IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 21-0227

DOYLE LEE,

Plaintiff and Appellant,

-vs-

LITHIA CDH, INC. d/b/a LITHIA CHRYSLER DODGE JEEP RAM FIAT OF HELENA,

Defendant and Appellee.

APPELLEE'S ANSWER BRIEF

From the Montana First Judicial District Court, Lewis and Clark County District Court Case DDV-2018-633
Honorable Mike Menahan, Presiding

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1. Whether the District Court correctly found that the parties reached an enforceable settlement agreement?

2. Whether Appellant Doyle Lee took the proper steps to attempt to rescind his acceptance of the settlement agreement if he believed Lithia had not performed its obligations?

II. STATEMENT OF THE CASE

Appellant, Doyle Lee ("Lee"), purchased a used 2009 Subaru Legacy from Appellee Lithia CDH, Inc. ("Lithia") on September 12, 2017, for $9,293.00. The vehicle was eight years old, and it had nearly 100,000 miles at the time of purchase. Lee also purchased an extended service agreement from First Extended Service Corporation ("FESC") which provided coverage for unexpected repairs to the vehicle.

Lee later experienced issues with the vehicle's engine consuming oil. FESC initially paid the service department at the local Subaru dealership to rebuild part of the engine. When this failed to fully correct the issue, FESC authorized a replacement of the vehicle's engine with a remanufactured engine that came with a three-year and unlimited mileage warranty. Lee refused to allow the new engine to be installed and instead filed suit against Lithia for allegedly misrepresenting the

condition of the used vehicle. Lithia had to pay more than $1,000 to return the remanufactured engine which had already been delivered to the dealership.

After Lithia's counsel contacted Lee's counsel and inquired why he had declined the benefits of his extended service agreement with FESC, Lee reversed course and agreed to accept the remanufactured engine. As the appointment for the installation of the engine approached, Lee's counsel advised that he was also experiencing issues with the vehicle's clutch, which is not a covered item under the extended service agreement. On November 14, 2018, Lithia's counsel contacted Lee's counsel and offered to have Lithia's service department replace the clutch to settle and release his claims against Lithia. The following day, Lee's counsel unconditionally accepted the offer in an email, writing: "Mr. Lee will accept the offer to have the clutch replaced in exchange for settling all his claims against Lithia."

Lithia then installed the remanufactured engine on behalf of FESC and replaced the clutch at its own expense in late November of 2018 pursuant to the settlement agreement it reached with Lee. Lithia's counsel then prepared a written release and provided it to Lee's counsel in December of 2018. Lee's counsel failed to respond to additional emails about the status of the release for more than five months. Thereafter, Lee reneged on the settlement agreement. His counsel claimed

that there had been a "failure of consideration" because the remanufactured engine provided by FESC allegedly did not work properly. Lee eventually demanded more than $15,000 in additional payments from Lithia to drop his claims—nearly double the amount he paid for the Subaru.

Lee never took any steps to rescind the settlement agreement. Notably, Lee never offered to return the clutch or compensate Lithia for the amount it had paid for the parts. In August of 2019, Lee traded the Subaru to Lithia as part of the purchase of a different vehicle. During his less than two years of ownership, Lee drove the Subaru for nearly 40,000 miles. This included more than 17,000 miles in just nine months after the clutch was provided by Lithia and the remanufactured engine by FESC. Lithia sold the Subaru to another customer, and they have not experienced any issues with the vehicle.

In November of 2020, Lithia moved the Court to enforce the binding settlement agreement that the parties had reached in November of 2018. Lee did not dispute that a settlement agreement had been reached. Rather, Lee—who had breached the settlement by refusing to drop his suit—argued that Lithia could not enforce the agreement because the engine provided by FESC did not work properly. Notably, the engine replacement was not a term of the settlement agreement Lithia reached with Lee. Nor could it have been because it was consideration FESC

provided to Lee pursuant to the extended service agreement he had purchased from the company. On February 25, 2021, the District Court granted Lithia's motion, finding that like in *Hetherington v. Ford Motor Company*, 257 Mont. 395, 849 P.2d 1042 (1993), there was an enforceable settlement agreement because Lee accepted the settlement offer unconditionally. The District Court also noted that if Lee believed that Lithia had breached the settlement agreement, his remedy was in contract rather than withdrawing from the settlement. Lee appeals.

III. STATEMENT OF FACTS

A. FACTUAL BACKGROUND

Lee purchased a 2008 Subaru Legacy GT ("Subaru") from Lithia on September 12, 2017. Complaint and Jury Demand, ¶ 2 (Court Docket Number ("Doc. No.") 1)[1], (Appendix "Appx." 1, Lithia 001–004) [2]. When it was brand new, the Subaru cost approximately $29,000. However, it was nine years old at the time Lee purchased it and the car had 99,456 miles on it. Reply Brief in Support of Motions *in Limine*, Affidavit of Chad Nethery (Ex. 1), ¶ 23 (Doc. No. 31), (Appx. 3, Lithia 010–015). Accordingly, Lee paid just $9,293.00 for the car. *Id.* Lee also purchased an extended service agreement to cover unexpected repairs on the used

[1] A Case Register Report is attached at Appendix ("Appx.") 2, Lithia 007-009.

[2] For the Court's convenience, reference to "Lithia" page numbers refer to the consecutively numbered pages contained in the Appellee's Appendix.

Subaru through First Extended Service Corporation ("FESC"). See Reply Brief in Support of Motion to Enforce Settlement, Second Affidavit of Howard Reed (Ex. 6), ¶ 5, (Doc. No. 30), (Appx. 4, Lithia 016–020).

Before, selling the Subaru to Lee, Lithia performed a 46-point inspection on the Subaru after receiving the vehicle as a trade-in. Brief in Support of Motion for Summary Judgment Re; Constructive Fraud and Consumer Protection, Value Auto Inspection Sheet (Ex. 1) (Doc. No. 32), (Appx. 5, Lithia 021–023). This included driving the vehicle and inspecting the oil levels. *Id.* Lee also had the opportunity to examine and drive the Subaru before he purchased it.

When purchasing the Subaru, Lee agreed in writing that he understood that it was being sold "as-is" and that there would be no returns or exchanges. Brief in Support of Motion for Summary Judgment Re; Constructive Fraud and Consumer Protection, We Owe (Ex. 2) (Doc. No. 32), (Appx. 6, Lithia 024). He also acknowledged in writing that, as the buyer, he was assuming the entire risk as to the vehicle's quality and performance and that if the vehicle proved defective after purchase, he would be responsible for the entire cost of service and repair. Brief in Support of Motion for Summary Judgment Re; Constructive Fraud and Consumer Protection, Buyer's Guide (Ex. 3) (Doc. No. 32), (Appx. 7, Lithia 025–026). Lee

further acknowledged in writing that he was aware that some of the major defects that can occur in used vehicles are oil leakage and misses in the engine. *Id.*

After Lee reported that the vehicle was consuming oil in late 2017, FESC authorized the local Helena Subaru dealership, Placer Motors, to attempt to rebuild part of the engine. Appx. 4, Lithia 017, ¶ 4. When the work by Placer Motors failed to correct the problems, FESC approved a replacement of the engine in the Subaru with a new remanufactured engine as a benefit under the extended service agreement Lee had purchased. *Id.*, ¶ 5. The engine came with a three-year and unlimited mileage warranty. *Id.* Lithia had the engine shipped to its dealership for installation. *Id.*, ¶ 6. After the engine arrived, however, Lee refused to let Lithia install it. Lithia then had to return the engine and it was assessed $1,103.75 in fees to return it. *Id.*, ¶¶ 6–7.

Lee has alleged that Lithia somehow created a false impression that the Subaru was "in good serviceable condition for the price that was paid." Appx. 1, Lithia 004, ¶ 22. Lee has alleged that before Lithia acquired the Subaru, the prior owner had taken it to Placer Motors in Helena for service work that was not disclosed to him. Appx. 1, Lithia, 002, ¶11. He has also alleged that significant repairs were never completed at Placer Motors. *Id.* Without evidence, Lee has alleged that Lithia had knowledge of prior defects in the vehicle or that it should have known of the defects.

Id. Lithia, however, did not have any knowledge of engine issues with the Subaru. The CARFAX report for the Subaru also does not reflect it ever being serviced at Placer Motors. Brief in Support of Motion for Summary Judgment Re; Constructive Fraud and Consumer Protection, CARFAX Vehicle History Report (Ex. 4) (Doc. No. 32), (Appx. 8, Lithia 027–031).

B. CASE HISTORY

Lee filed suit against Lithia on June 25, 2018. Appx. 1, Lithia, 001–006, at 1. Lee alleged, among other things, that Lithia was somehow aware of engine problems with the Subaru at the time he purchased it and failed to inform him of those issues. Appx. 1, Lithia, 001–006, at 2.

Beginning in August of 2018, counsel for Lithia began communicating with Lee's attorney to inquire why he had refused the new engine he was entitled to under his extended service agreement with FESC. Brief in Support of Motion to Enforce Settlement, Affidavit of Andrew T. Newcomer (Ex. 1), ¶ 4 (Doc. No. 17), (Appx. 9, Lithia 032–034). This was not a settlement offer regarding the litigation. Instead, it was something Plaintiff was already entitled to pursuant to the extended service agreement through FESC. The undersigned advised Lee's counsel that the new engine would be covered by a three-year and unlimited mileage warranty. Appx. 9, Lithia, 033, ¶ 4. There were no discussions or guarantees about the performance of

the new engine. In September of 2018, Lee agreed to allow the installation of the replacement engine pursuant to Lee's extended service agreement from FESC. Id, ¶ 5.

As the date approached for Plaintiff to deliver his vehicle to Lithia for the engine replacement, Lee's attorney advised that the Subaru was experiencing issues with the clutch. *Id.*, ¶ 6. The clutch is considered a "wear" item and is not covered under the extended service agreement. *Id.*

On or about November 14, 2018, counsel for Lithia offered for the dealership to replace the clutch in exchange for a settlement and a release of Lee's claims against Lithia. *Id.*, ¶ 7. On November 15, 2018, at 8:23 a.m., Lee's counsel unconditionally accepted the offer on Lee's behalf via email. *Id.*, ¶ 8; Brief in Support of Motion to Enforce Settlement, Email from Brian Miller to Andy Newcomer (Nov. 15, 2018) (Doc. No. 21), (Appx. 10, Lithia 035–037). Lee's counsel wrote: "**Mr. Lee will accept the offer to have the clutch replaced in exchange for settling all his claims against Lithia**." *Id.* Lee's counsel copied Lee on the November 15, 2018, email and Lee did not voice any objection to the agreement. See *Id.*

The engine and clutch were replaced in November of 2018. Appx. 4, Lithia 017, ¶¶ 8, 10. Lee was provided with a loaner vehicle while the work was performed.

Id., Lithia 019, ¶ 20. The value in parts and labor that Lee received from FESC for the engine replacement was $7,352.06—nearly the amount he had paid to purchase the Subaru. *Id.*, ¶ 8. The new clutch that Lithia installed cost the dealership $1,293.99 in parts. Id, ¶ 10. Because the clutch was installed at the same time as the new engine, Lithia did not incur additional labor costs. *Id.*, Lithia 017–018, ¶ 11. If at the clutch had been installed at a different time, however, the job would have cost $724.82 in labor. *Id.* Lee has never claimed that he experienced any issues with the new clutch.

After the engine and clutch were replaced, Lithia's counsel sent Lee's attorney a proposed release on December 20, 2018. Appx. 9, Lithia 033–034, ¶ 11. When Lee's attorney did not respond, Lithia's counsel sent the release again on January 8, 2019. *Id.*, Lithia 034, ¶ 11. When Lee's attorney still had not replied, Lithia's counsel again asked about the status of the release on April 11, 2019. *Id.*, Lithia 034, ¶ 12. Thereafter, Lee's counsel attempted to renege on the settlement and never returned the release. Lithia subsequently learned that Lee's counsel never showed him the proposed release. Deposition of Doyle Lee (Feb. 2, 2021) (Appx. 11, Lithia 042–044, at 146:18–148:8. Lee's counsel never complained about the replacement engine or the clutch while Lithia's counsel sought the signed release from Lee.

Lee drove the Subaru for 17,349 miles in just nine months after the engine was replaced and the new clutch was installed. Appx. 4, Lithia 018, ¶¶ 14–16. This is much more than the national average for which vehicles are expected to be driven in a year. *Id.*, ¶ 16. During the less than two years that he owned the Subaru, Lee put nearly 40,000 miles on the vehicle. *Id.*, ¶ 17. This is also much more than the national average for which vehicles are expected to be driven during a year. *Id.*

Lee eventually traded the Subaru to Lithia in August of 2019 and purchased a 2016 Jeep Compass instead. Appx. 3, Lithia 010, ¶ 2. The new engine still had more than two years remaining on the unlimited mileage warranty he received from FESC. Appx. 4, Lithia, 018, ¶ 13. Lithia discounted the price of the 2016 Jeep Compass to try to accommodate Lee as a customer. *Id.*, ¶ 5. Lee did not advise Lithia that he was experiencing any issues with the Subaru at that time. *Id.*, ¶ 4. A used vehicle inspection was performed on the Subaru and no significant issues were found. Appx. 4, Lithia 019, ¶ 21. Lithia then sold the Subaru to another local customer. *Id.* The buyer has not advised Lithia that they have experienced any issues with the Subaru. *Id.*

After Lee became unhappy with the 2016 Jeep Compass, he chose to purchase a 2018 Jeep Compass instead. Appx. 3, Lithia 011, ¶¶ 8–10. This vehicle cost more than twice as much as the Subaru. Appx. 3, Lithia 013–014, ¶ 23. It also had only

6,069 miles at the time of purchase compared to the Subaru which had nearly 100,000. *Id.*

Although Lee had already agreed to settle the case in November of 2018, Lithia had replaced the clutch as agreed, and he had driven the Subaru for nine months before trading it in and purchasing two subsequent vehicles from Lithia, Lee's counsel demanded nearly a year later on October 2, 2019, that Lithia pay Lee an additional $11,000 and $4,500 in attorney's fees. Appendix to Appellant's Opening Brief, Exhibit A. Although Lithia thought that it had already purchased its peace in this matter and had an enforceable settlement agreement, Lithia offered a nominal amount of $2,500 more to have finality rather than having to brief this issue with the court. *Id.*, Exhibit B.

Although Lee wishes not to be bound by his agreement to settle his claims against Lithia, he kept the benefit of the bargain by using his new clutch to drive the vehicle for nine months and 17,349 miles. Lee never offered to return the clutch or pay Lithia back the $1,293.99 it paid in parts for the new clutch. Lee is still unwilling to reimburse Lithia for these costs. Appx. 11, Lithia 039–040, at 143:25–144:4.

IV. STANDARD OF REVIEW

Summary judgment orders are reviewed *de novo*. *Mont. Dep't of Revenue v. Priceline.com, Inc.,* 2015 MT 241, ¶ 6, 380 Mont. 352, 354 P.3d 631. Summary

judgment is properly granted when the moving party demonstrates an absence of a genuine issue of material fact and that they are entitled to judgment as a matter of law. M.R.Civ.P. 56(c)(3); *Smith v. BNSF Ry. Co.*, 2008 MT 225, ¶ 10, 344 Mont. 278, 187 P.3d 639.

Settlement agreements are contracts. *Murphy v. Home Depot*, 2012 MT 23, ¶ 8, 364 Mont. 27, 270 P.3d 72. This Court reviews the existence of valid express contracts for correctness. *Lockhead v. Weinstein*, 2003 MT 360, ¶ 7, 319 Mont. 62, 81 P.3d 1284.

V. SUMMARY OF THE ARGUMENT

The district court correctly determined that the parties reached an enforceable settlement agreement. This case has been squarely addressed by existing Montana Supreme Court authority including *Murphy*, *supra*, *Hetherington v. Ford Motor Company*, 257 Mont. 395, 849 P.2d 1039 (1993), and *Lockhead*, *supra*. Here, Lee unconditionally accepted the settlement agreement and neither he, nor his, counsel disclosed an intention not to be bound. The agreement contained the material terms of the settlement amount (a clutch replacement) and a release of all claims.

Lee has no basis for rescinding his acceptance of the settlement agreement. He has not alleged that Lithia secured his acceptance through fraud or other untoward means. If Lee believes that Lithia breached the agreement, he failed to

take the statutorily required steps to rescind his acceptance, including acting promptly and offering or returning the consideration he received. Instead, Lee kept the consideration and continued to drive the Subaru for more than 17,000 miles in less than nine months. A party may not keep the consideration received as part of a settlement agreement while simultaneously repudiating the settlement agreement.

The district court correctly noted that if Lee believes Lithia failed to perform its obligations under the settlement agreement, his remedy is a suit for breach of contract. That was the remedy this Court recognized was appropriate in *Hetherington* for a plaintiff that believes that the defendant breached the settlement agreement but who had failed to rescind the contract. 257 Mont. at 402, 849 P.2d at 1044.

VI. ARGUMENT

A. THE DISTRICT COURT CORRECTLY FOUND THAT THE PARTIES REACHED AN ENFORCEABLE SETTLEMENT AGREEMENT.

The law favors compromise and the settlement of claims. *Augustine v. Simonson,* 283 Mont. 259, 266, 940 P.2d 116, 120 (1997). Stipulations of settlement are favored by the courts and not lightly cast aside. *Hallock v. State*, 474 N.E.2d 1178, 1180 (N.Y. 1984).

Settlement agreements are contracts and are governed by the provisions of contract law. *Murphy*, ¶ 8. An agreement is binding if there is an offer that is accepted unconditionally. *Id.*; *Hetherington*, 257 Mont. at 399, 849 P.2d at 1042. Material terms of a settlement agreement are the amount of the settlement and the release of all claims. *Murphy*, ¶ 10. A party to a settlement agreement is bound if they manifested assent to the terms of the agreement and did not manifest an intent not to be bound. *Id.*, ¶ 8. A latent or unexpressed intention not to be bound does not prevent a binding contract from being formed. *Id.*

An interim agreement to resolve a pending lawsuit without a simultaneous release or dismissal is enforceable and constitutes a binding and valid settlement. *Carlson v. State Farm Mut. Auto. Ins. Co.*, 76 F. Supp. 2d 1069, 1074 (D. Mont. 1999).

Hetherington is this Court's leading case on the enforceability of settlement agreements. *Lockhead*, ¶ 10. In *Hetherington*, the defendants offered to pay the decedent's estate in exchange for "a full and final release of all claims by the Hetheringtons." *Id.*, 257 Mont. at 397, 849 P.2d at 1041. The estate's personal representatives met with their legal counsel, agreed to the offer, and gave him authority to accept. *Id.* After the meeting, the estate's counsel sent the following letter to the agent that was negotiating on behalf of defendants:

> Please be advised that my clients have decided to accept your clients' combined offer of settlement in the amount of $185,000. Of the total amount, $10,000 will be contributed by Ronan Auto Body and $175,000 will be contributed by Ford Motor Company.... [E]ach of you will be sending me settlement drafts and the appropriate releases.

Id. The estate's counsel then asked for "drafts and settlement documents within 10 days." *Id.*

The estate, however, fired its counsel four days later and retained another attorney to file suit against the defendants because the estate believed it maintained the right to bring the claim "until that written settlement agreement was formally approved and executed." *Id.*, 257 Mont. at 397–98, 849 P.2d at 1039. Ford asserted the affirmative defense that a compromise and settlement had been reached prior to filing the action. *Id.* It also asserted a counterclaim seeking specific performance of the settlement agreement. *Id.*

Prior to trial, the lower court denied Ford's motion for summary judgment on its affirmative defense and counterclaim on the basis that there remained a question of fact regarding whether the parties intended to be bound prior to having a written signed agreement. *Id.* The district court then also directed a verdict in favor of the estate on the grounds that there had never been a meeting of the minds regarding what an "appropriate release" in the settlement agreement would have included. *Id.*

On appeal, this Court held that the district court erred in denying Ford summary judgment on the grounds that there was a binding agreement despite the estate's latent belief that it would not be bound until a written agreement was signed. *Id.*, 257 Mont. at 399, 849 P.2d at 1042. The Court noted that a party's latent intent not to be bound does not prevent the formation of a binding contract and that the communications between the attorneys and between the estate and their attorney "disclosed no conditions or manifestations of conditional intent." *Id.*

Similarly, in *Lockhead*, this Court also held that an oral settlement agreement reached between counsel was enforceable. In *Lockhead*, counsel for the plaintiff and defendant entered into an agreement during a telephone conversation in which they specified the dollar amount and the preparation of a general release. *Lockhead*, ¶ 3. Two days later, defendant's counsel prepared and faxed a proposed release to plaintiff's counsel. *Id.* Plaintiff's attorney then replied in a letter in which he stated: "We received the proposed General Release and agree with the terms you have proposed. Brian Lockhead accepts the settlement offer for the sum of $7,500." *Id.*, ¶ 4. Shortly after the agreement, plaintiff refused to settle. *Id.* The defendant moved to enforce the settlement agreement and was granted summary judgment. *Id.*, ¶ 5. On appeal, this Court upheld the district court's ruling based on *Hetherington* and

noted that "the only essential elements of an enforceable agreement are an unconditional offer and unconditional acceptance." *Lockhead*, ¶ 9.

Here, the district court correctly found that Lithia and Lee reached an enforceable settlement just as in *Hetherington* and *Lockhead*. *See Lockhead,* ¶ 9; *Hetherington*, 257 Mont. at 399, 849 P.2d at 1042. Indeed, Plaintiff admits that he agreed to settle the case. Appendix to Appellant's Opening Brief, Exhibit B at 1. Lithia presented substantial evidence of an enforceable and legally binding settlement. The undisputed facts demonstrate there was an unconditional offer and acceptance on November 15, 2018, between Lithia's counsel and Lee's counsel. Appx. 10, Lithia 035. The simple terms of the settlement were plainly stated in the email that Lee's counsel sent to Lithia's counsel accepting the settlement offer. *Id.* "**Mr. Lee will accept the offer to have the clutch replaced in exchange for settling all his claims against Lithia**." *Id.* The material terms of the settlement were present in the amount (clutch replacement) and a release of all claims. *See Murphy*, ¶ 10. Thus, the district court correctly held that there was an enforceable settlement agreement.

B. LEE HAS NO BASIS FOR VOIDING THE SETTLEMENT AGREEMENT.

If a settling plaintiff believes that defendant has breached their settlement agreement, they must take action to rescind the contract or, alternatively, they can

seek contract damages. *Hetherington*, 257 Mont. at 402, 849 P.2d at 1044.A party seeking to avoid a settlement has the burden of providing a valid basis for rescinding the agreement. *See Hinderman v. Krivor*, 2010 MT 230, ¶ 21, 358 Mont. 111, 244 P.3d 306 ("A party may rescind a settlement agreement if its consent to the agreement was given mistakenly or obtained through duress, menace, fraud, or undue influence exercised by another party to the agreement.").

A party seeking to rescind an agreement must act promptly upon discovering facts that reportedly entitle them to rescind the agreement. M.C.A. § 28-2-1713(1). They must also "restore to the other party everything of value that the rescinding party has received from the other party under the contract or shall offer to restore everything of value, upon condition that the other party shall do likewise . . .." M.C.A. § 28-2-1713(2).

Courts have observed that a releasor in a settlement agreement should not be permitted to retain the benefits they received under that agreement while simultaneously attacking its validity. *E.g.*, *Haller v. Borror Corp.*, 552 N.E.2d 207, 210–11 (Ohio 1990) ("Second, a releasor ought not be allowed to retain the benefit of his act of compromise and at the same time attack its validity when he understood the nature and consequence of his act, regardless of the basic nature of the inducement employed. In that event, the consideration should be first returned so

that the parties may be placed in the positions they enjoyed prior to the practice of the fraud alleged." (internal citation omitted)); *Jones v. Massingale*, 163 S.E.2d 217, 219 (S.C. 1968) ("Numerous decisions of this court adhere to the general proposition that, when a party to a compromise settlement wishes to avoid a duly executed release, and be restored to his original rights, he must restore the other party to his original position by returning or offering to return the consideration received under the compromise."); *Golden v. McDermott, Will & Emery*, 702 N.E.2d 581, 589 (Ill. App. Ct. 1998) ("the retention of the consideration by one sui juris, with knowledge of the facts will amount to a ratification of a release executed by him in settlement of a claim, where the retention is for an unreasonable time under the circumstances of the case").

In his appeal, Lee has attempted to shift his burden to Lithia. To proceed with his lawsuit against Lithia after agreeing to settle it, it was Lee's burden to show a valid basis for excusing him from the settlement agreement. *See Hinderman*, ¶ 21; *cf. Hallock*, 474 N.E.2d at 1181 (settlement agreements are not lightly case aside). However, Lee made no attempt to show that his consent to the agreement was "given mistakenly or obtained through duress, menace, fraud, or undue influence exercised by another party to the agreement." *See Id.* Lee also took no action to rescind his settlement agreement with Lithia. He did not promptly notify Lithia of his intention

to rescind the agreement. *See* M.C.A. § 28-2-1713(1). Nor did he attempt to return the clutch he received from Lithia or to reimburse Lithia for the costs of the clutch instead. *See* M.C.A. § 28-2-1713(2).

Indeed, when he was deposed nearly two and a half years after Lithia installed the clutch, Lee testified that he was unwilling to reimburse Lithia for the $1,293.99 it spent on the parts pursuant to the settlement agreement. Appx. 11, Lithia 039–040, at 143:25–144:4. Lee cannot retain the benefits he received under the settlement agreement while trying to void the same agreement. *See e.g.*, *Jones*, 163 S.E.2d at 219. Therefore, Lee must be bound the settlement agreement and he cannot proceed with his lawsuit.

In attempting to avoid his agreement to settle his claims in exchange for the installation of a new clutch by Lithia, Lee mispresents the terms of the settlement and ignores precedent from this Court regarding settlements. First, the replacement engine was not a term of the settlement nor was its consideration for the settlement. The terms of the settlement could not be clearer from Lee's counsel's email of November 14, 2018. Lee's counsel wrote: "**Mr. Lee will accept the offer to have the clutch replaced in exchange for settling all his claims against Lithia**." Appx. 10, Lithia 035. FESC—not Lithia—provided the remanufactured engine as a benefit of the extended service agreement Lee had purchased from it. Appx. 9, Lithia 033,

¶ 4. Thus, the remanufactured engine could not have been consideration for his agreement with Lithia as a matter of law. *See* M.C.A. § 28-2-801 (defining consideration as a benefit conferred upon a promisor "to which the promisor is not lawfully entitled"). Lee had also already agreed to permit the remanufactured engine to be installed pursuant to his agreement with FESC before Lithia offered to replace the clutch in exchange for a release of Lee's claims. Appx. 9, Lithia 033, ¶¶ 5–8.

Second, Lithia performed its obligations under the settlement by purchasing and installing a new clutch in Lee's Subaru. See Appx. 10, Lithia 035–037. The parts cost $1,293.99. Appx. 4, Lithia 017, ¶ 10. Lee has never claimed that the clutch was installed incorrectly or that it did not work correctly. After it was installed, Lee drove the Subaru for more than 17,000 miles in nine months using the new clutch. Appx. 4, Lithia 018, ¶¶ 14–16. Therefore, Lithia fully performed its obligations under the settlement agreement.

Third, if Lee believed that Lithia had breached the agreement, he failed to follow the remedies this Court identified in *Hetherington*. In *Hetherington*, this Court recognized that had the defendant Ford Motor Company breached the settlement agreement at issue by failing to pay the $175,000 it had agreed upon, the plaintiffs were required to rescind the contract if they wished to continue with their original tort claim. 257 Mont. at 402, 849 P.2d at 1044. Their only alternative was

to seek contract damages either by court enforcement of the settlement agreement or through a subsequent action for breach of contract. *Id.*

Finally, Lee relies upon inapplicable case law Lee and ignores his breach of the settlement agreement. Rather than pursuing the remedies for an alleged breach identified in *Hetherington* or attempting to prove why he should be permitted to rescind the settlement agreement, Lee erroneously tries to shift the burden to Lithia to enforce the settlement with inapplicable case law. Tellingly, *Siefert. v. Seifert*, the only case Lee cites on the subject, and one of just three cases in his entire brief, dealt with an option to purchase land, not a settlement. 173 Mont. 501, 568 P.2d 155 (1977). Additionally, unlike the plaintiff in *Siefert*, Lithia performed its obligations under the settlement agreement by replacing the clutch. This Court recognized in *Hetherington* that a settlement agreement is an enforceable obligation. *See* 257 Mont. at 402, 849 P.2d at 1044. Additionally, it was Lee, not Lithia, who breached the settlement agreement by repudiating it and continuing with this litigation after agreeing to drop his claims. As this Court recognized in *Hetherington*, if a settling party breaches a settlement by advising they will no longer honor it, the other party may ask a court to enforce that agreement. 257 Mont. at 402, 849 P.2d at 1044. That is exactly what Lithia did here.

C. THE DISTRICT COURT CORRECTLY RECOGNIZED THAT LEE'S REMEDY FOR ANY ALLEGED ERROR IN THE PERFORMANCE OF THE SETTLEMENT AGREEMENT WAS A SUIT FOR BREACH OF CONTRACT.

As noted above, this Court recognized in *Hetherington* that absent action to rescind a settlement agreement, a party that believes such an agreement was breached must seek contract damages. 257 Mont. at 402, 849 P.2d at 1044.

Numerous other courts have recognized that a breach of contract action is the proper remedy for an alleged error in the performance of a settlement agreement. *Deficcio v. Winnebago Industries*, No. CIV.A. 11-872 MLC, 2011 WL 4594291, at **1–2 (D. N.J., Sept. 30, 2011) ("To the extent Plaintiffs believe Winnebago breached the Settlement Agreement, the proper remedy is a suit for breach of that contract; they remain bound by its terms unless they can make the showing, by clear and convincing proof, that the Settlement Agreement should be set aside because it was achieved through fraud."); *Friedman v. Burns*, 46 N.Y.S.3d 853, 857–58 (N.Y. Sup. Ct. 2017) ("Moreover, the counsel for the plaintiffs contends that even if the two coats delivered to the Burns defendants were incorrect, such nonperformance would be a breach of [the settlement agreement] contract, and an immaterial breach at that."); *Beaman Pontiac Co. v. Gill*, No. M1999-00666-COA-R3-CV, 2000 WL 502822, at *2 (Tenn. Ct. App., Apr. 28, 2000) ("In essence, Beaman promised to dismiss it's cause of action brought in good faith in exchange for Gill's promise to

repurchase the Jaguar from Beaman. The parties to a bilateral contract bind themselves by mutual promises to perform. Thus, the exchanged promises serve as consideration for the contract. Any refusal to carry through on those promises does not render the contact void for lack of consideration. It most likely operates as a breach of an existing contract.").

In *Deficcio v. Winnegabo Industries, Inc.*, the United States District Court for the District of New Jersey held that the plaintiffs who believed they received inadequate repairs to their recreational vehicle as part of a settlement agreement could not void that agreement and instead were required to seek contract damages. 2011 WL 4594291, at **4–5. In *Deficcio*, the plaintiffs and defendant agreed that the defendant would make certain repairs to plaintiffs' recreational vehicle in exchange for a release of plaintiffs' claims, which included alleged consumer protection violations. *Id.* at **1–2. The plaintiffs alleged, however, that the defendant kept the recreational vehicle for longer than was originally contemplated and that it inadequately performed the agreed repairs. *Id.* at *2. Plaintiffs argued that there was thus a "failure of consideration" for the settlement agreement, and it was not enforceable. *Id.* at *3.

The United States District Court for the District of New Jersey disagreed. It found that the plaintiff's argument that the settlement agreement should be set aside

based on an alleged failure of consideration "exhibits circular logic confusing the promise aspect of contract formation with the performance and execution thereof." *Id.* at *4. The United States District Court said that if the plaintiffs believe that the defendant breached the settlement agreement by making inadequate repairs, "the proper remedy is a suit for breach of that contract." *Id.* at *5. The plaintiffs remained bound by the settlement. *Id.* The only way they could set it aside would be to demonstrate by clear and convincing evidence that the settlement agreement was achieved through fraud, which they utterly failed to do. *Id.* at ** 5–6.

In *Beaman Pontiac Company*, the Court of Appeals of Tennessee held that a settlement agreement was enforceable even though the plaintiff car dealership had not returned the Jaguar car at issue to the defendant and the defendant had stopped payment on the check intended as settlement. 2000 WL 502822, at *2. In this case, the defendant had traded the Jaguar to the plaintiff dealership, and it was later discovered that the car had a salvaged or branded title at the time of the trade in. *Id.* at *1. It was later agreed that the defendant would essentially buy the Jaguar back from the plaintiff in order to settle a lawsuit. *Id.* After refusing to honor the settlement, the defendant then appealed the trial court's motion enforcing the agreement, and argued, amongst other things, that the settlement was not enforceable

because there was a lack of consideration. *Id.* at **1–2. In doing so, the defendant noted that the plaintiff had never delivered the Jaguar as agreed. *Id.* at *2.

The Court of Appeals of Tennessee rejected this argument, finding that the defendant "misunderstands the nature of the agreement between the parties." *Id.* It noted:

> The recitation in the writing and the nature of the parties' original exchange attest to the bilateral nature of the contract of settlement. In essence, Beaman promised to dismiss it's cause of action brought in good faith in exchange for Gill's promise to repurchase the Jaguar from Beaman. The parties to a bilateral contract bind themselves by mutual promises to perform. **Thus, the exchanged promises serve as consideration for the contract. Any refusal to carry through on those promises does not render the contact void for lack of consideration. It most likely operates as a breach of an existing contract.**

Id. (emphasis added).

Here, as noted above, the consideration Lithia offered to resolve Lee's claims was to install a new clutch in the Subaru. Appx. 10, Lithia 035–036. It performed this obligation and Lee has never alleged that the clutch was installed improperly or that it was defective. Instead, Lee has alleged that the remanufactured engine provided by FESC as a benefit of Lee's extended service agreement did not function properly. The remanufactured engine from FESC was not a term of the settlement agreement between Lee and Lithia. Nor could it have been because it was something

Lee was already entitled to receive from FESC pursuant to the extended service agreement he purchased from FESC. *See* M.C.A. § 28-2-801.

Even if the remanufactured engine had been part of the consideration for the settlement and Lee believed that it was defective or it was installed improperly, his remedy would be to seek damages for an alleged breach of contract. *See Id.* at *5. However, this is not a basis for setting aside the settlement agreement. *Deficcio*, 2011 WL 4594291, at *5. Therefore, Lee has no basis for voiding the settlement and he must make a claim for breach of contract if he thinks Lithia performed inadequately.

VII. CONCLUSION

The district court correctly found that the Lithia and Lee reached a valid and enforceable settlement agreement. The settlement contained the required material terms and Lee did not express an intention not to be bound. Accordingly, the district court properly applied *Hetherington* and ordered the settlement agreement. This Court should affirm the district court's decision.

DATED this 4th day of November, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Words is 6268 words, excluding the table of contents, table of authorities, table of appendices, this certificate of compliance, and certificate of service.

DATED this 4th day of November, 2021.

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