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SEPTEMBER 8, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

James B. Lund, Plaintiff/Appellant, v. Leland A. Swanson and Open Road Trucking, LLC, Defendants/Appellees.	Supreme Court No.: 20200147 Cass County Case No.: 09-2020-CV-00082

APPEAL FROM AMENDED ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND JUDGMENT DATED MAY 14, 2020, COUNTY OF CASS, BY THE HONORABLE JOHN C. IRBY, EAST CENTRAL JUDICIAL DISTRICT

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

[¶ 1] Whether the district court erred in finding Plaintiff James B. Lund and Defendants Leland Swanson and Open Road Trucking, LLC did not enter into a binding and enforceable settlement agreement;

[¶ 2] Whether the district court erred as a matter of law by concluding the statute of frauds applied to the settlement agreement reached between the parties;

[¶ 3] Whether the district court erred as a matter of law by concluding the parties' exchange of emails and written signature agreements did not satisfy the statute of frauds; and

[¶ 4] Whether the district court erred by granting summary judgment in favor of Defendants Swanson and Open Road Trucking, LLC.

STATEMENT OF THE CASE

[¶ 5] In January 2020, the Plaintiff and Appellant, James Lund, initiated this action to request specific performance of a settlement agreement entered into between himself and the Defendants and Appellees, Open Road Trucking ("ORT") and Leland Swanson ("Swanson") (collectively, "Defendants"). Appellant's Appendix ("App.") 6-14; Dkt. #2-8. In his complaint, Lund detailed the litigation between the parties and the global settlement reached between them, requesting the district court conclude an enforceable agreement was reached and order specific performance of that agreement. App. 6-14. The parties had come to a verbal agreement to resolve several pending lawsuits the day before trial was set to proceed in one matter, exchanged emails detailing the terms of the settlement, and exchanged drafts of settlement agreements with minor modifications. *Id.* However, after receiving this Court's decision in a separate matter between the parties, Defendants lost interest in fulfilling the terms of the settlement agreement, leading to this action. *See id.*

[¶ 6] Swanson and ORT answered the complaint jointly, denying the parties reached a settlement agreement and denying ORT was a party to the settlement. App. 15-19. As an affirmative defense, ORT also alleged the settlement agreement was unenforceable under against the company under the statute of frauds as an agreement to alter repayment of a debt greater than $25,000. App. 19, ¶ 25.

[¶ 7] On February 20, 2020, Lund moved for summary judgment, requesting the district court grant the relief sought in his complaint. Dkt. #11-25. In response to Lund's summary judgment motion, Swanson and ORT, again acting jointly, submitted a responsive brief and requested the court grant summary judgment in their favor. Dkt. #27. Swanson and

ORT did not submit any evidence in support of their request or in response to Lund's motion. A hearing was held on the motion on April 27, 2020.

[¶ 8] On May 11, 2020, the district court filed an order denying Lund's motion for summary judgment, determining the statute of frauds barred enforcement of the settlement agreement between the parties and granting Defendants' request for summary judgment, ordering dismissal. Dkt. #35. A few days later, the district court entered an amended order with these same findings. App. 46-51. A judgment of dismissal with prejudice was entered on May 14, 2020. App. 52. Defendants served notice of entry of the judgment on May 15, 2020. Dkt. #43-44.

[¶ 9] Appellant served a notice of appeal with this Court on the same day it was served with Notice of Entry of the Judgment, noting the district court's error in dismissing the action. App. 53-55.

STATEMENT OF FACTS

[¶ 10] The parties, Lund, Swanson, and ORT, have been involved in a significant amount of litigation. To resolve the pending litigation between the parties, they came to a settlement agreement through an in-person meeting, subsequent exchange of emails, and drafts of settlement agreements exchanged with no substantive modifications.

[¶ 11] Specifically, at the time the parties entered into settlement discussions and an eventual agreement, they had several pending lawsuits between them, including the following cases:

> 1. *Leland A. Swanson, Derivatively on Behalf of Nominal Defendants, Fargo Cargo, LLC and Fargo Logistics, LLC, vs. James B. Lund and Cross The Line, LLC, and James B. Lund, as Third-Party Plaintiff vs. Joel Anderson, Third-party Defendant*, Cass County, North Dakota District Court Case No. 09-2018-CV-01447 (hereinafter "Fargo Cargo Lawsuit");

2. *Leland A. Swanson vs. James B. Lund and James B. Lund as Third-Party Plaintiff vs. Combined Asset Management, LLC, as Third-Party Defendant*, Cass County, North Dakota District Court Case No. 09-2018-CV-01448 (hereinafter "CAM Lawsuit");

3. *Open Road Trucking, LLC, as Assignee of Leland A. Swanson, as Assignee of Western State Bank v. Leland A. Swanson and James B. Lund*, Cass County, North Dakota District Court Case 09-2018-CV-03168 (hereinafter "First Open Road Trucking Lawsuit");

4. *Open Road Trucking, LLC v. James B. Lund*, Cass County, North Dakota District Court Case 09-2019-CV-00666 (hereinafter "Second Open Road Trucking Lawsuit"); and

5. *Open Road Trucking, LLC v. James B. Lund*, Becker County, Minnesota District Court Case 03-CV-19-258 (hereinafter "Minnesota Open Road Trucking Lawsuit").

[¶ 12] The undisputed facts relevant to underlying appeal occurred in December 2019, as the district court accurately detailed in its findings. App. 46-50. At that time, the above-listed cases were in various stages of litigation, with the Fargo Cargo Lawsuit and CAM Lawsuit pending before the district courts, the First Open Road Trucking Lawsuit on appeal to the North Dakota Supreme Court following the district court's order for the satisfaction of the judgment therein, and the Second Open Road Trucking Lawsuit and Minnesota Open Road Trucking Lawsuit being stayed by the respective district courts, pending the outcome of the appeal in the First Open Road Trucking Lawsuit. App. 48-49, ¶ 12.

[¶ 13] Attorney Sean Foss represents Plaintiff Lund in all of the above-listed actions, and attorneys Randy Stefanson and Bruce Schoenwald represent Defendants Swanson and ORT in all of the above lawsuits. App. 46.

[¶ 14] The CAM Lawsuit was set for jury trial to begin on December 3, 2019. App. 48, ¶ 10. In the interest of coming to a global resolution of the above-described litigation, the parties and their counsel met in person on December 2, 2019. App. 48, ¶ 11. As the district court correctly found, the parties orally agreed on the following terms of settlement at the

December 2nd meeting:

> (a) CAM would transfer all of its real estate properties to Defendant Swanson, except Plaintiff Lund would receive CAM's oil and gas interests and one-half of the net sale proceeds from the pending sale of a residence in Moorhead;
>
> (b) Defendant Swanson would transfer one-half of his membership interests in Wedak, LLC to Plaintiff Lund, and Wedak would pursue development of open lots owned by the company in Ray, North Dakota, with Defendant Swanson providing financing for the purchase and placement of mobile homes on such lots;
>
> (c) Other than Wedak, Plaintiff Lund and Defendant Swanson would formally dissolve and/or terminate the limited liability companies owned by the two of them, including Fargo Cargo, CAM, and SBC.
>
> (d) Plaintiff Lund, Defendant Swanson, and Defendant Over the Road Trucking, LLC would dismiss all pending matters between the Parties []; and
>
> (e) Plaintiff Lund, Defendant Swanson, and Defendant Over the Road Trucking, LLC would enter into a global release of all claims between the Parties.

App. 49, ¶ 13. The Defendants have not appealed from the district court's finding on these terms of the parties' oral settlement agreement.

[¶ 15] Following the December 2, 2019 settlement conference and the parties' oral settlement agreement, Plaintiff's counsel, Sean T. Foss, sent two emails. App. 20-21. First, Foss emailed the district court's law clerk, with a copy to attorneys Stefanson and Schoenwald, informing the Court the parties had settled the CAM Lawsuit and the trial scheduled to being the following day could be cancelled. App. 20. This email specifically stated as follows:

Id.

[¶ 16] Second, attorney Foss sent an email to Defendants' counsel, Randy Stefanson and Bruce Schoenwald, outlining the terms of the oral settlement agreement. App. 21. The email included that each of the below terms were agreed to by the parties:

From: Sean T. Foss
To: "Bruce Schoenwald"; Randy Stefanson
Cc: "Jim Lund"
Subject: Settlement
Date: Monday, December 2, 2019 2:42:57 PM
Attachments: image001.jpg

Gentlemen,
While drafting a note to my file regarding the settlement, I thought it would make sense to share it with you to make sure we are all on the same page and to help keep track of what all needs to be drafted and agreed upon.
Here are my notes regarding the terms, please let me know if you believe I am missing anything (or have anything incorrect I suppose):

(1) CAM - All CAM properties transferred to Lee (or his assignee) except Jim gets CAM oil interests and one-half of Moorhead net sales proceeds.
(2) WeDak - Lee will transfer one-half of his membership interest (i.e. 20% of the 40% he currently owns) to Jim. Parties intend to develop open lots in the Ray, ND development owned by Wedak, with Lee financing the purchase and placement of mobile homes on those lots.
(3) Formal dissolution/termination of the other LLC's owned between the two of them (Fargo Cargo, Fargo Logistics, SBC)
(4) Dismissal of the pending lawsuits - Fargo Cargo, CAM, Western State Bank, ORT - Cass County, ORT - Becker County.
(5) Global release of all claims.

Id. Foss specifically stated the email was intended "to make sure we are all on the same page" and requested that Defendants' counsel let him know if there were any terms missing or if anything was incorrect. *Id.* Defendants' counsel did not respond to the December 2nd email or otherwise indicate the email contained incorrect terms of the parties' verbal settlement agreement. Dkt. #14, ¶ 3.

[¶ 17] With no objections to the list above and as agreed upon by the parties at their December 2, 2019 settlement conference, Defendants' counsel drafted the Proposed Settlement Agreement. App. 23-32. Defendants' counsel, Randy Stefanson, sent the Proposed Settlement Agreement to Plaintiff's counsel on December 10, 2019. App. 23.

[¶ 18] The Proposed Settlement Agreement terms were all consistent with the parties' oral settlement agreement on December 2, 2019. *Id.*; App. 21. On December 12, 2019 at 9:08 a.m., Plaintiff's counsel emailed Defendants' counsel with an edited version of the Proposed Settlement Agreement. App. 33. The updated version of the Proposed Settlement Agreement did not make any material changes to the terms in the original version proposed by Defendants' counsel, including no changes to the provisions providing for dismissal of all pending litigation between the parties. App. 34-45.

[¶ 19] However, before the parties proceeded to execute the settlement agreement, this Court issued an opinion that caused Defendants to lose "interest in settling along the lines discussed by counsel." *See* App. 51, ¶ 20. On December 12, 2019, this Court issued its opinion in the First Open Road Trucking Lawsuit, *Open Road Trucking, LLC v. Swanson*, 2019 ND 295, 936 N.W.2d 72. This Court's decision was emailed to counsel for the parties at 1:50 p.m. on December 12, 2019, nearly four hours after Lund's counsel had emailed Defendants' counsel with the revised version of the Proposed Settlement Agreement. *See*

Dkt. #21.

[¶ 20] As this Court is aware, it effectively ruled in ORT's favor, affirming in part, reversing in part, and remanding, but ultimately concluding ORT could pursue enforcement of a judgment against Plaintiff Lund. *See Open Road Trucking, LLC*, 2019 ND 295, 936 N.W.2d 72. The net effect of this Court's decision was to reverse the district court's satisfaction of judgment and to revive Defendant ORT's judgment in the amount of $670,952.24 against Lund. *Id.* at ¶¶ 26-27. In light of this Court's decision reinstating a sizeable judgment against Lund and in favor of ORT, Defendants refused to dismiss the First Open Road Trucking Lawsuit in direct contravention to both the parties' December 2, 2019 oral settlement agreement and the Defendants' own Proposed Settlement Agreement, dated December 10, 2019. App. 51, ¶ 21.

[¶ 21] Upon Defendants' refusal to comply, Plaintiff Lund initiated this action to enforce the agreement between the parties, requesting specific performance or, in the alternative, damages caused by Defendants' breach of the agreement. App. 6-14. Defendants submitted a joint answer to the Complaint. App. 15-19. Based upon Defendants' Answer, brief, and statements at the motion hearing, the only true dispute in regards to terms of the parties' settlement agreement related to the dismissal of the First Open Road Trucking Lawsuit. *See id.*; Dkt. #27; Tr. 24. Defendants did not dispute the existence of the oral settlement agreement, the email from attorney Foss outlining the terms of the settlement, or the Proposed Settlement Agreement provided by Defendants' own counsel. App. 16, ¶¶ 8, 10. Rather, Defendants only deny the settlement "was ever intended to resolve or satisfy ORT's judgments in the First Open Road Trucking Lawsuit or the Minnesota Open Road Trucking Lawsuit." *Id.* As explained above, by the undisputed terms of the Proposed Settlement

Agreement provided by Defendants' counsel, the parties intended to dismiss "all pending claims in the Litigation," which term was specifically defined by Defendants to include the then-pending appeal with this Court. App. 24.

[¶ 22] At the hearing, counsel for the Defendants made a number of contradictory statements and concessions. The district court asked Defendants' counsel, "what would the defendants' position have been had Mr. Foss and his clients taken that draft that you sent in instead of asking for some corrections or changes not related to those items initially set forth and just signed it and sent it back? What would your clients' position have been? They can still go after and continue those lawsuits; is that what I'm hearing?" and Attorney Schoenwald's response was, "Well, I don't think that anybody really planned to continue the CAM or the Fargo Cargo lawsuits. I agree that that's – that the settlement contemplated at least that dismissal – or ultimate dismissal of those lawsuits." Transcript of April 27, 2020 Motions Hearing ("Tr."), p. 24. Thus, the Defendants' own counsel acknowledged the parties reached an oral settlement agreement on December 2nd that provided for pending litigation between the parties.

[¶ 23] Additionally, as further detailed in Defendants' counsel's argument at the motion hearing, ORT only raised the statute of frauds as a defense in relation to the First Open Road Trucking Lawsuit, which was pending on appeal when the parties came to the settlement agreement. Tr. 28; App. 19, ¶ 25. Although the Defendants' own proposed settlement agreement specifically identified the First Open Road Lawsuit as pending between the parties and specifically provided for dismissal of all pending litigation, Defendants' counsel stated to the district court: "Nobody was really talking about the

judgment that had been on appeal. So that was never really a part of this whole settlement discussion." Tr. 20.

[¶ 24] After the hearing, the district court issued its order and findings in this matter on May 11, 2020. Dkt. #35. The court then entered an amended order on May 13, 2020. App. 46-51. The district court found "Plaintiff Lund and Defendant Swanson verbally agreed to reach settlement" and went on to list the terms of the settlement, including dismissal of all pending matters between the parties. *Id.* at ¶ 13. However, the district court then found that Lund "did not sign or unconditionally accept this proposal which contained the elements of the anticipated settlement." *Id.* at ¶ 16. Without citation to case law or statutory authority aside from N.D.C.C. § 9-06-04, the district court concluded the parties had only "an agreement to agree," which itself was not an enforceable agreement. *Id.* at ¶¶ 21-22. The district court stated:

> No final written settlement agreement was reached. The statute of frauds exists to prevent the very types of disputes that have arisen in this case. The Defendant's word is not his bond unless it is written. N.D.C.C. § 9-06-04. The terms being negotiated would include debt forgiveness and interests in real property.

Id. at ¶ 21.

[¶ 25] The district court did not address Lund's numerous issues raised regarding the application of the statute of frauds, including part performance, public policy concerns, enforceability of portions of the settlement agreement, and the case law identifying acceptance and mutual consent as the standard for creating an enforceable settlement agreement. The district court denied Lund's summary judgment motion and granted summary judgment in the Defendants' favor as the non-moving parties. *Id.* at ¶ 23. The district court then entered judgment dismissing the matter with prejudice. App. 52.

[¶ 26] Plaintiff Lund now appeals this judgment, contending the district court erred in granting Defendants' request for summary judgment and dismissing this action. App. 53-54.

STANDARD OF REVIEW

[¶ 27] The district court decided as a matter of law that the settlement agreement was unenforceable. This Court's standard of review on summary judgment matters is well established:

> Summary judgment is a procedural device under N.D.R.Civ.P. 56(c) for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. The party seeking summary judgment must demonstrate there are no genuine issues of material fact and the case is appropriate for judgment as a matter of law. In deciding whether the district court appropriately granted summary judgment, we view the evidence in the light most favorable to the opposing party, giving that party the benefit of all favorable inferences which can reasonably be drawn from the record. A party opposing a motion for summary judgment cannot simply rely on the pleadings or on unsupported conclusory allegations. Rather, a party opposing a summary judgment motion must present competent admissible evidence by affidavit or other comparable means that raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record raising an issue of material fact. When reasonable persons can reach only one conclusion from the evidence, a question of fact may become a matter of law for the court to decide. A district court's decision on summary judgment is a question of law that we review de novo on the record.

McDougall v. AgCountry Farm Credit Services, PCA, 2020 ND 6, ¶ 10, 937 N.W.2d 546 (quoting *N.D. Private Investigative & Sec. Bd. v. TigerSwan, LLC*, 2019 ND 219, ¶ 8, 932 N.W.2d 756).

REQUEST FOR ORAL ARGUMENT

[¶ 28] Plaintiff/Appellant James B. Lund requests oral argument because this matter raises unique issues relating to the creation and enforceability of settlement agreements, including

oral agreements and whether exchanges of emails constitutes enforceable written agreements.

LAW AND ARGUMENT

[¶ 29] This Court should reverse the district court's decision on summary judgment because it erred as a matter of law as to both its denial of Lund's motion for summary judgment and grant of summary judgment in Defendants' favor. Specifically, this Court should conclude, as a matter of law, the statute of frauds does not apply here and the parties entered into a global settlement agreement that provided for dismissal and/or satisfaction of all pending cases between them. This Court should reverse and remand the district court's decision, directing the district court to enter an order for specific performance of the settlement agreement.

[¶ 30] In the alternative, this Court should conclude the district court erred by awarding summary judgment in favor of the Defendants, as the parties dispute material facts regarding whether they entered into an enforceable oral settlement agreement and the terms of such agreement.

I. The District Court Erred in Concluding the Statute of Frauds Precluded Enforcement of the Parties' Settlement Agreement.

[¶ 31] This Court should reverse the district court's decision and conclude the district court erred as a matter of law in determining the statute of frauds barred enforcement of this settlement agreement. This Court should conclude the district court erred because (i) the Statute of Frauds does not apply to the parties' settlement agreement; (ii) even if the statute of frauds theoretically applies, the parties' written Settlement Agreement and exchange of emails satisfied the statute; (iii) the parties' partial performance of the Settlement Agreement removes the agreement from the statute of frauds; and (iv) Swanson

and ORT should not have been allowed to use the statute of frauds as a defense under the undisputed facts of this case.

A. The Statute of Frauds Does Not Apply.

[¶ 32] First, this Court should conclude the district court erred in determining the statute of frauds applied to the parties' Settlement Agreement. In the district court, Defendants argued the statute of frauds under N.D.C.C. § 9-06-04(5) applied to the parties' settlement because it includes "[a]n agreement or promise to alter the terms of repayment or forgiveness of a debt that is in the aggregate amount of twenty-five thousand dollars or greater." The Defendants claimed the Judgment entered in favor of ORT in the First Open Road Trucking Lawsuit constituted "a debt that is in the aggregate amount of" $25,000.00 or greater and therefore the statute of frauds requires a written settlement agreement. The district court ultimately concluded the statute of frauds applied in part because "[t]he terms being negotiated would include debt forgiveness . . . ." App. 51, ¶ 21.

[¶ 33] The only authority cited by the district court in its order, N.D.C.C. § 9-06-04, provides:

> The following contracts are invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by the party's agent:
>
> 1. An agreement that by its terms is not to be performed within a year from the making thereof.
> 2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section 22-01-05.
> 3. An agreement for the leasing for a longer period than one year, or for the sale, of real property, or of an interest therein. Such agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing subscribed by the party sought to be charged.
> 4. An agreement or promise for the lending of money or the extension of credit in an aggregate amount of twenty-five thousand dollars or greater.

> 5. An agreement or promise to alter the terms of repayment or forgiveness of a debt that is in an aggregate amount of twenty-five thousand dollars or greater.

[¶ 34] This Court should reverse this conclusion because, at the time the parties entered into the oral settlement on December 2, 2019, any debt owed by Lund to ORT was already satisfied. As is standard in contract interpretation, agreements should be interpreted based upon the parties' intent at the time. *Kuperus v. Willson*, 2006 ND 12, ¶ 11, 709 N.W.2d 726. In the First Open Road Trucking Lawsuit, the district court entered an Order providing for satisfaction of the judgment against Lund and in favor of ORT at the time of the settlement. ORT appealed that Order to this Court, but on December 2nd, there was no debt owed by Lund to ORT.

[¶ 35] At best, at the time of the oral settlement, ORT had a claim against Lund. While ORT's claim was ultimately recognized by this Court, that does not change the fact that there was no forgiveness of debt included in the parties' oral settlement because the debt had already been satisfied by the district court.

[¶ 36] ORT did not provide any evidence to the district court to contradict this interpretation, and this Court should conclude the statute of frauds simply does not apply under these undisputed facts. Additionally, as discussed below, the portion of the agreement which related to real property involved the CAM Lawsuit only, it was reduced to writing, and it was partially performed by cancellation of trial in the CAM Lawsuit. Therefore, this Court should conclude the district court erred as a matter of fact and law in determining the statute of frauds applied.

B. Even if the Statute of Frauds Applied, the Parties' Settlement Agreement Complied with the Statute.

[¶ 37] Furthermore, this Court should conclude that even if the statute of frauds applies to the parties' Settlement Agreement, the Agreement was in compliance with the statute.

[¶ 38] First, in this case, the Settlement Agreement was subscribed by attorney Randolph Stefanson, acting on behalf of Swanson and ORT. Specifically, Stefanson sent the written Settlement Agreement as an attachment to an email, and the email included Stefanson's signature block. *See* App. 23. As the Eighth Circuit Court of Appeals has noted, "[E]mails that contain the material terms of an agreement that are signed with electronic signatures . . . have been held to satisfy the statute of frauds." *Eagle Technology v. Expander Americas, Inc.*, 783 F.3d 1131, 1138 (8th Cir. 2015). *See also Lamle v. Mattel*, Inc., 394 F.3d 1335, 1362 (Fed.Cir. 2005) (finding that an email signature satisfied the California statute of frauds where email contained the material terms of a proposed agreement). Defendants' counsel had authority to enter into the settlement agreement with express consent from its clients, as evidenced by their presence at the settlement conference on December 2, 2020. *See generally Midwest Federal Sav. Bank v. Dickinson Econo-Storage,* 450 N.W.2d 418, 422 (N.D. 1990) (noting attorneys need authority from clients to settle an action).

[¶ 39] North Dakota law also specifically acknowledges the validity of electronic signatures. Under N.D.C.C. § 9-16-06, entitled "Legal recognition of electronic records, electronic signatures, and electronic contracts," the following provisions apply:

> 1. A record or signature may not be denied legal effect or enforceability solely because the record or signature is in electronic form.
> 2. A contract may not be denied legal effect or enforceability solely because an electronic record was used in the contract's formation.
> 3. If a law requires a record to be in writing, an electronic record satisfies the law.
> 4. If a law requires a signature, an electronic signature satisfies the law.

(Emphasis added).

[¶ 40] The Eighth Circuit Court of Appeals has also recognized that the statute of frauds does not require formal execution of a contract to satisfy the signature requirement:

> The memorandum need not be a single document but may be composed of a series of writings, the combination of which supply all of the essential terms. . . . The signature may take many forms and be located anywhere in the writing, so long as it conveys an intention to authenticate the writing.

Vess Beverages, Inc. v Paddington Corp., 886 F.2d 208, 213 (8th Cir. 1989) (internal citations omitted). By sending the Settlement Agreement and appending his electronic signature, Attorney Stefanson indicated his agreement to the terms of the attached Settlement Agreement on behalf of his clients, Swanson and ORT. Stefanson's signature acknowledgement and exchange of writings is sufficient for the agreement to be enforced against the Defendants under the statute of frauds.

[¶ 41] Based upon the above-cited statutes and case law, as a matter of law, the district court erred in concluding Defendants' counsel's signature and affirmation did not satisfy the statute of frauds.

C. Even if the Statute of Frauds Applied, Part Performance Removed the Agreement from the Statute of Frauds.

[¶ 42] Next, if this Court concludes the statute of frauds applies to the parties' settlement agreement, it should further conclude that the parties' partial performance of the settlement removed the agreement from the statute of frauds.

[¶ 43] "To take a contract out of the statute of frauds, the party seeking to enforce the oral contract must establish part performance that is not only consistent with, but that is consistent only with, the existence of the alleged oral contract." *Kohanowski v. Burkhardt*, 2012 ND 199, ¶ 16, 821 N.W.2d 740 (emphasis in original). This Court has also said:

> Another requirement of the doctrine . . . is that the acts relied upon as constituting part performance must unmistakably point to the existence of the claimed agreement. If they point to some other relationship . . . or may be accounted for by some other hypothesis, they are not sufficient.

In re Estate of Thompson, 2008 ND 144, ¶ 13, 752 N.W.2d 624 (internal citation omitted).

[¶ 44] The parties immediately partially performed upon their settlement agreement following the in-person meeting on December 2nd. Upon the conclusion of the meeting, attorney Foss emailed the Court, with attorneys Stefanson and Schoenwald copied, to inform the Court the parties had "resolved" the CAM Lawsuit, asking the Court to take the trial off the calendar, and requesting 14 days to file "closing documents." App. 20. No party disputes that the trial was cancelled and the parties did not intend to move forward in that matter. *See* Tr., p. 24. Both Lund and Swanson alleged claims against one another that were scheduled to proceed towards trial, and both Lund and Swanson received and provided consideration as a result of the cancellation of this trial.

[¶ 45] Through cancellation of the trial and both parties' indication they intended to dismiss the matter, the parties performed upon their agreement to dismiss all pending litigation between them, including but not limited to the CAM Lawsuit. As further discussed below, this Court has approvingly cited case law in which informing the court of settlement before trial is a crucial consideration in determining whether the parties entered into a valid settlement agreement. *See Yonkers Fur Dressing Co. v. Royal Ins. Co.*, 160 N.E. 778, 781 (N.Y. 1928) (cited in *Bohlman v. Big River Oil Co.*, 124 N.W.2d 835 (N.D. 1963)). In light of the parties' part performance of the settlement agreement, this Court should conclude the district court erred in determining the statute of frauds barred enforcement of the oral settlement agreement.

D. Allowing Defendants to Rely on the Statue of Frauds as a Defense Promotes an Injustice.

[¶ 46] Finally, as a matter of policy concern, this Court should conclude the district court erred in allowing Defendants Swanson and ORT to rely on the statute of frauds as a defense herein because they are seeking to use such defense to perpetrate a fraud and injustice.

[¶ 47] "[W]hether or not the statute of frauds shall be allowed as a defense depends on the facts and circumstances of the individual case." *Wilhelm v. Berger*, 297 N.W.2d 776, 779 (N.D. 1980). "[T]he statute of frauds should not be allowed to be used to perpetrate a fraud or to promote an injustice." *Nelson v. TMH, Inc.*, 292 N.W.2d 580, 584 (N.D. 1980) (citing *Farmers Cooperative Ass'n of Churchs Ferry v. Cole*, 239 N.W.2d 808, 812 (N.D. 1976)). "The purpose and intent of the statute of frauds is to prevent fraud and perjury, and the statute should not be used as a defense where the effect would be to accomplish a fraud or to enable a party to enrich himself unjustly at the expense of another." *Wilhelm*, at 779 (citing *Nelson*, 292 N.W.2d 580, *Cole*, 239 N.W.2d 808, and 73 Am.Jur.2d, Statute of Frauds, § 563-64).

[¶ 48] There were no genuine disputes of fact presented to the district court regarding the series of events: Lund and Swanson met in person with their attorneys and negotiated a global settlement agreement on December 2, 2019; attorney Stefanson prepared a written agreement to memorialize the parties' agreement, which was provided to Lund on December 10, 2019; and Lund's counsel provided a revised version back to Swanson's counsel on December 12, 2019, which revised version did not change any of the essential terms of the parties' agreement. *Compare* App. 24-32 with App. 34-45.

[¶ 49] However, this Court entered its Opinion in the First Open Road Trucking Lawsuit later in the afternoon on December 12th, and Defendants Swanson and ORT suddenly

regretted the settlement for which they had bargained in light of this Court's favorable appellate decision. As determined by the district court, Defendants suddenly lost all interest in settlement. Instead of accepting the benefit of their bargain, Swanson and ORT have now been allowed to use the statute of frauds to perpetuate a fraud and injustice in bad faith.

[¶ 50] As explained above, this Court should reverse the district court because it erred as a matter of law in determining the statute of frauds applied here. However, to the extent this Court may conclude the statute of frauds applies, based upon the unique facts and timeline of this case, this Court should conclude application of the statute of frauds would result in a fraud and injustice upon Plaintiff Lund.

II. The Parties Entered into an Enforceable Settlement Agreement.

[¶ 51] As discussed above, this Court should conclude the statute of frauds does not apply to this matter. As such, this Court should also conclude the district court erred in viewing the undisputed evidence presented and determining the parties did not enter into a binding settlement agreement, whether looking at the oral or written agreements which memorialized that agreement.

[¶ 52] "In North Dakota, the law looks with favor upon compromise and settlement of controversies between parties, and where the settlement is fairly entered into, it should be considered as disposing of all disputed matters which were contemplated by the parties at the time of the settlement." *Thomas C. Roel Associates, Inc. v. Henrikson*, 295 N.W.2d 136, 137 (N.D. 1980) (*citing Bohlman*, 124 N.W.2d 835 (N.D. 1963) and *Herold v. Hill*, 41 N.D. 30, 169 N.W. 592 (1918)).

[¶ 53] As a result, "[w]hen a settlement is fairly made before trial, it 'takes on the character of a contract . . . and is final and conclusive, and based on good consideration.'" *Vandal v. Peavey Co.*, 523 N.W.2d 266, 268 (N.D. 1994) (quoting *Bohlman*, 124 N.W.2d at 837). Where the parties have entered into a valid pre-trial settlement agreement, the district court has the authority to enter a judgment in accordance with the terms of such settlement. *Thomas C. Roel Associates, Inc.*, at 137. This Court has also approvingly cited New York case law which indicates an even greater reverence for cases where the parties inform the court they have settled a matter. *Yonkers Fur Dressing Co. v. Royal Ins. Co.*, 160 N.E. 778, 781 (N.Y. 1928) (cited in *Bohlman*, 124 N.W.2d at 839) (noting where parties mark a case as "settled and discontinued," it is treated as if the matter had never been begun).

[¶ 54] This Court has also discussed the enforceability of oral agreements and said:

> "Where the parties have agreed on the essential terms of a contract, the fact they contemplated a further writing memorializing the agreement does not prevent enforcement of the contract." *Lonesome Dove Petroleum, Inc.*, 2000 ND 104, ¶ 18, 611 N.W.2d 154. Essential contract terms depend on the context of the agreement. *See, e.g., Lire, Inc.*, 541 N.W.2d at 434–35 ("a non-competition agreement for the selling of Italian type foods for a period of 5 years and within a radius of 60 miles of Rugby ... completely describe the type of business restriction, the duration of the restriction, and the geographic limitation for the restriction"); *Union State Bank v. Woell*, 434 N.W.2d 712, 717 (N.D. 1989) ("Essential terms of an oral contract to continue lending money in the future include the amount and duration of the loans, interest rates, and, where appropriate, the methods of repayment and collateral for the loans, if any."). "[I]t is the intent of the parties which controls, and a binding agreement is created unless the parties intended there be no agreement until a writing is signed." *Lonesome Dove Petroleum*, Inc., at ¶ 19.

B.J. Kadrmas, Inc. v. Oxbow Energy, LLC, 2007 ND 12, ¶ 12, 727 N.W.2d 270. A party to a contract who argues the parties did not intend to enter into a contract until signed and reduced to a writing bears the burden of establishing that fact. *Metzler v. O.J. Barnes Co.*, 226 N.W. 501, 503 (N.D. 1929).

[¶ 55] In *Lonesome Dove*, this Court concluded the lack of a final, signed writing did not preclude enforcement of an agreement. *Lonesome Dove Petroleum, Inc. v. Nelson*, 2000 ND 104, ¶ 20, 611 N.W.2d 154. The defendant, Nelson, argued the lack of a final, written contract and his failure to sign a written contract indicated a lack of mutual assent. *Id.* at ¶ 17. This Court concluded (1) the fact that the parties contemplated a further writing memorializing the agreement supported enforcement, and (2) under the flexible test of acceptance and mutual consent, there was mutual assent when Nelson accepted a benefit of the transaction. *Id.* at ¶¶ 18, 24-25.

[¶ 56] In addition to the North Dakota case law supporting enforcement of settlement agreements, many other courts have considered similar circumstances and concluded oral settlement agreements are enforceable. *See Roman-Oliveras v. Puerto Rico Elec. Power Auth.*, 797 F.3d 83, 86-87 (1st Cir. 2015) (concluding an oral settlement agreement was enforceable and noting an unsigned instrument circulated by the parties captured the terms of the oral settlement agreement); *Harris v. Arkansas State Hwy. & Transp. Dept.*, 437 F.3d 749, 751 (8th Cir. 2006) (noting an attorney had authority to enter a settlement agreement on behalf of a client and an oral settlement agreement was enforceable); *State Farm Mutual Auto Ins. Co. v. InterAmerican Car Rental, Inc.*, 781 So.2d 500, 501-02 (Fla. Ct. App. 2001) ("A settlement agreement does not have to be in writing, and does not have to definitely fix all details of the parties' understanding in order to be enforceable"); *Padilla v. LaFrance*, 907 S.W.2d 454, 460-61 (Tex. 1995) (determining the parties entered into a binding settlement agreement through a series of letters exchanged between counsel which satisfied a procedural rule requiring settlement agreements be in writing); *Mason v. Rabun Waste, Inc.*, 330 S.E.2d 400, 401-02 (Ga. Ct. App. 1985) (concluding an oral settlement

agreement was valid and not required to be reduced to a writing). Accordingly, this persuasive authority supports the enforcement of oral settlement agreements, especially those where the parties have exchanged writings to support the existence of a binding agreement. *City of Bismarck v. Materi*, 177 N.W.2d 530, 538 (N.D. 1970) (noting this Court looks to other courts' decisions for guidance).

[¶ 57] Here, the parties agreed on the essential terms of the Settlement Agreement, as evidenced by the emails between counsel, the agreement to cancel the jury trial in the CAM Lawsuit, and the proposed Settlement Agreement itself. The essential terms of the agreement involved the dismissal of all pending litigation, in addition to the agreed-upon exchange of business interests. As reinforced by the case law cited above, North Dakota law and public policy supports the enforcement of settlement agreements where the parties have agreed to all terms prior to trial and informed the court of their settlement. The parties clearly contemplated a writing further memorializing the oral agreement, as evidenced by the settlement agreement Defendants' counsel drafted which included the essential terms to the contract. The exchange of emails between counsel further memorializing these same terms also evidences the parties' intent to enter into the settlement agreement.

[¶ 58] Like in *Lonesome Dove*, the parties here contemplated a further writing memorializing their agreement. The email from Plaintiff's counsel, dated December 2, 2019, outlined the terms orally agreed to by the parties. Defendants' counsel's proposed Settlement Agreement, dated December 10, 2019, reduced the agreement to a formal writing. There is no dispute that the parties intended to reduce this agreement to a writing. Additional evidence of a validly formed contract exists because there was mutual assent to enter the contract.

[¶ 59] Additionally, like in *Lonesome Dove*, the parties accepted a benefit of the transaction, which included informing the district they had settled the matter and did not proceed to a jury trial in the CAM Lawsuit. As discussed above, the parties agree they contacted the Clerk of Court and informed the court they had agreed to settle the matter set for trial. App. 9, ¶ 14; App. 16, ¶ 7; *see also* App. 20. If the parties did not intend for their verbal settlement agreement to be immediately effective and subsequently reduced to a writing, there would be no reason to inform the Court in the CAM Lawsuit about the settlement and cancelled the jury trial that was to begin the following day.

[¶ 60] Based on these undisputed facts and based on the lack of any evidence presented to rebut this conclusion by Defendants, this Court should conclude Defendants did not meet any burden to show they did not intend to enter into the settlement agreement they proposed and reverse the district court's decision.

A. The Undisputed and Unrebutted Evidence Presented to the District Court Establishes the Settlement Agreement Included Dismissal of All Pending Claims.

[¶ 61] If this Court properly concludes the settlement agreement was enforceable, it should further conclude the terms of the settlement agreement between the parties included dismissal of all pending litigation, including the First Open Road Trucking Lawsuit.

[¶ 62] In addition to its error in granting Defendants' request for summary judgment, the district court erred in failing to address the terms of the settlement agreement, instead dismissing the entirety of the action despite the writings, evidence, and inapplicability of the statute of frauds. Based upon Defendants' responses in this matter, the only true dispute over the terms of the settlement related to whether the parties' agreement included the dismissal of the First Open Road Trucking Lawsuit.

[¶ 63] In regards to the interpretation of a settlement agreement, this Court has stated:

> A settlement agreement is a contract that either party may enforce, and the parties' rights and responsibilities are limited by the terms of the agreement. *Hastings Pork v. Johanneson*, 335 N.W.2d 802, 806 (N.D. 1983). The interpretation of a written contract to determine its legal effect is a question of law. *Lenthe Invs., Inc. v. Service Oil, Inc.*, 2001 ND 187, ¶ 14, 636 N.W.2d 189. In *Lire, Inc. v. Bob's Pizza Inn Rests., Inc.*, 541 N.W.2d 432, 433–34 (N.D. 1995) (citations omitted), we outlined our rules for the interpretation of a written contract:
>
> Contracts are construed to give effect to the mutual intention of the parties at the time of contracting. The parties' intention must be ascertained from the writing alone if possible. A contract must be construed as a whole to give effect to each provision, if reasonably practicable. We construe contracts to be definite and capable of being carried into effect, unless doing so violates the intention of the parties. Unless used by the parties in a technical sense, words in a contract are construed in their ordinary and popular sense, rather than according to their strict legal meaning.
>
> If a written contract is unambiguous, extrinsic evidence is not admissible to contradict the written language. However, if a written contract is ambiguous, extrinsic evidence may be considered to show the parties' intent. Whether or not a contract is ambiguous is a question of law. An ambiguity exists when rational arguments can be made in support of contrary positions as to the meaning of the language in question.

Kuperus v. Willson, 2006 ND 12, ¶ 11, 709 N.W.2d 726.

[¶ 64] In this case, the unambiguous mutual intent of the parties was to dismiss all pending litigation between the parties, which included the First Open Road Trucking Lawsuit. The proposed Settlement Agreement prepared by Defendants' counsel identifies all of the actions between Lund, Swanson and ORT, and the agreement specifically includes the First Open Road Trucking Lawsuit. The proposed Settlement Agreement then incorporates all of these actions under the term "Litigation." App. 24-25; *see also* App. 34-35.

[¶ 65] Section 2 of the Proposed Settlement Agreement then provides:

> Dismissal of the Litigation. Upon execution of this Agreement and completion of the requirements of Section two, the Parties agree to execute and file joint stipulations to dismiss all pending claims in the Litigation.

App. 27; *see also* App. 37. At the time counsel for Swanson and ORT provided the Proposed Settlement Agreement to Plaintiff, the First Open Road Trucking Lawsuit and Defendants' appeal was "pending" before the North Dakota Supreme Court, as the Court had not issued its Opinion. By the very terms of the Settlement Agreement provided on behalf of Defendants Swanson and ORT, the "pending claims" on appeal would have been dismissed. The written language of the enforceable contract between the parties requires dismissal of all pending litigation between the parties. Accordingly, this Court should reverse the district court's decision and conclude the parties' settlement agreement included a provision requiring the Defendants to dismiss all litigation that was pending at the time of the agreement, as intended by the parties, including the First Open Road Trucking Lawsuit.

B. This Court Should Conclude Plaintiff Lund is Entitled to Specific Performance of the Settlement Agreement.

[¶ 66] Finally, this Court should conclude Plaintiff Lund is entitled to specific performance of the settlement agreement as a remedy. "The law discourages litigation and encourages settlement. To enforce a compromise agreement an action in equity for specific performance is a proper remedy." *Muhlhauser v. Becker*, 37 N.W.2d 352, 362 (N.D. 1948) (citations omitted).

[¶ 67] In addition, with regard to specific performance of contracts generally, this Court has said:

> "The person seeking specific performance has the burden of proving he is entitled to it." *Id.* at 215. A party seeking specific performance of a contract "is held to a higher standard than if he merely asks for money damages for breach of the contract." *Sand v. Red River Nat'l Bank & Trust Co.*, 224 N.W.2d 375, 378 (N.D. 1974). Specific performance is an equitable remedy, and equitable principles must be followed in its use. *Wolf*, 334

> N.W.2d at 215. Specific performance may be denied if a contract is not fair, reasonable, and based on adequate consideration. *Sand*, 224 N.W.2d at 378. "And specific performance of an agreement must be denied when its terms are not sufficiently certain to make the precise act which is to be done clearly ascertainable." *Beebe*, 169 N.W. at 32. To be specifically enforceable, "'[a] contract must fix the price or consideration clearly, definitely, certainly, and unambiguously, or provide a way by which it can be fixed with certainty.'" *Mandan–Bismarck Livestock Auction v. Kist*, 84 N.W.2d 297, 301 (N.D.1957) (quoting 81 C.J.S., Specific Performance § 34). To be specifically enforceable, a contract "'must be complete in itself ... at least with respect to its essential and material terms ... The court cannot supply an important omission or complete a defective contract for the purpose of specific performance.'" *Id.* at 302 (quoting 81 C.J.S., Specific Performance § 35).

Linderkamp v. Hoffman, 1997 ND 64, ¶ 5, 562 N.W.2d 734. "When parties enter into an agreement, each expects to receive certain benefits therefrom, and they never can be fully compensated unless such parties perform in accordance with the terms and provisions of their agreement." *Larson v. Larson*, 129 N.W.2d 566, 567 (N.D. 1964).

[¶ 68] Here, this Court should conclude Plaintiff Lund is entitled to specific performance. The terms of the enforceable contract are complete, fair, reasonable, and based on adequate consideration. The terms are also unambiguously definite in what must be done to perform under the contract: dismissal of all pending actions at the time of the agreement.

[¶ 69] Plaintiff Lund cannot be fully compensated for Defendants' failure to perform in accordance with their agreement, due to the additional expenses he will incur and the uncertainty of litigation if Defendants are permitted to continue pursuing litigation in the First Open Road Trucking Lawsuit. As a result, damages are inadequate to fully compensate Plaintiff for Defendants' breach of the agreement.

[¶ 70] In light of the large judgment now entered against Plaintiff in the First Open Road Trucking Lawsuit, without specific performance, Lund will be subject to any number of possible collection activities by ORT, which will have unknown and unpredictable

collateral consequences on his personal life, finances, and business opportunities. Accordingly, this Court should reverse and remand, directing the district court to enter an Order for Judgment and Judgment requiring Defendants to specifically perform in accordance with the terms of their agreement, pursuant to N.D.C.C. ch. 32-04.

III. In the Alternative, this Court should Reverse and Remand due to a Genuine Dispute of Material Fact.

[¶ 71] Alternatively, this Court should conclude the district court erred by entering summary judgment in Defendants' favor, due to the genuine dispute of material fact regarding whether they entered into an enforceable oral settlement agreement and the terms of such agreement.

[¶ 72] This Court has said:

> A party opposing a motion for summary judgment cannot simply rely on the pleadings or on unsupported conclusory allegations. Rather, a party opposing a summary judgment motion must present competent admissible evidence by affidavit or other comparable means that raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record raising an issue of material fact.

McDougall, 2020 ND 6, ¶ 10, 937 N.W.2d 546. Here, Plaintiff Lund submitted substantial evidence in support of the specific terms of the settlement agreement. Defendants submitted no evidence to support any variation of the terms of the agreement to which they drafted and agreed. No "competent admissible evidence" was submitted in support of Defendants' position and request for summary judgment or to dispute Plaintiff Lund's version of the events.

[¶ 73] As stated above, the only purported dispute between the parties was whether the oral settlement agreement provided for dismissal of the First Open Road Trucking Lawsuit. In reality, the terms of the Defendants' own proposed Settlement Agreement establish the

oral agreement provided for such dismissal. Nevertheless, in the event this Court concludes there is any genuine dispute of material fact regarding the specific terms of the settlement agreement, it should remand to the district court to determine such terms and make a determination of whether the agreement was enforceable.

CONCLUSION

[¶ 74] This Court should reverse the district court's decision denying Plaintiff Lund's motion for summary judgment and granting summary judgment in Defendants ORT and Swanson's favor.

Dated this 8th day of September, 2020.

O'KEEFFE, O'BRIEN, LYSON & FOSS, LTD.

/s/ *Sean. T. Foss*

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CERTIFICATE OF COMPLIANCE

[¶ 1] The undersigned hereby certifies the Appellants' Brief is in compliance with N.D.R.App.P. 32 and contains 32 pages.

Dated this 8th day of September, 2020.

O'KEEFFE, O'BRIEN, LYSON & FOSS, LTD.

/s/ *Sean. T. Foss*

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

James B. Lund, Plaintiff/Appellant, v. Leland A. Swanson and Open Road Trucking, LLC, Defendants/Appellees.	Supreme Court No.: 20200147 Cass County Case No.: 09-2020-CV-00082

APPEAL FROM AMENDED ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND JUDGMENT DATED MAY 14, 2020, COUNTY OF CASS, BY THE HONORABLE JOHN C. IRBY, EAST CENTRAL JUDICIAL DISTRICT

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF CASS)

[1] I, Tricia A. Fossen, hereby states that she is of legal age and that on September 8, 2020, she served the following:

APPELLANT'S BRIEF

APPELLANT'S APPENDIX

by sending a true and correct copy thereof VIA E-MAIL to the parties listed below:

Randolph Stefanson
rs@stefansonlaw.com

Bruce A. Schoenwald
bruces@stefansonlaw.com

[2] To the best of affiant's knowledge, information and belief, such address as given above was the actual address of the party intended to be so served.

[3] I declare under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on the 8th day of September, 2020 at Fargo, North Dakota, USA.

/s/ Tricia A. Fossen
Tricia A. Fossen