

20150228

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT  
DECEMBER 9, 2015  
STATE OF NORTH DAKOTA

20150228  
Supreme Court No. ~~20150116~~  
District Court No. 31-2013-CV-00037

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**State of North Dakota**

In the Supreme Court

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Jerry Lumley and Linda Lumley,

Plaintiffs/Appellants,

v.

Elaine Kapusta,

Defendant/Appellee,

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**Jerry Lumley et al v. Elaine Kapusta**  
**On appeal from an Amended Order**  
**of the District Court of Mountrail County**

**BRIEF OF APPELLANT**

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## **STATEMENT OF ISSUES**

- I. Whether an enforceable oral agreement existed between the parties.
- II. Whether the part performance of the parties was sufficient to remove the oral agreement from the statute of frauds.

## STATEMENT OF THE CASE

[¶1] This case involves the disputed oral agreement to sell approximately 990 acres of real property in Mountrail County in the State of North Dakota. The seller of the real property is the defendant and appellee, Elaine Kapusta. The buyers of the real property are Jerry Lumley and Linda Lumley, husband and wife.

[¶2] On February 27, 2013 Jerry and Linda Lumley (hereinafter “Lumleys”) filed a summons and complaint against Elaine Kapusta (hereinafter “Kapusta”) compelling specific performance of a verbal land transaction. (R. at 1 and 2). In their complaint, the Lumleys alleged the Lumleys and Kapusta had an enforceable oral contract for the sale of the tracts of land with a legal description as follows:

**Township 158 North, Range 91 West of the 5th P.M.**  
**Section 20: Outlot 1A of SW1/4SW1/4**  
**Section 30: All**

**Township 156 North, Range 91 West of the 5th P.M.**  
**Section 9: W1/2**

[¶3] On May 7, 2013, Kapusta filed an answer and counterclaim denying there was a verbal contract and that any alleged verbal transaction was prohibited by North Dakota’s Statute of Frauds. (R. at 5). The parties exchanged written discovery and conducted depositions of the litigants and other witnesses. (R. at 7).

[¶4] On March 14, 2014, by and through her attorney of record, William E. Bergman, of the law firm, Olson & Burns, P.C., Elaine Kapusta filed a motion for summary judgment. Kapusta's motion alleged: (1) no verbal agreement existed between the parties; (2) the Lumleys were not compliant with any alleged verbal agreement; and (3) the Statute of Frauds bars the action. (R. at 19).

[¶5] The Lumleys responded on April 22, 2014 with a cross motion for summary judgment. (R. at 34-35). The Lumleys' cross-motion for summary judgment argued that during deposition testimony the parties had unequivocally established an oral agreement and that the oral agreement had been partially performed as a matter of law by both parties, namely by the fact that Kapusta had cashed the check for the purchase price of the property. (R. at 35). Kapusta responded with to the cross motion for summary judgment on May 2, 2015. (R. at 39).

[¶6] The district court denied both parties' cross-motions for summary judgment. (R. at 42). In its order the district court explained an issue of fact regarding the existence of an oral agreement on the sale of the property. (R. at 42).

[¶7] The district court held a bench trial on May 1, 2015. (R. at 47). After the one-day trial, the parties submitted post-trial briefs. (R. at 48 and 50). The district court issued its written memorandum opinion on June 4, 2015. (R. at 73). Notice of Entry of Judgment was filed and served on June 9, 2015. (R. at 75). On July 2, 2015, the district court issued an amended judgment with

Kapsuta entitled to a judgment against the Lumleys in the amount of \$652.76 for costs and disbursements. (R. at 79). Notice of entry of judgment on the amended judgment was served and filed on July 2, 2015. (R. at 80).

[¶8] The Lumleys filed their first Notice of Appeal on July 23, 2015. (R. at 84). The Supreme Court issued an order of remand to the district court on August 25, 2015 for a district court order on Kapusta's counterclaim. (R. at 93). The Lumleys filed their supplemental notice of appeal with statement of preliminary issues on September 9, 2015. (R. at 95). The district court issued its order for judgment of dismissal on the counterclaim on September 23, 2015. (R. at 98).



## STATEMENT OF FACTS

[¶9] Jerry Lumley and Linda Lumley are semi-retired farmers who reside in the Stanley, North Dakota area in Mountrail County. (Transcript, page 4, lines 10-20). The Lumleys have two sons who actively farm the area and live on or near property either owned by or leased from Kapusta. (T. at 4, lines 19-23). A third son farmed the land prior to becoming partially disabled. (Tr. at 4, lines 19-23). The Lumleys owned some of the land they farmed and rented some of the land they farmed; some of the farmland the Lumleys farmed was owned by Kapusta. (Tr. at 5, lines 2-11).

[¶10] The Lumleys and Peter Kapusta, prior to his death, and then after his death, Elaine Kapusta, had a long-standing partnership that spanned several decades. (Tr. at 5, line 3). Linda Lumley described their working relationship as “wonderful.” (Tr. at 5, lines 14-15). Linda further testified that although they at one time had a written lease agreement for a portion of the farming operation, agreements regarding any of the property involved in the farming operation were usually verbal agreements. (Tr. at 5, lines 22-24). Linda further testified the parties always “talked things out.” (Tr. at 5, line 24). The parties had a long-standing history of verbal agreements.

[¶11] Peter Kapusta died in 1996 while visiting his property in North Dakota. (Tr. at 6, lines 5-6). Other than the trial on this matter, Peter’s death was the only other time that Elaine visited North Dakota. Since Peter’s death, the Lumleys

went through Elaine to continue their farming operation renting from Kapusta and sometimes purchasing parcels of property from Elaine. (Tr. at 6, lines 24-25 and page 7, lines 1-6). It was the regular course of business for the parties to conduct their business verbally, over the telephone without the necessity of a written contract. (Tr. at 6, lines 24-25 and page 7, lines 1-6). Linda testified that Kapusta preferred to conduct business verbally, because her house was often overrun with paperwork and she was afraid of losing documents. The parties had, on multiple occasions and over the course of several decades conducted large monetary transactions without written agreements. Linda considered Elaine a close friend and Linda testified that the women often supported each other emotionally. (Tr. at 7, lines 8-12).

[¶12] During Peter's life, he often expressed his desire that the Linda and Jerry Lumley's children eventually take over the farming operation and that the Lumley children purchase the Kapusta land. (Tr. at 7, lines 13-22). Linda testified that, "Peter is the one [who] wanted it that way." (Tr. at 7, line 18). The Lumleys repeatedly expressed their desire to purchase the Kapusta land. Linda further testified that other than one (1) lease agreement that was written, the Lumleys dealings with the Kapusta were always verbal. (Tr. at 8, lines 4-10).

[¶13] Linda Lumley also testified that one of her sons had been living on one of the Kapusta parcels for twenty (20) years making improvements and caring for the property. (Tr. at 9, lines 14-15).

[¶14] Linda Lumley's son, Taryn Lumley, had previously entered into an oral contract for the purchase of land from Elaine Kapusta and that transaction was verbal. (Tr. at 10, lines 9-22). As with other land transactions, the family conducted the transaction over the telephone. There was no written agreement or other tangible document to memorialize the agreement. (Tr. at 10, lines 19-24). The parties' mutual history created an understanding and reliance on a certain course of dealing.

[¶15] The parties had discussed the eventual purchase of the three parcels at issue in this case for several years. (Tr. at 11, lines 4-5). Relying upon Kapusta's promise to sell the parcels to the Lumleys, the Lumleys purchased a larger tractor to accommodate the increased acreage. (Tr. at 11, lines 10-11). Elaine Kapusta and her daughter, Lynn Kay, had contacted Jerry and Linda Lumley as well as the Lumley's son offering the property for sale. (Tr. at 11, lines 19-20).

[¶16] When the Lumleys learned Kapusta was committed to moving forward with the sale of the property, the Lumleys contacted their bank, Dacotah Bank, and requested an appraisal. (Tr. at page 12, lines 8-15). The Lumleys also requested an appraisal from Haugland's Auction Service. (Tr. at 12, lines 16-21). In anticipation of the property conveyance, the Lumleys paid for the property's

abstract to be updated. (Tr. at 13, lines 4-8). The Lumleys also contact their attorney in order to have the deeds for the conveyance prepared. (Tr. at 13, lines 20-22).

[¶17] Between the two appraisals, one from the bank and one from Haugland Auctions, the Dacotah Bank appraisal came back \$60,000.00 lower than the appraisal from Haugland Auctions. Linda Lumley testified that she and Elaine discussed the difference between the two appraisals. Lumley further testified the parties agreed to the Dacotah Bank appraisal price because of the Lumleys' need to secure financing. (Tr. at 16, lines 2-15). The parties also decided the Lumleys would purchase the land outright, something that would require the Lumleys to finance the transaction with their Bank, rather than on a contract for deed, because of the desire of both parties to "get these things settled." (Tr. at 16, lines 21-25). Linda Lumley testified that Elaine Kapusta wanted to have the property conveyed and the transaction closed by the end of the year in order to give Elaine the most benefit for capital gains purposes. (Tr. at 18, lines 14-17).

[¶18] Linda Lumley also testified the parties agreed on an "80 for 80 swap" on the minerals on land adjacent to the Lumley's son's home. (Tr. at 19, lines 21-25). The purpose for the swap were the parties' mutual concerns that the Lumleys own the surface and minerals of their purchase so that the Lumleys could control any future leasing or drilling operations on their property on which they also own the surface rights. At that time, the parties had an agreement on the terms

and conditions for the sale of the Kapusta property to the Lumleys and Linda Lumley contacted her attorney to have the deeds drafted and sent to Kapusta. (Tr. at 20, lines 9-13). The Lumleys then sent the agreed-upon purchase price and unsigned deeds to Kapusta. (Tr. at 20, lines 14-16).

[¶19] During the time of the telephone conversations, December 2012, Linda Lumley took detailed notes of the parties' conversations. (Tr. at 21, lines 11-14). In addition to Linda's notes, Linda also drafted and sent a letter to Kapusta detailing the steps she needed to take in order to effectuate the conveyance. (Tr. at 21, lines 15-19). Kapusta stated to Linda Lumley that her house was filled with paperwork that was causing her an extreme amount of stress. (Tr. at 21, lines 20-25). Due to that concern, Linda Lumley requested from Kapusta that everything be signed and returned the same day in order to avoid the parties' paperwork being lost in Kapusta's house. (Tr. at 22, lines 5-15). Lumley also confirmed with Kapusta during that telephone conversation the purchase price for the property. (Tr. at 31, lines 4-6).

[¶20] Kapusta received, accepted and cashed the Lumley's check for the purchase of the land for \$525,827.00. (Tr. at 22, lines 20-24). Kapusta also received, accepted and cashed a personal check from Jerry Lumley in the amount of \$7,900.00. (Tr. at 23, lines 1-2). Both checks were endorsed and deposited in Kapusta's checking account.

[¶21] On January 2, 2013, Linda Lumley received a text message, ostensibly from Kapusta, stating that Kapusta was going to “hold off” on the transaction until she had consulted with a financial advisor. Linda Lumley testified it was unusual to communicate with Kapusta this way and when she tried to contact Kapusta, her calls were unreturned, which was also unusual.

[¶22] Kapusta did not deny any of the elements of the transaction, nor did she disagree with the terms of the transaction. (Tr. at 24, lines 10-15). Kapusta’s testimony regarding the extent of the transaction between herself and the Lumleys was that she simply could not remember the details. Lynn Kay, Kapusta’s daughter, similarly did not deny the oral agreement existed, the amount of the purchase price or the property to be transacted. Lynn testified she assisted her mother in getting to the bank to cash the check and was excited to finally be getting rid of the property in North Dakota.

[¶23] Linda Lumley then testified that on January 18, 2013, she was finally able to talk to Kapusta directly. Kapusta stated she wanted to continue with the land transaction but that her daughter, Lynn Kay, and a woman named Cindy Gibbs wanted more money from the Lumleys. (Tr. at 25, lines 11-20). At this time, Kapusta had cashed the checks and signed the deeds and had the signatures notarized, but Kapusta stated that her daughter refused to allow her to mail the deeds. (Tr. at 25, lines 11-25).

[¶24] At the time of trial, Elaine Kapusta testified. The trial in May, 2015 took place two and a half years (2 ½) after the land negotiations occurred. During the trial, Kapusta had difficulty remembering her age, her address and other personal details. (Tr. at 55 and 56, lines 23-25 and 1-2). Kapusta also stated she had difficulty remembering things. (Tr. at 56, lines 4-6). Kapusta had difficulty remembering a farm contract that she had signed between herself in the Lumleys. (Tr. at 57, lines 18-19). Further, Kapusta stated she had conversations with the Lumleys regarding the sale of the land and did want to sell the land to the Lumleys, because she didn't like dealing with the farming aspect of her late husband's business and wanted to be rid of the farming business. (Tr. at 58, lines 20-22). Kapusta specifically stated she wanted to be "rid" of the farmland so that she could focus on her rental properties in Virginia. (Tr. at 58, lines 23-25).

[¶25] Kapusta testified that although she talked to the Lumleys about the land transaction, her memory was poor and she would be unable to recall any specifics. (Tr. at 60, line 9). Kapusta claimed her memory was failing at the time of trial and she had no recollection of even receiving the check and deeds from the Lumleys. Kapusta further denied having any memory of any of the transaction details, although she never denied having an agreement to sell the property. Her testimony was solely that she didn't remember the details, not that the oral agreement did not exist. (Tr. at 61, lines 1-3). During the duration of

the trial and subsequent briefs, neither Elaine Kapusta nor her daughter, Lynn Kay, denied the parties had an oral agreement regarding the sale of the land or the minerals.

[¶26] In this case, the testimony establishes that only did an enforceable oral contract for the purchase of the property exist, but also that both parties acted on the contract sufficient to remove it from the statute of frauds as a matter of law.



## **LAW AND ARGUMENT**

[¶27] In this case, the district court found the parties disagreed about the existence of an oral contract. The Lumleys allege the parties had a verbal contract, the Lumleys complied with the terms of the contract and the Lumleys had sufficient part performance to remove the contract from the statute of frauds given the fact that it was a verbal contract. The district court order finds, “Ms. Kapusta’s position at trial was that there was no oral agreement.” (R. at 73, Memorandum Opinion, Order for Judgment and Judgment, dated June 4, 2015 at ¶ 4). Although the district court order makes this argument for Kapusta, the record reflects Kapusta did assent to the terms of the oral agreement and, indeed, even acted in accordance with those terms.

[¶28] On appeal, the Lumleys anticipate Kapusta will – after the fact - argue there was no oral contract sufficient to establish the terms and establish the elements of a contract and that in the event such a verbal contract existed, it is barred by the Statute of Frauds. In this case, the Lumleys’ argument that a verbal or oral contract existed is not disputed in the trial testimony and as a matter of law, this Court should reverse the district court’s finding that no oral contract existed. The matter should be remanded for an order consistent with this Court’s order on appeal.

**I. Whether an Enforceable Oral Agreement Existed between the Parties.**

[¶29] In North Dakota, the existence of an oral contract is a question of fact. Brotten v. Brotten, 2015 ND 127, ¶ 9, 863 N.W.2d 902 (citing Estate of Thompson, 2008 ND 144, ¶ 10, 752 N.W.2d 624). “In an appeal from a judgment entered after a bench trial, a district court’s findings of fact are reviewed under the clearly erroneous standard of N.D.R.Civ.P. 52(a).” Id. “A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the evidence, we are left with a definite and firm conviction a mistake has been made.” Id. A district court’s choice between two permissible views of the evidence is not clearly erroneous. The Supreme Court has previously stated that it will not overturn a district court’s view of the evidence because the Supreme Court takes a different view of the evidence. Id. The Supreme Court will give due regard to the district court’s opportunity to assess the witnesses’ credibility, and it does not second guess the district court on its credibility determinations. Id. The Supreme Court will not re-weigh the evidence. Id.

[¶30] A court will not enforce a contract which is vague, indefinite, or uncertain, nor will they make a new contract for parties. Gift v. Ehrichs, 284 N.W.2d 435, 437 (N.D.1979); Drees Farming Assoc. v. Thompson, 246 N.W.2d 883, 886 (N.D. 1976). However, courts do not favor, and will lean against destruction of contracts because of uncertainty. Tobias v. North Dakota Department of Human

Services, 448 N.W.2d 175 (1989). If feasible, agreements will be construed so as to carry into effect the reasonable intention of the parties, if that can be determined. Id. The terms of an implied contract are manifested by conduct. N.D.C.C. § 9-06-01. When dealing with contracts that are implied in the fact, the court is required to determine the intentions of the parties from the surrounding circumstances. N.D.C.C. § 9-07-12; see also St. John P.S.D. v. Engineers-Architects, 414 N.W.2d 285, 287 (N.D.1987)

[¶31] An oral contract exists when the parties have agreed on its essential terms, which depends on the context of the agreement. See Knorr v. Norberg, 2014 ND 74, ¶ 10, 844 N.W.2d 919 (citing B.J. Kadrmas, Inc. v. Oxbow Energy, LLC, 2007 ND 12, ¶ 12, 727 N.W.2d 270; Lonesome Dove Petroleum, Inc. v. Nelson, 2000 ND 104, ¶ 18, 611 N.W.2d 154). Pursuant to section 9-01-02 of the North Dakota Century Code, the requirements for a contract are that the parties are capable of contracting, the parties consent, a lawful object and sufficient cause or consideration. N.D.C.C. § 9-01-02.

[¶32] In order for an agreement to exist, there must be mutual assent to the terms between the parties. Lire, Inc. v. Bob's Pizza Inn Restaurants, Inc., 541 N.W.2d 432, 434 (N.D. 1995). In this case, there was never any dispute between the parties regarding assent. Kapusta wanted to sell the property to the Lumleys and the Lumleys wanted to buy the property; this had been a long standing agreement that the Lumleys had relied upon for several decades. Peter Kapusta had

promised to sell the property to the Lumleys on several occasions and no one, including all the witnesses for Kapusta denied that it was Peter Kapusta's desire to sell the property to the Lumleys. The Lumleys had been sharecropping the land with Kapustas for twenty-seven (27) years and wanted to continue the family legacy down to their sons. Kapusta and Linda Lumley both testified that Kapusta had no interest in the farming operation and desperately wanted to be "rid" of it.

[¶33] In this case, the district court found there was no oral agreement. (R. at 64). In its memorandum, the district court did not move on to an analysis of whether there was part performance because of the purported non-existence of the oral contract.

[¶34] The district court's decision is employs a clearly erroneous interpretation of the law. In Brotten, the North Dakota Supreme Court explained "terms of alleged contract[s] may be explained by alternative theories" when the party seeking to enforce the alleged contract provides clear and unequivocal evidence establishing the terms, character and existence of the contract. Brotten, at ¶ 13.

[¶35] In this case, those terms have all been met. The terms of the contract were not only documented by the parties' collective previous course of dealings and behaviors on this transaction, but also by the contemporaneous notes of Linda Lumley offered as evidence at trial. (R. at 54 and 63). At trial, Lumley testified that Kapusta not only wanted to sell, but needed to sell the property in 2012 in

order to avoid what she considered to be excessive capital gains taxes on the profits of the sale minus the basis. In her note to Kapsuta, Linda Lumley specifically notes that in order for the sale to be completed in 2012, Kapusta must cash the check. Kapusta did cash the check. Kapusta's act of cashing the check alone is sufficient to prove the existence of the contract, as a matter of law.

[¶36] In this case, the terms of the contract were sufficiently documented and even performed upon by the parties. The parties did not dispute the sale price, agreed upon the identity of the property to be sold and agreed upon the fact that the sale needed to be effectuated before the end of 2012 for Kapusta's financial benefit.

[¶37] The only thing arguably disputed in this case was the "80 for 80" swap testified to by the parties at trial. The terms surface sale were reasonably articulated and agreed to by the parties. The parties had an agreement and both parties were even eager to complete the sale. The district court erred when it concluded any purported dispute over the minerals were sufficient to make a finding that an oral agreement did not exist. Even a pessimistic reading of the transcript finds that the parties agreed on everything regarding the transaction and that at best, there was confusion on the part of Elaine Kapusta over the minerals. In that event, the district court should have severed the mineral swap from the oral agreement the parties had regarding the surface and treated it as a separate transaction.

**I. The Contract was Enforceable Outside of the Statute of Frauds due to the Partial and Consistent Performance of the Parties with the Terms of the Oral Agreement.**

[¶38] North Dakota requires all contracts for the sale of real property be in writing.

N.D.C.C. § 9-06-04. Verbal contracts for the sale of property are barred by the statute of frauds; however, it is well-established in North Dakota that part performance of an oral contract, equitable estoppel or promissory estoppel involving the conveyance of property bars the assertion of the statute of frauds as a defense if there was an oral agreement. Part performance of an agreement or contract regarding the sale of property may bar the assertion of the statute of frauds. Trosen v. Trosen, 2014 ND 7, ¶ 21, 841 N.W.2d 687, Cooke v. Blood Sys., Inc., 320 N.W.2d 124, 127 (N.D.1982); see also Moen v. Thomas, 2001 ND 95, ¶ 16, 627 N.W.2d 146; Buettner v. Nostdahl, 204 N.W.2d 187, 190 (N.D.1973) overruled on other grounds by Shark v. Thompson, 373 N.W.2d 859, 867 (N.D.1985); see also 73 AM.JUR.2d Statute of Frauds § 364 (2012). The part performance doctrine is based in equity and premised upon principles of equitable estoppel. Id. A party with unclean hands should be prohibited from using the statute of frauds to perpetrate a fraud. Trosen, at ¶ 21 (citing 10 Richard A. Lord, WILLISTON ON CONTRACTS § 28.2 (4th ed.2011); 73 AM.JUR.2d Statute of Frauds §§ 292, 295-96 (2012)).

[¶39] Under the doctrine of part performance, application statute of frauds defense can be avoided if there has been part performance of an alleged oral contract. 73

AM.JUR.2d Statute of Frauds § 289 (2012). Successful application of the doctrine to an oral contract has the effect “of taking [the] contract from the operation of the Statute of Frauds so that a court of equity may decree its specific performance or grant other equitable relief.” *Id.* (citations omitted). The North Dakota Supreme Court has previously held in Trosen that the oral agreement must be complete in its terms in order for the part performance to remove the contract from the statute of frauds. Trosen, at 22.

[¶40] A court may compel the specific performance of an oral agreement for the sale of real property in the case of part performance. N.D.C.C. § 47-10-01. “In order to succeed on a claim of part performance, the claimant must show that the alleged part performance is consistent only with the existence of the alleged oral contract.” Brotten, at ¶ 10 (citing Trosen v. Trosen, 2014 ND 7, ¶ 24, 841 N.W.2d 687). The acts of the party claiming part performance must unmistakably point to the existence of the claimed agreement. Estate of Thompson, 2008 ND 144, ¶ 13, 752 N.W.2d 624. Part performance of an oral contract must be consistent only with the existence of the alleged oral contract and not explainable by other circumstances, pre-existing facts or other explainable circumstances. Brotten, at 10.

[¶41] In North Dakota there are three categories of acts by the purchaser that make an oral contract for the purchase of land enforceable: paying the contract price, taking possession of the property, and making improvements. Johnson Farms v.

McEnroe, 1997 ND 179, ¶ 18, 568 N.W.2d 920. In this case, two of the three actions exist. First, the Lumleys paid the purchase price, in full, as requested by Kapusta. The parties do not dispute that it was always the intention to sell the land to the Lumleys. Kapusta and Linda Lumley even discussed the terms – specifically, that Kapusta did not want to enter into a contract for deed on the property, but rather requested the Lumleys pay cash for the property. Second, the Lumleys had possession of the property and had been paying cash rent on the property for decades. The Lumleys do not dispute the third category is not performed as any buildings on the property were not habitable or otherwise suited for improvement. The Lumleys direct the court’s attention to the fact that not only did an oral agreement exist, but that payment of the purchase price acts as per se evidence that Kapusta knew of and assented to all the terms of the agreement.

[¶42] A party may assert the doctrine of part performance to secure specific performance of a contract for which there is no memorandum in writing, as required by the statute of frauds, where the circumstances of the case require equitable relief. 73 AM.JUR.2d Statute of Frauds § 293 (2012). A party asserting that part performance has removed an unwritten agreement from the statute of frauds must prove the alleged contract existed. Anderson v. Mooney, 279 N.W.2d 423, 429 (N.D.1979). In determining whether an oral or verbal contract exists sufficient to remove a contract from the statute of frauds, the part



performance of the contract must be clear and unequivocal evidence of the alleged oral contract. Brotten, at ¶ 12.

[¶43] In its findings of fact, conclusions of law, and order for judgment, the district court in this case found that the oral agreement did not exist because there was not sufficient evidence to move on to the analysis of whether the respective parties' part performance was sufficient to remove the contract from the statute of frauds. The district court interprets the law in error. The analysis should not and cannot be whether there is first an oral contract and then whether that contract is barred by the statute of frauds. This is a case in equity. The district court should have looked at and incorporated the equitable doctrine of part performance pursuant to the Trosen decision wherein while the two issues of whether a verbal agreement exists and the doctrine of part performance are distinct, in some cases they are intertwined. In this case, the district court's failure to complete the analysis of part performance constituted a clearly erroneous view of the law and must be reversed for further findings consistent with the order from this Court.

[¶44] In reaching its conclusion that a complete contract did not exist, the district court relied only on the portions of transaction that met the statute of frauds. In equitable analysis, pursuant to this Court's decision in the Trosen case, the district court must analyze and reconcile to all elements of a contract, not "merely those that meet the statute of fraud writing requirement." Trosen, at 23.

On a review of the entire record, the requirements for formation of an oral contract were met: the Lumleys contracted with Elaine Kapusta to purchase the 990 acres of disputed property for the purchase price and the transaction must take place before the end of 2012. Elaine Kapusta then cashed the check and was ready to send the deeds to the Lumleys until other forces, namely those who wanted Elaine to demand more money from the Lumleys, despite their long standing relationship with Kapusta.

### CONCLUSION

[¶45] The Lumleys are asking this Court to reverse the district court's finding that no verbal contract existed and remand for instructions consistent with its opinion.

Dated this 9th day of December, 2015.

/s/ Erin M. Conroy  
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## CERTIFICATE OF COMPLIANCE

[¶46] The undersigned, as one of the attorneys representing Appellants, and one of the authors of the Brief of Appellant, hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that the brief was prepared with proportional typeface and that the total number of words does not exceed 8,000 from the portion of the brief entitled “Statement of Issues” through the signature block. The word count was verified with the assistance of the undersigned’s word processing software, which also counts abbreviations as words.

Dated this 9<sup>th</sup> day of December, 2015.

/s/ Erin M. Conroy  
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**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

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JERRY LUMLEY AND LINDA LUMLEY,  <p style="text-align:right">Plaintiff,</p> vs.  ELAINE KAPUSTA,  <p style="text-align:right">Defendant.</p>	SUPREME COURT No. 20150228  DISTRICT COURT No. 31-2013-CV-00037  <p style="text-align:center"><b>CERTIFICATE OF SERVICE</b></p>
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[¶ 1] I, Erin M. Conroy, of Conroy Legal Services, PLLC, 416 Sinclair Street, PO Box 137, Bottineau, North Dakota 58318, hereby certify that I sent via electronic service the Appellate Brief and Appellant’s Appendix in the above-captioned matter to the following:

William Bergman  
*webergman@minotlaw.com*

North Dakota Supreme Court Clerk  
*supclerkofcourt@ndcourts.gov*

Dated this 9<sup>th</sup> day of December, 2015.

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**IN THE SUPREME COURT****STATE OF NORTH DAKOTA**

JERRY LUMLEY AND LINDA LUMLEY,  Plaintiff,  vs.  ELAINE KAPUSTA,  Defendant.	SUPREME COURT No. 20150228  DISTRICT COURT No. 31-2013-CV-00037  <b>CERTIFICATE OF SERVICE</b>
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**[¶ 1]** I, Erin M. Conroy, of Conroy Legal Services, PLLC, 416 Sinclair Street, PO Box 137, Bottineau, North Dakota 58318, hereby certify that I sent via electronic service the Appellant's revised Appendix in the above-captioned matter to the following:

William Bergman  
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North Dakota Supreme Court Clerk  
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Dated this 14<sup>th</sup> day of December, 2015.

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