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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Janet L. Helbling,	)	Supreme Court No. 20180095
	)	District Court No. 30-2013-DM-00149
Plaintiff and Appellee,	)	
v.	)	
Wayne T. Helbling,	)	
Defendant and Appellant.	)	

APPELLEE'S BRIEF

APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT, DATED FEBRUARY 17, 2018 AND AMENDED JUDGMENT, DATED FEBRUARY 21, 2018

HONORABLE THOMAS J. SCHNEIDER, PRESIDING, SOUTH CENTRAL JUDICIAL DISTRICT

Charles "Casey" L. Chapman, ID #03380
Attorney for Defendant and Appellant
Chapman & Chapman, P.C.
103 S. 3rd Street, Suite 6
PO Box 1258
Bismarck, ND 58502-1258
(701) 258-6030
chapmanlaw@chaplawnd.com

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D. The District Court correctly interpreted the Judgment to require an amendment of its terms to be in writing.

II. STATEMENT OF THE CASE

1. Janet Helbling (herein Janet) filed a post-judgment motion with the District Court, requesting the District Court to establish terms of payment, under which Wayne Helbling (herein Wayne) would be required to pay his obligations under the terms of the Judgment.

2. Following pre-hearing discovery, the District Court heard this matter on December 4, 2017, and the parties were given the opportunity to make written closing arguments.

3. The District Court made and entered its Memorandum Opinion, dated January 3, 2018, followed by Findings of Fact, Conclusions of Law, and Order for Judgment, dated February 17, 2018. An Amended Judgment was entered on February 21, 2018.

4. Wayne filed an Objection to Findings of Fact, Conclusions of Law, and Order for Judgment and Amended Judgment, dated March 2, 2018, and that Motion was denied by the District Court in an Order, dated March 22, 2018.

5. Wayne then filed Notice of Appeal.

III. STATEMENT OF THE FACTS

A. The Terms of the Judgment

6. Shortly before their scheduled divorce trial in 2014, Janet Helbling (herein Janet) and Wayne Helbling (herein Wayne) reached an agreement on settlement. The ensuing Judgment (App., p. 101) provided that Wayne would receive (a) his interest in Helbling Bros Ranch, a ranching partnership formed by Wayne and his two brothers (App., p. 105, Para 21), (B) 160 acres constituting the SE/4 of Section 28-138-82, Morton County (herein Wayne's Land) upon which Wayne had a home (App., p. 103, Para 15), and (C) other assets. In return, Janet would receive (D) $1 million in payments from Wayne (App., p. 105, Para 21), (E) a house in Mandan subject to the mortgage thereon (herein Janet's House) (App., p. 103, Para 15), and (F) other assets.

7. Wayne agreed to pay $750,000 of the $1 million within 60 days following the entry of judgment; the judgment was entered on September 14, 2014. The remaining $250,000 was to be paid when Wayne reached the age of 65 years. (App., p. 105, Para 21(a) and (b)).

8. Until Janet was paid in full, Janet was to receive rent on Wayne's Land, calculated as the average rental rate, as reflected in the annual "FSA North Dakota Land Rent and Values publication." (App., p. 105, Parag 21(b)).

9. The Judgment provided that, after Wayne completed payment of the first $750,000 to Janet within 60 days, Janet would be responsible to satisfy the mortgage on Janet's House. (App., p. 105, Para 21(a)).

10. The judgment also contained a provision, at Paragraph 21(c), (App., p. 105), stating that, "[I]f Wayne does not get financing, the parties will either reach an agreement

on how the $1,000,000 is to be paid and if they cannot do so the parties will ask the court to determine the terms of payment. Each would then be able to present evidence to the court on the issue of how it is to be paid."

11. The Judgment, at Paragraph 33, (App., p. 108), also provided that no modification of the Judgment would be valid unless "in writing and executed with the same formality as this agreement."

B. The facts presented to the trial court.

12. The evidence was presented in the form of testimony and trial exhibits.

13. According to the Judgment, Wayne was to pay $750,000 to Janet within 60 days following the entry of judgment. However, Wayne testified that, at the time that he offered, and agreed to, the terms of settlement, he had not bothered to talk to his bankers. (Tr. p. 112, ln. 14-24). Instead, the evidence indicates that he did not approach any lender for a loan until some point in late 2014, at which time he contacted Dakota Community Bank, requesting a $500,000 loan. (Tr. p. 77, ln. 24 – p. 78, l. 4). Dakota Community Bank representative Joel Ostendorf testified that the bank did not process his request for the $500,000 loan and that Wayne later reduced the amount requested. (Tr., p. 73, ln. 15-19).

14. Following the entry of judgment, the testimony differed, regarding the continued relationship between Janet and Wayne. Janet testified that, for the greater part of 2015, she and Wayne continued a sexual relationship. (Tr., p. 14, ln. 12 -p. 15, ln. 4). Wayne denied the full extent of Janet's recollection of their intimacy; however, he did admit that he and Janet had at least one sexual encounter at some point following the entry of Judgment. (Tr., p. 93, ln. 19-24).

15. Wayne made no payments against the $750,000 obligation within 60 days of the entry of judgment. Janet claimed that the parties' relationship continued after the divorce. There is evidence in the record, from Wayne's cell phone records (App., p. 308-345, Exhibit 4, see summary on p 308), indicating that there was continued cell phone communication between the parties during the remainder of 2014, and into 2015. In fact, Exhibit 4 reflects the fact that, out of 24 cell phone calls in 2015 between the parties, Wayne initiated all but 9 of those cell phone calls. Janet contended in her testimony that the cell phone records only reflect a portion of their communication and that, on many occasions, Wayne would stop at Janet's house unannounced. (Tr., p. 14, ln. 12-18). Janet was clear that there was some effort by the parties to explore the possibility of reconciliation (Tr., p. 29, ln. 2-5). That effort, in the testimony of Janet, explained what she called "sex and supper" encounters into 2015; she testified that those encounters only ended in November 2015, when Wayne experienced an inability to perform intimately. (Tr., p. 30, ln. 5-12).

16. On January 16, 2015, Wayne made a payment to Janet of $25,000. (App., p. 301, Exhibit 1). There was no evidence presented regarding any verbal agreement regarding that payment. A review of Wayne's cell phone records does not reveal any telephone communication between Wayne and Janet between January 2, 2015, and the date of that first payment. (App., p. 308-345, Exhibit 4).

17. There is no evidence, regarding any communication between Janet and Wayne in late 2014 or in the early months of 2015, regarding any attempt by Wayne to reach a verbal agreement with Janet on a modified payment schedule

18. Wayne made a second payment against his obligation, in the amount of $275,000, on March 27, 2015. (App., p. 302, page 2 of Exhibit 1). The funding for this payment was secured by a mortgage, in favor of Farm Credit Services. (Tr., p. 62, ln. 24 – p. 63, ln. 11). Janet satisfied her obligation under the Judgment by signing a subordination agreement, acknowledging that Farm Credit Service's mortgage interest in Wayne's Land was superior to her own interest, (App., p. 304, Exhibit 2), and she also executed, at the request of Farm Credit Service, a deed conveying Wayne's Land to Wayne. (Tr., p. 11, ln. 3-9).

19. Wayne claimed in testimony that, at some undetermined time in spring 2015, he and Janet reached the verbal agreement to modify the judgment during a discussion, lasting approximately half an hour, at Janet's house. (T., p. 116, ln. 6-17). However, there is nothing in Wayne's testimony, and nothing in the District Court record, which links this claimed verbal agreement to the second payment of $275,000. Instead, the timing of the alleged agreement was left to speculation. Wayne acknowledged that there is nothing in writing, which supports his claim to an agreement. (Tr., p. 89, ln. 14-19).

20. In his original affidavit, filed in response to Janet's motion, (App., p. 433, Exhibit 16), Wayne claimed at Paragraph 3 of his affidavit that the terms of the verbal agreement modified Wayne's obligation so that he would only need to currently pay a total of $460,000 to Janet. In return, according to Paragraph 4 of Wayne's affidavit, Janet would then forgo any further payments on the balance of the $750,000 obligation "until I retire" and would permanently give up her entitlement to receive the agreed annual rental value payments. Wayne's affidavit made no mention of interest on the delayed payment. During cross examination at the hearing, Wayne initially testified that the agreement was

made for $460,000. (Tr. p. 115, ln. 9-11). Only two cross-examination questions later, Wayne denied that the verbal agreement was made for $460,000; instead, he said it was made for $430,000. (Tr. p. 115, ln. 15-21). Wayne's explanation for the difference is revealing; in response to a question, wondering why he put $460,000 in his affidavit if the agreement was actually made for $430,000, Wayne explained the difference: "because I figured that's probably with the cash I gave her. That was the total I had gave her so far." (Tr. p. 115, ln. 15-24). That explanation threw serious doubt on Wayne's claim that he and Janet agreed on a specific dollar amount of current payment; instead, it appeared that Wayne had simply made his own calculation of what he thought should be paid. He further conceded that, even under this claimed verbal agreement, he had not paid in full, because his payments had only totaled $430,000. (Tr., p. 118, ln. 16-18). Wayne testified that this lack of certainty in the terms of the alleged verbal agreement was caused by his misunderstanding of his September 18, 2014, payment to Janet of $20,496.48, (App., p. 307, Exhibit 3). Janet was entitled to that payment under Paragraph 19 of the Judgment, as payment of one-half of the balance in an Investment Centers of America account, (App., p. 104, Judgment, Para 19), the memo on the check (Exhibit 3) says "PMT ½ Inv Center Acct," and Wayne in his testimony agreed that the payment of $20,496.48 had nothing to do with his $750,000 obligation. (Tr., p. 118, ln. 19-21).

21. Wayne not only offered this confusing rendition of the dollar amount of the alleged verbal agreement, but also offered questionable testimony regarding the new due date of his payments. Wayne testified that Janet agreed to defer the remainder of her financial entitlement under the Judgment, without interest, until Wayne "retired;" he admitted that, at the time of the claimed verbal agreement, no age for retirement was

discussed. Thus, Wayne admitted that, if he worked until he was 75 years old, Janet would need to wait until then to receive payment. (Tr., p. 117, ln. 6-25). When pressed regarding plans for retirement, Wayne, while professing a desire for retirement at age 65 years, admitted that neither he nor his brothers have any specific plans for retirement. (Tr., p. 118 ln. 1-15). In fact, in the amended partnership agreement for Helbling brothers, executed on June 26, 2015, the term of the partnership was extended for 20 years until December 31, 2035. (App., p. 416-423, Exhibit 14, paragraph 3).

22. Sometime in spring or summer of 2015, according to the testimony from the Dakota Community Bank loan officer Ostendorf, the Dakota Community Bank loan request was revised downward to just under $130,000. (Tr., p. 78, ln. 5-19). Those discussions did not result in another payment to Janet until November 6, 2015, when Wayne paid Janet a third payment of $130,000. (App., p. 303, page 3 of Exhibit 1). On that occasion, it is again noted from Exhibit 4 that there had been no cell phone communication recorded between the parties since October 31. Wayne admitted in testimony that he delivered that check to Janet personally. (Tr., p. 96, ln. 16-20).

23. Janet agreed that this final payment was made on or about November 6 or 7, 2015. She testified that, on that day, Wayne appeared at her home, unannounced. She also testified that, after Wayne delivered the check, they had another sexual encounter; in the aftermath of that sexual encounter, while both of them were in Janet's bed, Janet testified that Wayne made his first, and only, request to defer further payments on the settlement. (Tr. p. 14, ln. 5-24). Janet testified very emphatically that she never agreed to a deferral but did concede a "wait-and-see" approach, which would allow Wayne to forgo future payments against his $750,000 obligation, as long as they were working toward

possible reconciliation. (Tr., p. 15, ln. 7-23). However, Janet also testified, just as emphatically, that there was no discussion about waiver of the annual rental payments. (Tr., p. 15, ln. 24 –p. 16, l. 5).

24. After his November 2015 payment, Wayne has made no further payments. Janet testified that she felt that reconciliation was still an option in 2016, even though cell phone records showed an absence of cell phone calls during the year. Janet testified that the reduction in cell phone communications was a combination of the result of her battle with some serious health problems, the result of Wayne's apparent physical issues in November 2015, and the result of the fact that Wayne had learned to use texting in 2016 (Tr., p. 30, ln. 5-19). Janet testified that, in spite of a subpoena to Verizon, Janet was unable to retrieve the content of any text messages between them. (Tr., p. 49, ln. 23 – p. 50, ln. 23). Instead, Janet was only able to offer text messages which were taken from her own cell phone, dated only back to fall 2016. Janet testified that, based on continued communication between Wayne and herself, she still felt that Wayne was willing to look at the possibility of reconciliation. (Tr., p. 40, ln. 15-23; Tr., p. 30, ln. 20-23). Janet had no reason to suspect that there was any major hurdle to the possibility of reconciliation; although Wayne claimed at trial that he had entered a relationship with a new girlfriend, Wayne admitted that he did not admit anything about his new girlfriend until the end of the calendar year 2016. (Tr., p. 119, ln. 5-8). Thus, Janet reasonably felt that they were both "available" for the possibility of reconciliation.

25. Janet's hopes of reconciliation were certainly fostered by the sexually-charged text exchange, initiated by Wayne, on December 28, 2016. (App., p. 350-353, pp 5 thru 8 of Exhibit 5); those text messages were accompanied by cell phone calls on the same day.

(App., pp. 372 and 377, cover page and p. 5 of Exhibit 6). However, Janet recalled in testimony that it was the next day, December 29, when she first discovered that Wayne had a girlfriend. Janet testified that the girlfriend called Janet about 9 PM on December 29, 2016, and revealed that she (the girlfriend) and Wayne were living together; Janet testified that she was shocked and surprised regarding this discovery (Tr., p. 35, ln. 6-19); Wayne's cell phone records reveal calls between them on December 29. (App., pp. 372 and 375, cover page and p. 3 of Exhibit 6). Wayne, most probably fearing that his temporary payment deferment was about to end, responded on December 31 with cell phone calls (App., pp. 372 and 374, cover page and p. 2 of Exhibit 6), and with four successive and identical text messages, starting at 9:13 p.m. on December 31, proclaiming to Janet, "U did look extremely hot today." (App., p. 357, p. 12 of Exhibit 5).

26. Even though Janet testified that she and Wayne continued to talk into January 2017, Janet testified that she told Wayne that he needed to decide if the relationship between her and Wayne was moving forward and that, if not, he needed to pay Janet her money. (Tr., p. 57, ll. 4-14). The testimony indicated that Janet was still hopeful; when, according to her testimony, Wayne agreed to consider a trip together, Janet went ahead and made preliminary arrangements in January 2017, and sent a picture of a vacation spot in the Bahamas (App., p. 354), only to be disappointed once again. (Tr., p. 37, ln. 15 – p. 38, l. 14). Wayne agreed that the trip was discussed but denied that he had any interest in the trip. (Tr., p. 119, ln. 23- p. 120, ln. 2).

27. The testimony and exhibits revealed two pieces of evidence which verified Janet's belief that there had been ongoing communications between the parties and thus the continued hope for a possible reconciliation, even into early January 2017. The first

piece of evidence is Exhibit 19 (App., p. 457), offered by Janet as a copy of her Raymond James financial statement for the month of January 2017. The first page of that exhibit shows Janet and Wayne as joint tenants. Janet testified that, after the divorce, Janet had, up to January 2017, kept Wayne as a joint tenant owner; she explained that, due to her hope of reconciliation, she did not change the account ownership. However, on the second page of the exhibit, there is reference to a withdrawal and transfer of funds on January 6, 2017; Janet testified that she took that action when she realized that reconciliation had become improbable. (Tr. p., 40, ln. 15 – p. 41, ln. 7).

28. The second piece of evidence is found on page 17 of Exhibit 5. (App., p. 362). At 11:16 a.m. on January 5, 2017, Janet sent a text message to Wayne, reflecting her realization that the relationship was over and that Wayne needed to pay the remainder of his obligation. Her text message states, "I have a couple options for the remainder of the divorce settlement. Do you want to discuss it or should I just have the documents sent to you?" In response, Wayne texted back, "I can call u," and she replied "whenever you have a few minutes." Even though Wayne texted back that he would call in "5 min?", Wayne never did call. (Tr., p. 127, ln. 6-16). Nothing in the evidence revealed any protest by Wayne to Janet's texted demand that he pay the remainder of his payment obligation. There was no claim, such as, "but we had an agreement," and absolutely no denial of Janet's right to demand her payments.

29. The evidence presented to the District Court clearly indicated that, at the time of the hearing, in spite of borrowing $430,000 to pay to Janet, Wayne was doing extremely well financially.

30. At the time of the divorce, Wayne agreed to values in the property listing (App., p. 411, Exhibit 13), which showed that his assets included the following:

a.	1/3 interest in Helbling Brothers – –	$2,403,758
b.	Investment Center	$39,000
c.	Dakota Community bank account	$20,000
d.	American Bank Center IRA	$5,656
e.	State Farm life insurance	$18,331
f.	House plus 160 acres	$435,000
g.	TOTAL	$2,921,745

31. At the hearing, the evidence indicated that Wayne's asset value had remained constant. A reasonably current value of the partnership was shown in a financial statement, submitted to Dakota Community Bank in fall 2016, and signed by Wayne. (App., p. 409, Exhibit 12). Other values were established by exhibits and testimony offered at the hearing.

a.	1/3 interest in Helbling Brothers – – (calculated from total partnership value of $7,279,300, shown in the financial statement)	$2,426,433
b.	Investment Center (Appendix, p. 446, Exhibit 18)	$51,741
c.	Dakota Community bank account (Appendix, p. 461, Exhibit 20)	$24,888
d.	American Bank Center IRA (Tr., p. 121, ln. 19-23)	$5,656
e.	State Farm life insurance (no evidence of change)	$18,331
f.	House plus 160 acres (Tr., p. 123, ln. 4-7)	$430,000
g.	TOTAL	$2,956,779

32. From these values, it became clear that, with Wayne's cash flow, he had been able to maintain payments on the loans, without reducing his asset value.

33. Wayne testified that he receives $2500 per month as a draw from the partnership. (Tr., p. 90, ln. 18-20). However, the income reporting IRS Form K-1 For 2016, showed self-employment earnings in the amount of $144,733. (App., p. 431, Exhibit 15). Although Wayne suggested in testimony that he only made about $7,917 in

2016 (Tr., p. 88, ln. 11-22), a review of Wayne's bank deposits for the year 2016 (App., p. 500-504, selected pages from Exhibit 28) showed total deposits of $57,791.58.

34. The evidence also indicated that Helbling Brothers has a history of bonuses. The amounts received by Wayne as bonuses was evidenced by a selected bank deposit slips. (App., p. 464-469, Exhibit 23). Those deposit slips indicate bonuses ranging from an apparent $15,000 year-end bonus for 2016 (App., p. 469, p. 6 of Exhibit 23), to an apparent $25,000 year-end bonus for 2015 (App., p. 468, p. 5 of Exhibit 23), with an apparent $25,000 mid-year bonus in 2015 (App., p. 466, p. 3 of Exhibit 23).

35. Wayne testified that he has borrowed the maximum, which he can obtain. However, he testified that he did not talk to a banker again about borrowing more money, after he borrowed money to make the November 2015 payment. (Tr., p. 89, ln. 7-13). It was apparent that the only purpose for recent contact with banker Ostendorf was related to trial testimony. In fact, banker Ostendorf testified that no decision could be made about future loans to Wayne, without "better information." (Tr., p. 74, ln. 21 – p. 75, ln. 2).

36. The evidence indicated that the Helbling family partnership has valuable land, the majority of which is unencumbered. When a partner needs money, there is evidence that the partnership has been willing to offer partnership land as security for loans which are intended to benefit a single partner. Wayne's November 2015 payment of $130,000 was secured by a mortgage signed by the partnership against partnership land. (App., pp. 484-497, Exhibit 26). On March 27, 2017, the partnership executed a mortgage against partnership land in the amount of $311,467.18, in order to secure a loan for the benefit of Wayne's brother Fred. (App., pp. 470-483, Exhibit 25).

37. Evidence also indicated that Helbling Brothers amended its partnership agreement in June 2015. (App., p. 416, Exhibit 14). Under the amended partnership agreement, there is nothing to prevent individual partners from offering their interest in the partnership for sale to third parties, subject only to a right of first refusal in the other partners. Paragraph 12(A) of the amended agreement says:

> "In the event of a voluntary or involuntary sale or transfer of any or all of a Partner's Partnership Interest to a person who is not a Partner of the Partnership, the relinquishing/selling Partner (relinquishing Partner) shall first offer to sell, assign or otherwise transfer the relinquishing Partner's partial or entire interest in the Partnership, as the case may be, to the Partnership and the remaining/non-relinquishing Partners…"

38. Although the amended partnership agreement does contain a provision which allows the partners to reach agreement as to the value of partnership property for purposes of the buy-out provisions, there is no evidence that partners have ever reached such agreement.

39. Janet testified that she wanted to receive the remaining $320,000, from the initial financial obligation, along with interest at the legal rate from November 14, 2014, which date was 60 days following the entry of judgment. (Tr., p. 41, ln. 8 – p. 42, ln. 16). In addition, the Court received Exhibits 7, 8, 9, and 10, (App., pgs. 382-393), which were the annual FSA Land Rent and Values statements for calendar years 2014, 2015, 2016, and 2017, respectively. Janet testified that Wayne's Land consists of 155 acres of cropland, along with 5 acres for his house. Those exhibits show the average rental value for unirrigated cropland as $42.50 in 2014, $39.80 in 2015, $39.20 in 2016, and $39.80 in 2017. Based on those values, calculated with the 155 acres, Wayne owes $25,001.15 in unpaid rental value through calendar year 2017. Further, though, Janet requested that the

Court deal with Wayne's full $1 million obligation because, as Janet pointed out, she does not want to go through this same battle in the future. (Tr., p. 41, ln. 8 – p. 42, ln. 20).

40. Janet also requested an award of attorney fees. She offered Exhibit 11, which evidenced the attorney fees which she has incurred as of the most recent billing statement, dated October 30, 2017. (App., pgs. 394-408, Exhibit 11).

IV. LAW AND ARGUMENT

A. The District Court's finding that the parties had not reached a binding agreement to modify the Judgment was not clearly erroneous.

41. Wayne's argument to the District Court, and again to this Court, is based primarily on his claim that he and Janet reached an agreement, in early 2015, under which (a) Wayne would pay Janet a portion of the $750,000 which he was required to pay under the Judgment, (b) Janet would forgo any further payments against Wayne's Judgment obligation until Wayne retired, and (c) Janet would completely waive her right to the rental entitlement, which she was awarded under the Judgment.

42. In his brief, Wayne has created two separate issues, which are covered by Janet in this section of her brief. Wayne's first issue is his claim that the District Court erred in finding that there was no modification, and the second issue is his claim that the District Court erred in finding that any claimed oral agreement was not enforceable.

43. Wayne acknowledges that the existence, or nonexistence, of a verbal contract is a factual determination. Janet agrees with that statement. Further, this Court has held that an oral contract must be established by "clear and unequivocal evidence that unmistakenly points to the existence of the claimed agreement instead of some other relationship." Lumley v. Kapusta, 2016 ND 74, 878 NW2d 65, Para 6. As a result, this Court should not overturn the finding of the District Court, unless the District Court's

finding is clearly erroneous. N.D.R.Civ.P. 52(a). Id. at Para 6. As Wayne points out in his brief, that civil rule requires that the District Court's findings be left intact, unless the finding is induced by an erroneous view of the law, unless there is no evidence to support it, or unless the appellate court's view of the evidence creates a definite and firm conviction that a mistake has been made. Red River Wings, Inc., v. Hoot, Inc., 2008 ND 117, 751 NW2d 206.

44. On the facts of this case, the District Court was faced with two completely different versions of the facts regarding possible agreements on repayment. Wayne's version claimed that he reached an agreement for deferral of payments with Janet in spring 2015; Janet absolutely denied any spring 2015 agreement in her testimony. Janet's version was that the only discussion between her and Wayne regarding payment deferral occurred in November 2015, when she agreed to defer payment enforcement as long as she and Wayne were working to re-establish their relationship.

45. The District Court, having considered this factual dispute, found that "the parties reached no enforceable agreement, by which Janet waived her right to claim payments on either principal or rentals until Wayne retired." (App., p. 270, Paragraph 8, Findings of Fact, Conclusions of Law, and Order for Judgment). The District Court had the opportunity to observe the witnesses, as they testified, and also to consider the circumstances of the respective claims.

46. Wayne had the burden to prove that Wayne and Janet had agreed to the essential terms of the oral agreement. Lumley v. Kapusta, at Para 7. Wayne failed in that burden. As noted in the factual summary, Wayne's testimony varied, regarding the claimed the dollar amount of the agreement, within the span of only three questions at the

hearing. At first, he reaffirmed the dollar amount of $460,000, as set forth in his affidavit. However, in his responses to the next couple questions of cross-examination, he claimed that the verbal agreement was really for $430,000. His explanation for the difference was claimed confusion over the payment of an investment account. This explanation for the change in dollar amounts, i.e., "because I figured that's probably with the cash I gave her. That was the total I had gave her so far," (Tr. p. 115, ln. 15-24), clearly indicated that Wayne could not prove that any specific dollar amount had been the subject of an agreement.

47. Further, Wayne claimed that Janet agreed to forego further payments until he retired. Although Wayne did testify, upon questioning from his attorney, that he planned to retire at age 65 years, Wayne later admitted that he and Janet did not discuss a specific age for retirement. When asked on cross-examination whether Janet would need to wait until the age of 75 years, if he decided to work until age 75, he agreed that Janet would need to wait. Clearly, there was no specific agreement has the time span for the claimed delay in payments.

48. Thus, even if the District Court believed that there actually was discussion between Wayne and Janet in spring 2015 regarding an arrangement for deferral of payments, the District Court's finding that the claimed agreement lacked the specifics, necessary to create an enforceable agreement, was a factual finding which was based on the evidence. There was clearly no agreement on any essential terms, which could form the basis for an enforceable oral agreement. Although formed in the context of a relationship between a bank and a borrower, Union State Bank v. Woell, 434 NW2d 712 (ND 1989), held that the "essential terms of an oral contract to continue lending money in

the future include the amount and duration of the loans. [additional language omitted]." Id. at Para 4. At the time of the claimed oral agreement, Wayne had an obligation to pay money to Janet. His request for a re-negotiation of the agreed terms for payment of the $750,000 amounted to a request for a loan of the remaining amount. However, his testimony could not even identify neither the actual amount of the requested deferral nor the payment.

49. The District Court, upon review of all of the evidence, found that it was more probable that Janet's version of the discussions on deferment was believable. Janet claimed that the single discussion of payment deferment occurred in November 2015, in the aftermath of a sexual encounter between Wayne and Janet. At the time, Janet believed the reconciliation was possible and was willing to forgo enforcement of further payments, as long as the two of them were working toward reconciliation. Although Wayne disavowed any thoughts of reconciliation, the District Court received evidence of phone calls and text messages between them, including the sexual text messages at the end of 2016. Obviously, the District Court found Janet's reliance to be reasonable, especially in light of the fact that Wayne hid the fact that he had a girlfriend.

50. In response to the revelation of a girlfriend, Janet told the District Court that, within days thereafter, she removed Wayne's name from her investment account, an account which she maintained in joint tenancy following the divorce, hoping for reconciliation. In addition, she sent the January 5, 2017, text message to Wayne, (App., p. 362, Exhibit 5), demanding options for payment of the remainder of the settlement amount. Wayne did not protest her demand but, instead, requested the opportunity to talk with Janet. The District Court could certainly make two reasonable assessments from this

evidence. First, the District Court could find that Janet's actions, upon learning about the girlfriend, and upon realizing that Wayne was not interested in reconciliation, were consistent with a person who had previously believed that reconciliation was being pursued but who had subsequently learned that the other party did not intend any further reconciliation. Second, the District Court could conclude that, if Wayne truly had an agreement to defer payments, Wayne would have protested vigorously against Janet's demand.

51. The District Court did not believe that Wayne had presented sufficient evidence to convince the District Court that Wayne had reached an enforceable agreement with Janet to defer her settlement entitlement. The District Court had sufficient evidence to sustain that finding, and there is no basis for this Court to overturn those findings.

B. The District Court did not err by refusing to grant Wayne's claim of estoppel.

52. Wayne's claim of estoppel is not supported by the facts in this case.

53. Wayne's brief relies upon Section 31-11-06, North Dakota Century Code, for the legal position that a party, who by that party's "declaration, act, or omission, intentionally and deliberately has led another to believe a particular thing true and to act upon such belief," cannot later deny such declaration, act, or omission. This Court has characterized this law as providing the basis for a claim of equitable estoppel and has identified the elements of equitable estoppel as: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are other than those which the defendant subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or will influence, the plaintiff; and (3) knowledge, actual or constructive,

of the real facts. Dalan v. Paracelsus Healthcare Corp of North Dakota, Inc., 2002 ND 46, 640 NW2d 726. In Dalan, this Court confirmed that the reliance must be reasonable and that "there must be some form of affirmative deception" by the party against whom equitable estoppel is asserted. Id. at Para 15.

54. Wayne cannot identify any finding of the District Court which indicates that the conduct or statements of Janet led Wayne to take the loans, with which he made partial payments. There is no finding that Janet was responsible for any conduct or statement, which could be the basis for Wayne's claimed reliance. The only evidence that Wayne could generate at the hearing was the claimed oral agreement in spring 2015. The District Court found that Wayne had not proven an enforceable agreement; the District Court also found that there was a continued sexual relationship between Wayne and Janet after the divorce and that Janet reasonably believed that reconciliation was possible. Thus, any delay in Janet's enforcement of Wayne's duty to make further payments was explained, not by some promise that she made Wayne, but by factors other than Wayne's reliance on statements or actions of Janet. Instead, the District Court's findings lead to an opposite conclusion, i.e., it was the statements and actions of Wayne which led Janet to withhold further proceedings to enforce Wayne's obligations.

55. Wayne claims, at Paragraph 13 of Wayne's brief, that Janet's actions, which generated the claimed reliance of Wayne, was her acceptance of $430,000. In fact, Wayne argues that, if she wanted more money, she should have rejected the $430,000, and should have taken the issue before the District Court. Wayne completes this argument by claiming that he has maximized his borrowing capacity and that, if Janet was not going to be satisfied with $430,000, she should have made her position known to

Wayne earlier. That argument is difficult to sustain in light of the fact that Wayne testified that he entered into the divorce settlement agreement to pay $750,000 within 60 days, without ever having talked to a lender about his ability to get the money. Wayne's payment of $430,000 was partial reduction of his pre-existing obligation; Wayne cannot now argue that Janet's acceptance of those payments estopped her from demanding the balance of the obligation. Wayne had every opportunity, under the terms of the Judgment, to enlist the District Court in resolving the matter.

56. The evidence, and the findings, lead one to realize that Wayne, rather than bringing the matter before the District Court, continued a relationship with Janet, after making his final payment of $130,000 in early November 2015, for the probable purpose of maintaining the status quo, i.e., Janet's inclination to refrain from seeking enforcement of the remaining payment obligation. Unfortunately for Wayne, his girlfriend revealed her presence to Janet by the telephone call on the evening of December 29. It is noteworthy that, upon the expiration of eight days thereafter, Janet was demanding a plan for repayment of the remaining settlement obligation. If Wayne believed that he was acting in reliance upon the prior statement or action of Janet, in making the payments of $430,000, Wayne certainly would have responded to Janet's demand for further payments with specific reference to those actions and statements of Janet, upon which he relied. Instead, Wayne merely asked if he and Janet could talk. That is not the response of a person who has relied, to his detriment, on any statements or actions of Janet.

57. It was Wayne's burden to prove to the District Court that Wayne relied, in good faith, upon the statements and actions of Janet and that, as a result of that reliance,

he changed his position to his detriment. Wayne did not satisfy his burden of proof, and the findings of the District Court on this issue should not be disturbed.

C. Under the terms of the Judgment, the District Court had the discretion to order a 10-year amortization requiring Wayne to pay the remaining amounts due under the Judgment and to further order that Wayne be required to pay interest on both the past due balance and on the future balance.

58. In Wayne's brief, his Issue IV claims that the District Court erred in creating a 10-year amortization schedule, and his issue VI claims that the District Court erred by forcing Wayne to pay interest on the unpaid balance. Those two issues are combined, for purposes of response, in this section of Janet's brief.

59. Wayne refers this Court to legal precedent which holds that, when a settlement agreement is merged into a judgment, the terms of the judgment become the controlling document. Kukla v. Kukla, 2013 ND 192, 838 NW2d 434. In the interpretation of the ensuing judgment, the process of interpretation is similar to that employed in the interpretation of written contracts, i.e., the language of the judgment controls unless the language is ambiguous and the incorporating court's intent cannot be determined. Kukla, at Para 9.

60. Wayne argues that, because there was no motion to specifically modify the Judgment, the District Court did not have the authority to implement either an amortization schedule or the payment of interest.

61. In his argument, Wayne ignores the provisions of Paragraph 21(c), (App., p. 105), of the Judgment, stating that, "[I]f Wayne does not get financing, the parties will either reach an agreement on how the $1,000,000 is to be paid and if they cannot do so the parties will ask the court to determine the terms of payment. Each would then be able to present evidence to the court on the issue of how it is to be paid." Thus, it was the

agreement of Wayne and Janet, later incorporated into the terms of the Judgment, which specifically gave to the District Court the ability to hear evidence and then to formulate terms for repayment. There is absolutely no ambiguity in that language; it is clearly stated that, under the stipulated circumstances, the parties will look to "the court to determine the terms of payment."

62. Further, the District Court's ability to "determine the terms of payment" was not limited to the initial $750,000. The Judgment says that, if Wayne cannot finance his initial payment of $750,000, the determination of terms of payment of the entire $1 million then vests in the District Court. There is nothing in the language of the Judgment which limits the District Court's ability to create terms of payment. If Wayne did not want the District Court to have the unlimited authority to create terms of payment, Wayne should have insisted on other terms of the agreement in the divorce settlement.

63. In his analysis on these issues, Wayne does not offer any alternate options which the District Court should have followed, when Wayne was unable to obtain financing. Instead, in his brief, Wayne falls back to his claim, rejected by the District Court, that the parties had reached an agreement on the terms of payment. In addition, Wayne says that he has reached the maximum of his borrowing power and can borrow no more. First, that position is not consistent with the evidence, i.e., lenders who testified only stated that the would need to look at all information before making a decision. Second, as noted by the District Court in its opinion, any opinions regarding Wayne' ability for repayment ignored the fact that Wayne is the owner of the partnership interest, which is valued at more than $2 million, and which can be transferred by Wayne under the terms of the June 2015 amended partnership agreement.

64. The Judgment was clear. If Wayne could not pay the full $750,000, and if the parties cannot agree on a payment plan, then the Judgment vests the District Court with the authority to determine repayment. The District Court exercised the exact authority, which was given to the District Court by the agreement of the parties, as incorporated into the Judgment.

D. The District Court correctly interpreted the Judgment to require an amendment of its terms to be in writing.

65. Wayne objects to the District Court's requirement of a written modification to the Judgment. Actually, this argument is simply another version of Wayne's contention that he and Janet had an oral agreement to modify the Judgment.

66. In support of this argument, Wayne again points out that an oral agreement, if proven to have sufficient specificity and clarity, can be enforced. However, in that argument, Wayne completely ignores the provisions of Paragraph 33 of the Judgment (App., p. 108), which sets the standard that no modification of the Judgment would be valid unless "in writing and executed with the same formality as this agreement."

67. This provision, setting the standards for modification is language, was contained in the divorce settlement agreement, which was entered only with Wayne's agreement, and which was then incorporated into the Judgment.

68. Even in the absence of such language, it seems somewhat elementary that, if a Judgment is actually to be amended, the amendment must be approved by the District Court. In order to gain that approval, at least in the experience of undersigned counsel, the agreement must be evidenced by a writing, or by a stipulation in open court.

69. Further, as noted by the District Court in its Findings, the claimed oral agreement "confers benefits solely upon Wayne." (App., p. 270, Findings, Conclusion,

and Order at Para 8). Wayne had an obligation to pay $750,000 within 60 days. Under the terms of Wayne's claimed oral agreement, Wayne was relieved of the obligation to pay the remaining $320,000 of that obligation, was not required to pay interest as consideration for his payment deferral, and was completely relieved of the obligation to pay rent to Janet. As this Court held in the case of Mitchell v. Barnes, 354 NW2d 680 (ND 1984), referencing Section 9-09-06, North Dakota Century Code, a claim of an executed oral modification of an written agreement can only be enforced if "the party performing has incurred a detriment which he was not obligated by the original contract to incur." Id. a 682. Janet gained nothing by the claimed oral contract; Wayne suffered no detriment and, as noted by the District Court, reaped all of the benefit.

70. Further, courts have routinely upheld contract clauses which require that any modifications be evidenced by a writing. Benz Farm, LLP,v Cavendish Farms, Inc., 2011 ND 184, 803 NW2d 818, Para 12 ("No-oral modification clauses are enforced under North Dakota law"). The idea that the parties can verbally amend a Judgment is fraught with the risk of confusion and unnecessary litigation. The District Court, in its findings, at Paragraph 8, determined that it was the intent of the parties that any modification of their agreement, even when incorporated into the Judgment, would need to be evidenced by a writing "executed with the same formality as the Divorce Settlement Agreement." Likewise, the District Court, which now have the Judgment within its jurisdiction, declared that an oral modification would not be honored.

71. Wayne cannot, at this stage, unilaterally amend the provisions of the divorce settlement agreement, as incorporated into the Judgment. At the time of the divorce, he

agreed that any modifications must be in writing, and he has admitted that there is no written modification.

V. CONCLUSION

72. The Amended Judgment, as entered by the District Court, should be affirmed in all respects.

Dated this 31st day of July, 2018.

CHAPMAN & CHAPMAN, P.C.
Attorneys for Plaintiff and Appellee
103 South 3rd Street, Suite 6
P.O. Box 1258
Bismarck, ND 58502-1258
(701) 258-6030
chapmanlaw@chaplawnd.com

By: /s/ Charles "Casey" L. Chapman
Charles "Casey" L. Chapman (#03380)

CERTIFICATE OF SERVICE

On the 31st day of July, 2018, a copy of the foregoing Appellant's Brief and Appellant's Appendix were served by e-mail upon the following:

North Dakota Supreme Court Clerk
supclerkofcourt@ndcourts.gov

Theresa L. Kellington
theresa@kopcemail.com

CHAPMAN & CHAPMAN, P.C.
Attorneys for Plaintiff and Appellee
103 South 3rd Street, Suite 6
P.O. Box 1258
Bismarck, ND 58502-1258
(701) 258-6030
chapmanlaw@chaplawnd.com

By: /s/ Charles "Casey" L. Chapman
Charles "Casey" L. Chapman (#03380)