he resold the hay for. *Id.* Mr. Good's counsel sought to refresh Mr. Good's recollection with a document (the

"Damages Exhibit"), which was labeled as "Plaintiffs Ex. 21," but which was never admitted into evidence. Tr. Vol. I, p. 62 (transcript p. 110, L. 8-13).

On its face, the Damages Exhibit purports to be a compilation of the sales Mr. Good made to Barnes and Anchustegui. Plaintiff's Trial Exhibit 21. The Damages Exhibit apparently created by Mr. Good's counsel summarizes the date, the amount in tons, and the price of hay that was sold. *Id.* The Damages Exhibit further provides a "Grand Total" of $130,034.91, which purports to be the total amount Mr. Good received from Barnes and Anchustegui to offset his damages, for a total damages of $144,186.60. *Id*. Immediately after reviewing this document, Mr. Good testified that he recovered $130,034.91 from the sales to Barnes and Anchustegui, and that based on this offset amount, he was damaged in the amount of $144,185.60. Tr. Vol. I, p. 62 (transcript p. 110, L 8-20).[10]

Counsel for Harry's Dairy cross-examined Plaintiff about his memory of his purported sales to Barnes and Anchustegui. Specifically, he questioned Mr. Good as to why there was no documentary or other real evidence of his sales to Anchustegui. Tr. Vol. I, p. 76 (transcript p. 168, L. 2 through transcript p. 169, L. 13.) During the relevant time period there were only four load tickets, which added together, amounted to only 100 tons of hay. *Id.* In fact, the Damages Exhibit from which Mr. Good based his damages testimony suggests that Mr. Good sold

[10] Upon closer review, by adding the numbers provided in the "Total Price" column of the Damages Exhibit, the total offset price adds up to $152,827.90, which is $22,792.99 more than the $130,034.91 total supplied by the Damages Exhibit. Plaintiff's Trial Exhibit 21. Using the correctly calculated amounts, the total damage number should have been $121,393.60, not $144,186.60.

approximately 1,104.2 tons of hay to Anchustegui which, when added to the total sales to Barnes, amounted to nearly 700 tons more than called for in the agreement between the parties. *See* Plaintiff's Trial Exhibit 21. Critically, Mr. Good failed to introduce any invoices, weigh tickets, or other documents into evidence, rendering that portion of the damage award pure speculation.

Mr. Good's conclusory testimony as to his damages, which was plainly based on the Damages Exhibit, is little more than Mr. Good's counsel testifying and is insufficient to warrant the jury's verdict for a number of reasons. Mr. Good had no independent knowledge of the damages amounts. Mr. Good did not introduce any load tickets, invoices, or documentary evidence that supported the Anchustegui deliveries. Mr. Good also admitted that he had refused to provide his own bank records in discovery so Harry's Dairy had no means to verify the claimed sales to Anchustegui. Mr. Good even acknowledged a lack of personal knowledge and had his memory refreshed with a compilation exhibit that was never introduced and was not supported by record evidence. And, the Damages Exhibit does not even add up and is internally flawed as it plainly miscalculates the total "offset" price Mr. Good purported to recover from his sales to Barnes and Anchustegui.

Under Idaho law, "the factfinder may not determine damages by mere speculation and guesswork and there must be a reasonable foundation established by the evidence from which the factfinder can calculate the amount of damages." *See Eagle Equity Fund, LLC*, 161 Idaho at 361, 386 P.3d at 502. The jury's verdict must be vacated because its decision rested exclusively on

Mr. Good's speculative testimony derived from an unadmitted, inadmissible, unverifiable, and flawed document.

2. The evidence is insufficient to show the hay sold to Barnes and Anchustegui was the Harry's Dairy hay.

As noted above, the jury awarded damages to Mr. Good under I.C. § 28-2-706. To qualify for the § 28-2-706 damages, Mr. Good has the burden of demonstrating that: (1) he provided the requisite notice prior to selling the goods; (2) he resold the goods that were reasonably identified to the contract; and (3) that the resale, including the terms, method, and manner of the resale, was commercially reasonable. *Id.* A seller's failure to sufficiently demonstrate it complied with the requirements of Section 2-706 prohibits the seller from obtaining the damages in that section. *See* I.C. § 28-2-206 cmt. 2. According to Official Comment 2 to the UCC, if the seller cannot prove it complied with the requirements of § 2-706, the seller is relegated to the damages provisions of § 28-2-708. *Id.*

At trial, Mr. Good summarily testified that the hay he sold to Barnes and Anchustegui was identified as hay to the contract. Tr. Vol. I, p. 61 (transcript p. 106, L. 18-25, p. 107, L. 1-3). Mr. Good's testimony is against the clear weight of the other evidence presented at trial. The evidence presented at trial, including the very Damages Exhibit on which Mr. Good based his testimony, demonstrates the hay he sold to Barnes and Anchustegui was not reasonably identified to the contract.

During trial, counsel for Harry's Dairy elicited testimony from Bob Barnes and from Mr. Good that Barnes had regularly purchased hay from Mr. Good before, right up until Barnes

purportedly purchased hay identified to the contract. *E.g.*, Tr. Vol. I, p. 61, L. 15-20. The record establishes that Mr. Barnes was buying from Mr. Good regardless of the Harry's Dairy contract. Furthermore, the Damages Exhibit used to refresh Mr. Good's recollection suggests that the hay subject to the contract was commingled with Mr. Good's other hay—the total amount of hay sold to Barnes and Anchustegui amounts to approximately 2,944.59 tons, nearly 800 more tons of hay than the amount of hay remaining for resale under the contract. *See* Plaintiff's Trial Exhibit 21. Excluding the tons the document identifies as "not part of offset," the total tonnage still adds up to 2,387.49 tons, representing an additional 200 tons that Mr. Good purportedly identified as hay subject to the contract. *Id*.

Mr. Good's trial testimony, which was based on the unreliable and miscalculated Damages Exhibit, is insufficient to demonstrate the hay sold to Barnes and Anchustegui was the hay identified to the contract. To the contrary, the Damages Exhibit demonstrates that Mr. Good commingled the hay to the contract with his other hay, and that sales made to Barnes and Anchustegui were made without sufficiently identifying the hay as subject to the contract. Mr. Good failed to meet his burden in demonstrating the hay identified to the Agreement was the hay sold to Barnes and Anchustegui. The jury's finding in this regard is not support by substantial and competent evidence.

3. Mr. Good failed to present substantial and competent evidence that the sales to Barnes and Anchustegui were commercially reasonable and made in good faith.

As stated above, to qualify for the remedies provided in I.C. § 28-2-706, the seller has the burden of showing the sale was commercially reasonable in every aspect, including the method,

manner, time, and terms of the sale. *See* I.C. § 28-2-706(2). Official Comment 2 to Section 2-706 provides that it "enables the seller to resell in accordance with reasonable commercial practices so as to realize as high a price as possible in the circumstances." I.C. § 28-2-706 cmt. 2.

Mr. Good failed to present substantial and competent evidence of commercial reasonability. First, Mr. Good failed to present *any* testimony or documentary evidence with regard to the sales to Anchustegui. Mr. Good offered no evidence of when the sales to Anchustegui took place, where the sales took place, how the parties arrived at the sale price of $70.00 per ton, and what other efforts Mr. Good took to resell the hay before selling to Anchustegui. Tr. Vol. I, p. 61 (transcript p. 107, L. 1-3); p. 76 (transcript p. 168, L. 2-18). The absence of evidence cannot amount to substantial and competent evidence of damages.

Second, the little evidence Mr. Good did proffer at trial is insufficient to show that Mr. Good fulfilled his duty to realize as high price as possible for the hay under the circumstances, with regard to both the Barnes and Anchustegui transactions. After receiving Mr. Good's notice of his intent to resell in April 2016, Harry's Dairy offered to take delivery of, and pay the full agreement price of $128 per ton for all remaining marketable hay. Tr. Vol. I, p. 116 (transcript p. 327, L. 8-12). Despite the offer, Mr. Good and his counsel unjustifiably refused to allow Harry's Dairy to inspect the remaining 2,000 tons of hay. Mr. Good offered no credible reason for his refusal to allow Harry's Dairy to inspect and purchase the remaining hay. Instead, Mr. Good immediately began selling the hay to Barnes and Anchustegui for rock bottom prices. Under these circumstances, Mr. Good's refusal to allow Harry's Dairy to purchase the hay at the full Agreement price, and thereby realize as high a price as possible for the hay, was at best

commercially unreasonable, and at worst was a deliberate and intentional act of bad faith to increase his damages and harm Harry's Dairy by simultaneously depriving Harry's Dairy of the benefit of conforming hay and creating unnecessary damage.

The fact that Mr. Good failed to offer *any* evidence that his sales to Anchustegui were commercially reasonable deprives him of any remedy under I.C. § 28-2-207. Furthermore, the evidence was insufficient to demonstrate Mr. Good acted reasonably and in good faith in selling the hay to Barnes and Anchustegui for less than half the contract price, when in fact, Harry's Dairy offered to purchase all remaining marketable hay for the full purchase price under the contract. Mr. Good's failure to present substantial and competent evidence that he sold the hay in good faith and in a commercially reasonable manner deprives him of an award of damages under § 2-706, and mandates that this Court vacate the jury's award.

E. The District Court Erred in Awarding Mr. Good Fees and Costs and Prejudgment Interest.

Where one issue on appeal is intimately connected with another part appealed from, "a reversal of that part would require a reconsideration of the whole case in the court below. . . ." *Idaho First Nat. Bank v. Bliss Valley Foods, Inc*., 121 Idaho 266, 291, 824 P.2d 841, 866 (1991) (quoting *Gonzales v. R.J. Novick Constr. Co., Inc*., 575 P.2d 1190, 1194 (S.C. Cal. 1978)). In particular, an attorney fee award connected with a reversed judgment must also be reversed. *Marty v. Bainter*, 727 So. 2d 1124, 1125 (Fla. Dist. Ct. App. 1999)

The award or prejudgment interest (R. at 1151) and the order awarding fees and costs (R. at 1155-57) are predicated upon a judgment that the Court should reverse. Therefore, the Court

must also reverse the award of prejudgment interest and order for fees and costs in favor of Mr. Good.

F. Harry's Dairy is Entitled to Fees and Costs on Appeal.

Idaho Code § 12-120(3) mandates that the courts award attorney fees to the prevailing party in a civil action involving a "commercial transaction." *Climax, LLC v. Snake River Oncology of E. Idaho, PLLC*, 149 Idaho 791, 798, 241 P.3d 964, 971 (2010). Mr. Good was awarded fees under Idaho Code § 12-120(3) at the district court. R. at 1155-57. Harry's Dairy requests attorney fees and costs on appeal pursuant to I.A.R. 40 and 41 and under Idaho Code § 12-120(3) (commercial transaction) as the prevailing party on appeal, in the event this Court does not remand for a trial on the merits but directs judgment in favor of Harry's Dairy. *See Climax*, at *id.* (declining to award fees under § 12–120(3) where award of summary judgment was reversed and case was remanded for further proceedings).

V. CONCLUSION

Harry's Dairy maintains that the district court improperly made numerous factual determinations on summary judgment. Harry's Dairy respectfully requests this Court reverse the summary judgment decision of the district court, and remand for a trial on the merits on no fewer than the following twenty-one issues of fact:

1. Whether the contract was an installment contract;
2. Whether the installments were nonconforming due to mold;
3. Whether the moldy installments substantially impaired the contract;
4. Whether Harry's Dairy made a justified demand for adequate assurances;
5. Whether Harry's Dairy notified Mr. Good of cancellation within a reasonable time;
6. Whether Harry's Dairy is entitled to damages for cover hay;

7. Whether Harry's Dairy's various communications with Mr. Good amount to sufficient rejections of the remaining 2,000 tons;
8. Whether Harry's Dairy's obligation to reject was even triggered without a post-purchase inspection;
9. Whether the rejections were timely;
10. What a reasonable time to haul hay under the contract was;
11. Whether Harry's Dairy failed to haul within a reasonable time;
12. Whether Harry's Dairy had failed to pay for certain loads;
13. Whether the failure to pay was a substantial impairment of the contract;
14. Whether the failure to pre-pay in thirds was waived by the course of dealing;
15. Whether the failure to pre-pay in thirds was a substantial impairment of the contract;
16. Whether Mr. Good had provided proper notice before resale;
17. Whether Mr. Good had made an express warranty;
18. Whether implied warranties attached to the contract;
19. Whether the implied warranties survived the pre-purchase examination;
20. Whether Harry's Dairy had provided timely notice of breach of warranty;
21. Whether Harry's Dairy was entitled to damages for breach of warranty.

If the Court declines to reverse the award of summary judgment to allow for trial on these issues, Harry's Dairy requests the Court vacate the jury's award and direct a retrial on damages.

DATED: March 19, 2019.

GIVENS PURSLEY LLP

/s/ Bradley J. Dixon
Bradley J. Dixon
Kersti H. Kennedy
Attorneys for Harry's Dairy, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this 19th day of March, 2019, I caused a true and correct copy of the foregoing to be served electronically through the iCourt system,

Kevin E. Dinius Sarah Hallock-Jayne DINIUS LAW Email: kdinius@diniuslaw.com Email: shallockjayne@diniuslaw.com *Attorneys for Respondent Jeff Good*	

By: */s/ Bradley J. Dixon*
Bradley J. Dixon
Kersti H. Kennedy