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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0343

DANIEL PERL and SANDRA PERL, Individually and as Trustees and Settlors of the D. & S. Perl Family Trust dated August 24, 1998

Plaintiffs and Appellants,

v.

CHRISTOPHER GRANT, Individually and as Trustee and Settlor of the Grant Revocable Trust dated July 18, 2008, and GRANT CONSTRUCTION, LLP

Defendants and Appellees.

BRIEF OF APPELLANTS

Appeal from Cause No. DV 21-126(A),
Montana Eleventh Judicial District Court, Flathead County,
Hon. Amy Eddy Presiding

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STATEMENT OF THE ISSUES

1. Whether the District Court erred in granting, in part, the Defendants/Appellees' Motion for Summary Judgment; and

2. Whether the District Court erred in denying the Plaintiffs/Appellants' Cross-Motion for Summary Judgment.

STATEMENT OF THE CASE

Appellants/Plaintiffs Daniel Perl and Sandra Perl ("Dan" or "Sandra" and the "Perls" collectively), individually and as Trustees and Settlors of the D. & S. Perl Family Trust (the "Perl Trust"), initiated this action on February 9, 2021. *See* Court Record ("CR") 1 (Complaint). The Complaint alleges negligence, breach of contract, breach of warranty, violation of the Montana Consumer Protection Act, and construction defect arising from pervasive defects in the Perls' home located at 149 Shooting Star Circle in Whitefish, Montana (the "Property"). *Id*. The Perls purchased the Property in 2019 from the builders of the home, Appellees and Defendants Christopher ("Chris") Grant, individually and as Trustee and Settlor of the Grant Revocable Trust (the "Grant Revocable Trust"), Grant Construction, LLP ("Grant Construction"), and the Grant Revocable Trust (collectively, the "Grants"). *Id*.

The Grants filed a Motion for Summary Judgment and supporting brief on June 18, 2021, alleging that the Perls' claims were barred by a purported settlement agreement whereby the Grants would purchase the Property back from the Perls in exchange for a release of the Perls' claims relating to the construction defects. *See* CR 15 and CR 16. The Grants contend that this alleged agreement to purchase the Property was reached on October 19 and 20, 2020, through an exchange of three text messages between Dan Perl and Jason Grant ("Jay" or "Jason"), the brother of Chris Grant. *See generally*, CR 16.

The Perls responded and filed a cross-motion for partial summary judgment on July 16, 2021, asking the District Court to find as a matter of law that the Statute of Frauds was not satisfied and that no enforceable agreement had been reached for the sale of the Property or settlement of the Perls' claims. CR 19 and CR 20.

The District Court held a hearing on the parties' cross-motions for summary judgment. *See* Appx. 2, Transcript of Proceedings dated November 16, 2021. The District Court made an oral ruling from the bench, granting the Grants' motion for summary judgment in part, finding that the Statute of Frauds was satisfied and that "there was an enforceable settlement agreement for the purchase and sale of the property in exchange for release of claims related to the construction of the property." *Id.*, 26:20-24. The District Court also denied the Grants' motion for

summary judgment in part, finding "there was not an agreement to enter into an MDTL release…" *Id*., 27:1-2 The District Court denied the Perls' Cross-Motion for Summary Judgment. *Id*., 26:16-17. The District Court further memorialized the basis of its ruling in a written order dated November 16, 2021. Appx. 1 (CR 48) (the "Order").

The District Court ordered that parties would "have 120 days to finalize their agreement for the purchase of the property and to stipulate to the dismissal of this matter," otherwise the parties would need to appear for a show cause hearing on May 31, 2022, at which "if the parties have not reached an agreement, the Court will be prepared at that time to order immediate specific performance of the agreement, subject to commercially reasonable terms." Order, p. 8; *see also* Appx. 2, 27:9-20. The parties did not reach an agreement to consummate a purchase of the Property and the District Court conducted a hearing on May 31, 2022. Appx. 3, Transcript of Proceedings dated May 31, 2022. The District Court thereafter entered a Final Judgment on June 13, 2022, ordering that "the parties shall perform pursuant to the terms of the settlement agreement as found in this Court's November 16, 2021 Order," and entered Judgment for the Grants "for specific performance of the parties settlement agreement and that the parties shall take such actions as are necessary to complete the agreement." Appx. 4, CR 66 (the "Judgment").

The Perls timely filed their appeal from the District Court's Order and Judgment on June 28, 2022.

STATEMENT OF FACTS

This case arises from numerous significant defects in the construction of the Perls' home at 149 S. Shooting Star Circle, Whitefish, Montana. The Grant Revocable Trust was the prior owner of Property on which the house was constructed. CR 10, ¶ 7. Grant Construction, acting as general contractor, built the house. CR 10, ¶ 8. Chris Grant is trustee of the Grant Revocable Trust and a partner in Grant Construction, LLP. CR 10, ¶ 2.

By Warranty Deed dated February 6, 2019, the Grant Revocable Trust sold the Property (including the defective house) to the Perl Trust, of which Dan Perl and Sandra Perl are co-trustees. CR 1, ¶ 1; CR 10, ¶ 11; Appx. 5, ¶¶ 2, 4. Grant Construction, LLP, thereafter entered into two separate contracts with the Perls for additional work and improvements on the House, and was paid for the work. CR 10, ¶¶ 12-15.

The work performed by Chris Grant and Grant Construction, both before and after the sale of the Property to the Perls, was deficient and unworkmanlike in numerous respects and resulted in pervasive defects which continue to be discovered throughout the house. *See* CR 1 (Complaint), ¶¶ 16-17 and Appx. 5 (Affidavit of Dan Perl), ¶ 13. The Perls notified Chris Grant of these defects and

had multiple conversations with Chris and his wife, Rachelle Grant. Appx. 5, ¶¶ 13-14. Chris eventually refused to discuss the concerns about defects with the Perls. *Id*., ¶ 16.

Chris Grant's brother Jay Grant then began having discussions with Dan Perl regarding the construction defects. Appx. 5, ¶ 15; Appx. 6, ¶ 4. Jay Grant has never provided Dan or Sandra Perl with any written authorization showing that Chris Grant, Rachelle Grant, the Grant Revocable Trust or Grant Construction, LLP, or some combination of them, were permitting Jay Grant to negotiate or enter an agreement on their behalf. Appx. 5, ¶ 17. However, Dan Perl believed and understood that Jay Grant was attempting to negotiate a resolution on behalf of Chris Grant, Rachelle Grant, the Grant Revocable Trust, Grant Construction or some combination of these people and entities. *Id*., ¶ 16. Throughout these discussions, Jay Grant never represented that he was negotiating on his own behalf, nor did Dan Perl believe that Jay Grant was negotiating on his own behalf to purchase the Property. *Id*.

The Grants assert that in these discussions with Jay Grant, Dan Perl agreed to sell the Property to Jay Grant at a price of $2.8 Million in exchange for a release of the Perls' claims against the Grant Construction, the Grant Revocable Trust, Chris Grant, Rachelle Grant, and Jay Grant. Appx. 6, ¶ 10. The only writings

produced in relation to these discussions are three text messages (hereinafter, the "Text Messages"), as follows:

Monday, October 19, 2020 at 11:12 p.m. (from Jay to Dan):

> Hi Dan, I have talked with Chris and Rachelle (MacKenzie says hi) and we are happy with all the terms you laid out (built in TVs, appliances, window coverings, and ELFs stay, everything else goes, Jan 15 close, deposit paid on signing and remainder paid on close in cash). But 2.8 is a stretch for us

Tuesday, October 20, 2020 at 11:23 a.m. (from Dan to Jay):

> Jay:
> Glad we could reach agreement. What is the name and contact points of your attorney? Ours is Karl Rudbach at Ramlow & Rudbach in Whitefish.
> Dan

Tuesday, October 20, 2020 at 11:25 a.m. (from Jay to Dan):

> Me too. Her name is Samantha Travis at Ogle, Worm and Travis.

Appx. 6, ¶ 7-9; App. 7 (Text Messages).

On October 30, 2020, The Grants' attorney, Samantha Travis, e-mailed the Perls' attorney, Karl Rudbach, stating that she had attached a "proposed Buy-Sell Agreement and Release for the Perls' review." Appx. 11. Ms. Travis had drafted and attached a proposed "Agreement to Sell and Purchase" (hereinafter, "Buy-Sell") and a proposed "General Release" ("General Release"). Appx. 8 (CR 16, Exh. B) ¶ 7; Appx. 9 (Buy-Sell); Appx. 10 (General Release). The proposed Buy-Sell identified "Jason Grant" as the purchaser of the Property. Appx. 9, p. 1. In

her e-mail, Ms. Travis specifically alerted the Perls' counsel—for the first time—that Jay Grant would purchase the Property:

> You will notice that Jason Grant (Chris's brother) will by the Buyer – I believe he and the Perls have had direct communication on this.

See Appx. 8. This was the first time Dan Perl had ever heard that Jay Grant himself wished to purchase the Property. Dan Perl testified by affidavit to the District Court that he did not agree, and would never have agreed, to sell the Property to Jay Grant. Appx. 5, ¶ 18.

Additionally, Dan Perl disagreed with numerous terms included in the proposed Buy-Sell (Appx. 9) that Ms. Travis had sent to his attorney. Appx. 5, ¶ 19. As set forth in his affidavit, the proposed terms to which Dan Perl expressly disagreed included, *inter alia*, "the identity of the purchaser," the provision "that I would sign a General Release simultaneously with the Agreement to Sell and Purchase," the proposed "personal property to be transferred" with the real estate, and that "I would pay for title insurance" and "closing fees and transaction expenses." *Id*. Dan Perl also did not agree to the proposed "General Release." *Id*., ¶ 20.

Significantly, Sandra Perl was not a participant to the text conversation between Dan Perl and Jay Grant. *See* Appx. 7. There is nothing in the record before the District Court indicating that Sandra had any involvement whatsoever in discussions regarding a potential sale or settlement. *See* Appx. 5, 6, 7, 8 and 11.

There has been no evidence (or even allegation) presented by the Grants to show that Sandra ever agreed to sell her home to Jay Grant or anyone else, or that she agreed to settle and release any claims against the Grants. *Id*. However, the Grants clearly understood the need for Sandra's consent and inclusion in any conveyance of the Property, because they had previously deeded the Property to the Perl Trust, and their attorney proposed a Buy-Sell that identified the "Seller" as being "Daniel Perl and Sandra Perl, Trustees of the D. & S. Perl Family Trust," with signature lines for both "Sandra L. Perl, Trustee" and "Daniel L. Perl, Trustee." *See* Appx. 9, pp. 1, 6.

The Perls rejected the settlement proposal reflected in the Buy-Sell and proposed General Release, and their attorney conveyed a counteroffer, which was not accepted. Appx. 5, at ¶¶ 21-22. The Perls thereafter filed suit against the Grants on February 9, 2021. CR 1.

STANDARD OF REVIEW

The Montana Supreme Court "review[s] summary judgment rulings *de novo*, applying the standards set forth in M. R. Civ. P. 56(c)(3). Summary judgment is appropriate when the moving party demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law. Once the moving party has met its burden, the opposing party must present material and substantial evidence to raise a genuine issue of material fact." *Hill County High*

Sch. Dist. No. A v. Dick Anderson Constr., Inc., 2017 MT 20, ¶ 6, 386 Mont. 223, 390 P.3d 602 (internal citations omitted). The Montana Supreme Court "will draw all reasonable inferences from the offered evidence in favor of the party opposing summary judgment; but conclusory statements, speculative assertions, and mere denials are insufficient to defeat a motion for summary judgment." *Id.*

Determining if a contract exists is a combined question of law and fact. *Jarussi v. Sandra L. Farber Trust*, 2019 MT 181, ¶13, 396 Mont. 488, 445 P.3d 1226 (citations omitted). This Court will review the factual findings of a district court under the clearly erroneous standard. *Id.* A district court's factual findings are clearly erroneous if they are unsupported by substantial evidence, if the court has misapprehended the effect of the evidence, or if reviewing the record leaves this Court with the definite and firm conviction that a mistake has been made. *Id.* The Court reviews a district court's conclusions of law for correctness. *Id.*

SUMMARY OF ARGUMENT

For centuries, the Statute of Frauds has provided certainty to parties who are contemplating real estate transactions, and provided an essential safeguard against misunderstanding, fraud and mischief in those transactions. The Statute of Frauds accomplishes these goals by preventing the enforcement of alleged oral agreements for the sale of real property, and specifically by requiring a written note or memorandum sufficiently setting forth all the material terms of any purported real

estate purchase contract, subscribed by the parties to that transaction or by the party's agent, authorized in writing. *See e.g.*, § 28-2-903(d), MCA; *Dineen v. Sullivan*, 123 Mont. 195, 198, 213 P.2d 241, 242–43 (1949). The Statute of Frauds is not satisfied and as discussed below, this case exemplifies the policy rationale underpinning the Statute of Frauds and demonstrates the need for its continued enforcement.

The District Court correctly determined that the Statute of Frauds applies to the purported settlement agreement in this case. However, the District Court disregarded and misapprehended the evidence when it found that the three cursory Text Messages exchanged between Dan Perl and Jay Grant satisfied the Statute of Frauds and formed an enforceable contract requiring the Perls to sell their home. This was clear error. On their face, the Text Messages are wholly insufficient because they fail to delineate numerous terms that are material and essential to formation of any binding real estate contract. The Text Messages:

(1) fail to identify the parties to the contract;

(2) are not subscribed by essential parties to the Contract, including Sandra Perl and the Grants;

(3) contain no evidence that Sandra Perl consented to either a sale of the Property or settlement of the Perls' claims, and do not establish that

Dan Perl and the other parties mutually consented to the same thing in the same sense;

(4) do not contain a description of the Property to be purchased; and

(5) do not adequately describe the alleged consideration for any purchase, because they make no reference whatsoever to a release or settlement of disputed claims.

Because the Statute of Frauds is not satisfied, the purported agreement to settle the Perls' claims in exchange for the Grants' purchase of the Property is unenforceable as a matter of law. The District Court should have granted summary judgment to the Perls on this basis.

In addition to failing to satisfy the Statute of Frauds, the evidence before the District Court was insufficient to establish the formation of an enforceable settlement agreement under Montana law more broadly. While the issue of contract formation is a mixed question of law and fact that may sometimes be resolved on summary judgment, "[w]hen conflicting evidence exists, it is the province of the jury to judge the credibility and weight of the evidence" and to determine whether a contract was formed. *Smith v. Gen. Mills, Inc.*, 1998 MT 280, ¶ 19, 291 Mont. 426, 433, 968 P.2d 723, 727; *see also Masters Grp. Int'l, Inc. v. Comerica Bank*, 2015 MT 192, ¶ 92, 380 Mont. 1, 42, 352 P.3d 1101, 1129

(question of contract formation was properly submitted to the jury where evidence was conflicting).

The District Court disregarded an abundance of conflicting evidence in the record of this case, and misapprehended the evidence it did consider, all of which shows that there was no mutual consent on terms of the alleged settlement agreement. Summary Judgment should have been granted for the Perls on that basis, but at a minimum the Grants' motion for summary judgment should have been denied based on the many genuine issues of material fact as to whether an enforceable contract was formed. The Judgement of the District Court should be reversed accordingly.

ARGUMENT

I. THE ALLEGED SETTLEMENT AGREEMENT IS NOT ENFORCEABLE BECAUSE THE STATUTE OF FRAUDS IS NOT SATISFIED.

The District Court's summary judgment Order was clearly erroneous because the Statute of Frauds applies to this case as a matter of law, and the undisputed facts demonstrate that the Statute of Frauds was not satisfied. In Montana, the Statute of Frauds is found in at least three separate statutory provisions. First, the Statute of Frauds is codified as an essential provision of Montana's contract law:

> The following agreements are invalid unless the agreement or some note or memorandum of the agreement is in writing and subscribed by the party to be charged or the party's agent:
>
> ***
>
> (d) an agreement for the leasing for a longer period than 1 year or for the sale of real property or of an interest in real property. The agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing and subscribed by the party sought to be charged.

Sec. 28-2-903(1), MCA. These same requirements are found in the provisions of Title 70, Chapter 20, which governs transfers of real property and states:

> An estate or interest in real property, other than an estate at will or for a term not exceeding 1 year, may not be created, granted, assigned, surrendered, or declared otherwise than by operation of law or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring it or by the party's lawful agent authorized by writing.

Sec. 70-20-101, MCA. Finally, the Statute of Frauds is included in similar provisions of Title 30, Chapter 11 governing sales. *See* § 30-11-111, MCA.

Under these statutes, any agreement for the sale of real property must be memorialized in a written note or memorandum. Although "the statutes of Montana do not say what shall be contained in such note or memorandum…[t]his Court has said that the note and memorandum must contain the essentials of the contract <u>so that they may be ascertained from the writing without a resort to oral evidence</u>." *Dineen*, 123 Mont. at 198, 213 P.2d at 242–43 (emphasis added). The degree of detail required in the writing may vary based on the complexity of the

transaction. "Little might be needed in a simple pay and take agreement; and much in a more involved transaction and agreement." *Id*. But in any agreement, whether simple or complex, the memorandum must at a minimum state "*the terms and conditions of all the promises constituting the contract* and by whom and to whom the promises are made." *Id*., 123 Mont. at 201-202, 213 P.2d at 244 (emphasis in original). "Unless essential terms of the sale can be ascertained from the writing itself, or by reference in it to something else, the writing is not in compliance with the statute…." *Id*., 123 Mont. at 200, 213 P.2d at 243.

The District Court correctly determined that the Statute of Frauds is applicable to this case. *See* Transcript, 26:18-19. However, it erred in determining that "the text messages between the parties satisfies [sic] the statute of frauds as they contain all of the material terms." Order, p. 6. The three threadbare Text Messages exchanged between Jay Grant and Dan Perl do not constitute a sufficient writing, because on their face they lack numerous essential terms of a contract for the sale of real estate.

A. The Statute of Frauds Applies to Settlement Agreements Involving the Sale of Real Property.

Initially, the District Court correctly determined that the Statute of Frauds applies to this case. When a settlement agreement requires the conveyance of real property, it must satisfy the statute of frauds. *See in re Estate of Burrell*, 2010 MT 280, ¶ 28, 358 Mont. 460, 466, 245 P.3d 1106, 1111. Application of the Statute of

Frauds is required by Montana law because "[a] settlement agreement is a contract; therefore, we apply contract law to determine whether the agreement is valid and enforceable." *Gamble v. Sears*, 2007 MT 131, ¶ 24, 337 Mont. 354, 362, 160 P.3d 537, 543. The body of "contract law" to be applied necessarily includes the Statute of Frauds, which provides—without exception—that any contract for the sale of real property must be in writing. *See also* 72 Am. Jur. 2d Statute of Frauds § 93. ("Generally, when a settlement agreement includes a transfer of an interest in land, it necessarily implicates the Statute of Frauds; therefore, the agreement must be in writing and signed by the party to be charged….")

Thus, notwithstanding the general principle that contracts (including settlement agreements) may be formed by oral communications (*see* § 28-2-901, MCA), any such oral agreement is void if it requires that the parties thereafter execute a written agreement within the Statute of Frauds:

> The rule that an oral agreement to execute an agreement which is within the statute of frauds or to sign an agreement which that statute requires to be in writing is invalidated by that statute is applicable regardless of the character of the contract which is to be reduced to writing, and applies to oral contracts to execute written contracts for the sale or transfer of interest in land.

Mahoney v. Lester, 118 Mont. 551, 560, 168 P.2d 339, 343 (1946), citing 49 Am. Jur., Statute of Frauds, 368, § 6.

Consistent with this rule, this Court has previously applied the Statute of Frauds in the context of an alleged settlement agreement involving the conveyance

of real property. In *Burrell*, the grandchildren of a decedent entered into a written settlement agreement providing for the conveyance of 40 acres of land to the grandchildren, in exchange for dismissal of claims against their grandmother's estate. This Court noted that "Section 28-2-903(1)(d), MCA requires agreements for the sale of an interest in real property to be evidenced by a writing and subscribed by the party charged, or the party's agent," and found that "[t]he Statute of Frauds [was] satisfied" because "[t]he property was adequately described, and each Grandchild signed the Agreement." *Burrell*, ¶ 28, n. 1. Here, as in *Burrell*, the Court must analyze whether the Text Messages that are purported to memorialize the alleged oral settlement agreement satisfy the Statute of Frauds. They do not, for the reasons discussed below.

B. The Text Messages Do Not Contain All Material Terms of a Real Estate Contract.

The material terms of a contract for the sale of real property "will include the parties, the subject matter, a reasonably certain description of the property affected, the purchase price or the criteria for determining the purchase price, and some indication of mutual assent." *Wood v. Anderson*, 2017 MT 180, ¶ 10, 388 Mont. 166, 170, 399 P.3d 304, 308–09. On their face, the Text Messages lack these elements.

1. <u>The Texts Do Not Identify the Parties to the Contract for the Purchase of Real Estate.</u>

It is axiomatic that before any contract can be formed there must be "identifiable parties." Sec. 28-2-102(1), MCA. Any suggestion that the identity of the purchaser is immaterial is baseless and contrary to Montana law. Parties have a right to know who they are contracting with, and to that end this Court has required the written note or memorandum to state "<u>by whom and to whom the promises are made.</u>" *Dineen*, 123 Mont. at 201-202, 213 P.2d at 244 (emphasis added). This first and most basic element of a contract is missing, and the District Court's determination that "the parties to the contract were identified" in the Text Messages (Order, p. 6) is contradicted by the Text Messages themselves.

The District Court focused on language in the first text message wherein jay Grant stated, "I have talked with Chris and Rachelle (Mackenzie says hi) and ***we*** are happy with all the terms you laid out." Order, p. 6 (emphasis in original). The District Court reasoned that the text says "…'we are happy with all the terms you laid out.' Not they are happy." Appx. 2, 16:17-22. On that basis, the District Court held that "[a] plain reading of this language identifies the parties to the contract as the Perls, Grants, and Jay Grant." *Id*. (Emphasis supplied by District Court).

The District Court's analysis is clearly erroneous. The District Court misapprehended the evidence by fixating on the identity of the persons antecedent

to the pronoun "we," while neglecting to examine what Jay Grant's text actually said about those persons. On its face, the text in question does not state that Jay Grant, Chris Grant, Rachelle Grant, or any combination of them will be doing anything, or that they or their affiliated businesses would be the *purchasers* of the Property. Rather, this language merely identifies such individuals as all being "happy" with terms that had been discussed. Jay Grant's text message does not specify any person, entity, or combination of such as being the purchaser or purchasers. It does not specify "by whom and to whom the promises are made." *Dineen*, 123 Mont. at 201-202, 213 P.2d at 244. Reading the text message, there is no way that the Perls could possibly have ascertained that Jay Grant—rather than the other Grant individuals and entities who were actually parties to the dispute—would be the intended purchaser. The district court completely misread and misapprehended this language, and its finding that the Text Messages identify the parties to the contract is clearly erroneous. *See Jarussi*, ¶ 13 (a district court's factual findings are clearly erroneous "if the court has misapprehended the effect of the evidence.")

The first and only writings to ever identify a purchaser of the property were the October 30, 2020 e-mail sent by the Grants' counsel to the Perls' counsel, and the accompanying proposed Buy-Sell. Appx. 11. However, it is undisputed that the Perls immediately rejected that written proposal. Appx. 5 ¶¶ 18, 20-21. The

lack of any writing to substantiate an agreement to sell the Property to Jay Grant is further demonstrated by the Grants' counsel making a specific point to alert the Perls' counsel that Jay Grant would be the purchaser, claiming that she "believe[d] [Jay] and Mr. Perl have had direct communications on this." *Id.* If indeed the "parties to be charged" with purchase of the real estate had been identified in a previous written agreement weeks earlier, it would be entirely unnecessary for the Grants' counsel to resort to this extrinsic oral evidence of an alleged agreement that Jay Grant would be the purchaser.

The "party to be charged" and bound to purchase the Property is simply not identified in the Text Messages,[1] and the District Court's determination to the contrary was clear error. As a result, the Statute of Frauds is not satisfied because this critical element of contract formation was never agreed to in writing.

[1] The failure of this essential element is further illustrated by a reversal of roles. If the Perls were seeking to enforce a real estate purchase agreement against the Grants, it would still be impossible to ascertain from the Text Messages which of the Grants (people or entities) would be bound to complete the purchase. Would it be Chris Grant, Rachelle Grant, the Grant Revocable Trust, Grant Construction LLP, Jay Grant, or some combination of them? Any of these parties could avoid being bound to perform by correctly pointing out that the Text Messages fail to identify them as a purchaser, and could rightly argue that the Text Messages do not specify "by whom and to whom the promises are made." *Dineen*, 123 Mont. at 201-202, 213 P.2d at 244.

2. The Text Messages Are Not Subscribed by Sandra Perl or the Grants.

The Statute of Frauds is not satisfied because Sandra Perl is an essential party to any real estate sale agreement, but it is undisputed that she did not subscribe the writing that is alleged to memorialize the parties' agreement. To satisfy the Statute of Frauds, the writing must be "subscribed by the party to be charged." Sec. 28-2-903(1), MCA. A valid subscription consists of "any mark affixed to a writing with the intent to authenticate it…. " *Kluver v. PPL Montana, LLC*, 2012 MT 321, ¶ 25, 368 Mont. 101, 109, 293 P.3d 817, 822.

The District Court's cursory analysis of this issue is limited to a single-sentence footnote stating that "[t]he names and numbers associated with these text messages, as well as the follow up e-mails of counsel, satisfy any subscription requirement." Order, p. 6, citing *Kluver*, ¶ 24, 26, 29. Even assuming that the subscription requirement can be satisfied by reference to the names and phone numbers associated with a text message, it is undisputed that Sandra was not a participant in the text conversation between Jay Grant and Dan Perl. *See* Appx. 7. Sandra's name is not subscribed to the Text Messages and her name and phone number are nowhere to be found in the Text Messages. There is nothing whatsoever in the Text Messages that even references Sandra, much less indicates her intent to authenticate a text conversation *in which she did not even participate* as being her agreement or consent to a sale of the Property.

The absence of any subscription by Sandra is fatal to the enforceability of the alleged agreement to sell the Property. Sandra's subscription is not a mere formality; it is indispensable because she is a "party to be charged" with selling the Property, as shown by the District Court ordering her to specifically perform the alleged contract. Order, p. 6. Furthermore, it is undisputed that Sandra is co-trustee of the Perl Family Trust, which owns the Property. This fact is critical because it means the Property cannot be sold without her consent. By law, co-trustees must act either unanimously, or by a majority decision when disposing of trust property. Sec. 72-38-703, MCA ("Co-trustees who are unable to reach a unanimous decision may act by majority decision"); *Restatement (Third) of Trusts* § 39 (2003) ("If a trust has two trustees, they must concur in order to exercise powers of the trusteeship. If there are three or more trustees and they disagree, the decision of the majority controls….")

The Statute of Frauds is not satisfied where property is owned in trust, but only one of two co-trustees subscribes the memorandum. In *Amdahl v. Lowe*, 471 N.W.2d 770, 771 (S.D. 1991), the plaintiff sought to enforce a contract for the sale of real property, a portion of which was owned by a trust controlled by two co-trustees. However, only one of the trustees had subscribed a writing memorializing the alleged contract. The Supreme Court of South Dakota found that even though the writing was otherwise sufficient to satisfy the Statute of

Frauds, the contract was nonetheless invalid and could not be specifically enforced because South Dakota law makes it clear that a single co-trustee could not contract to convey title under South Dakota law. *Id.*, 471 N.W.2d at 776-77; *see also Traxler v. Rothbart*, 2004 WL 385409, at *2 (Mich. Ct. App. 2004) ("…in order to satisfy the statute of frauds, the purchase agreement had to be signed by both [co-trustees], or, at a minimum, with the [non-signing co-trustee's] consent.")

The same result is required under Montana law. Dan Perl is only one of two co-trustees, and therefore could not legally enter a contract to sell the Property without Sandra's participation and consent. The Perls expressly argued to the District Court that "there is no evidence that Sandra Perl, either individually or as trustee of the Perl Trust, consented to the terms of any settlement agreement." CR 16, at p. 13. The Grants did not supply, and the District Court's Order did not find, any evidence whatsoever that Sandra had subscribed the Text Messages or otherwise consented to the terms of any agreement. There is no such evidence. It appears that the District Court simply overlooked this issue entirely. Doing so was clear error, because even if Dan subscribed the Text Messages, the contract cannot be specifically enforced in the absence of a subscription or other evidence of Sandra's consent. *See* § 27-1-412(3), MCA ("An agreement to perform an act which the party has not power to perform lawfully when required to do so" cannot be specifically enforced).

Furthermore, the subscription requirement is not obviated by the unspecified "follow-up e-mails by counsel" referenced by the District Court. Order, p. 6. The only e-mail in the record is the October 30, 2020 e-mail from the Grants' counsel attaching a "proposed Buy-Sell Agreement and Release for the Perls' review." Appx. 11. The record contains no e-mails or other written offerings from the Perls' counsel, and nothing else in the record indicates that the Perls' counsel ever assented to the proposed Buy-Sell Agreement and Release, on behalf of either Sandra or Dan.

Finally, the District Court erred in finding that the "subscription" requirement was satisfied by a text message associated with Jay Grant's name and phone number. Appellees/Defendants Chris Grant, Grant Revocable Trust, and Grant Construction LLC are necessary parties to any settlement agreement, and the District Court found that they were parties to the contract allegedly formed by the Text Messages. *See* Order, p. 6. But just like Sandra Perl, these individuals and entities were not participants in the text conversation and did not subscribe the Text Messages. It cannot be argued that Jay Grant subscribed as agent for these people or entities, because the Statute of Frauds provides that an agreement "made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing and subscribed by the party sought to be charged." Sec. 28-2-903(1)(d), MCA; *see also* § 30-11-111, MCA; *Zier v. Lewis*, 2009 MT 266, ¶ 21,

352 Mont. 76, 81, 218 P.3d 465, 469 (holding that a person cannot bind another to a contract involving the sale of real property without written authority to do so). There is no evidence or allegation that Jay Grant was ever authorized in writing to enter a real estate contract on behalf of the other Grant entities or individuals.

3. The Text Messages Do Not Establish the Parties' Mutual Consent to the Same Thing in the Same Sense.

The Text Messages likewise fail to establish the "mutual assent" element of contract formation. The District Court determined that "Dan Perl's statement, 'Glad we could reach an agreement,' indicated mutual assent," *see* Order p. 6, but it did not undertake any further analysis to determine *what* Dan Perl had assented to and whether the parties agreed "upon the same thing in the same sense." Sec. 28-2-303, MCA.

"It is a well-established rule that there must be mutual assent or a meeting of the minds on all essential elements or terms to form a binding contract." *Jarussi v. Sandra L. Farber Tr.*, 2019 MT 181, ¶ 17, 396 Mont. 488, 495–96, 445 P.3d 1226, 1232. "Consent is not mutual unless the parties all agree upon the same thing in the same sense...." Sec. 28-2-303, MCA. "To form a binding contract, there must be mutual consent on all essential terms." *Murphy v. Home Depot*, 2012 MT 23, ¶ 8, 364 Mont. 27, 29, 270 P.3d 72, 74.

In *Murphy*, the Court found that the element of mutual assent was lacking notwithstanding the fact that "both parties manifested their intent to settle specific

claims." *Murphy*, ¶ 12. Murphy's counsel had sent a written offer to settle the matter for $7,500, and Home Depot's counsel had responded in writing that "our client has agreed to offer…[$7,500 minus the previously paid $252.75] as a global settlement offer." *Id*., ¶ 3. Murphy's counsel then responded in writing "thanking Home Depot for accepting Murphy's offer to settle," and sent a proposed release form. *Id*. However, Home Depot rejected the language of the release and proposed alternate language, which Murphy's counsel then rejected. *Id*. Despite the written statements of both parties indicating assent to a settlement (including specific assent to a release), after negotiations over the language of the written release broke down, the Court determined that "neither party agreed on the same thing in the same sense, thus there was no mutual consent on all the essential terms of the agreement." *Id*., ¶ 12.

Likewise, in *Jarussi*, a written settlement offer was accepted in an e-mail exchange between counsel, including an e-mail expressly stating "[t]he counteroffer is accepted." *Jarussi*, ¶ 4. Both parties even agreed that a settlement agreement was formed, but disagreed as to its interpretation. *Id*., ¶ 15. This Court found that notwithstanding this language of assent, there was no settlement because the parties' communications "did not contain express language referencing termination of all litigation," and there was "disagreement about the nature of the

litigation that would continue." *Id.*, ¶¶ 21-22. Thus, the parties "did not mutually assent to the scope of their proposed agreement." *Id.*

The writings between the parties in *Murphy* and *Jarussi* were insufficient to establish mutual assent. Yet compared to the threadbare text messages between Jay Grant and Dan Perl, those writings provided far stronger indicia of mutual assent and far more information about what "agreement" the parties were alleged to have reached than anything that has been produced in this case. Dan Perl's text message does reference an "agreement" and the parties did exchange the names of their respective attorneys, but otherwise the scope and terms of any agreement are not defined and critically, the Text Messages do not even mention the Perls' construction defect claims or a settlement and release of any claims. As in *Jarussi*, there is no "express language referencing termination of all litigation." *Jarussi*, ¶ 22. And in fact, Dan Perl's affidavit directly disputes that he agreed to sign a release. Appx. 5, ¶ 19. When the proposed Buy-Sell and General Release were sent to the Perls' counsel, the Perls rejected it and then made a counteroffer, which the Grants did not accept. As the Court observed in *Jarussi*, "[t]hese are not the actions 'of two parties who have had a 'meeting of the minds.' " *Jarussi*, ¶ 23.[2]

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[2] The District Court's assertion that the Text Messages were "confirmed in writing by counsel for the parties, whose agency has not been contested" (Order, p. 6) is incorrect and unsupported by anything in the record. Although the Grants' counsel sent the Perls' counsel an e-mail with the proposed Buy-Sell and release (Appx. 11), there is nothing in the District Court record suggesting that the Perls' counsel

Without Jay Grant's proffered extrinsic evidence of his oral conversations with Dan Perl—which Dan Perl has directly disputed—there is no plausible reading of the Text Messages that establishes the Perls' assent to a release of claims in exchange for Jay Grant's purchase of the Property. However, the Statute of Frauds requires that the parties' mutual assent must be "ascertained from the writing itself." *Dineen,* 123 Mont. at 198, 213 P.2d at 242–43. Consequently, the Text Messages do not satisfy the Statute of Frauds.

4. The Texts Do Not Describe the Real Property to be Conveyed.

The District Court also found that the Text Messages satisfied the Statute of Frauds because "there is no dispute as to the identification of the Property." Order, p. 6. However, that is not the standard with respect to satisfaction of the Statute of Frauds.

The requisite description of the real property cannot be "understood" or inferred from extrinsic evidence. Rather, a "reasonably certain" description of the property must be supplied in the writing itself, "without a resort to oral evidence." *Dineen* 123 Mont. at 198, 213 P.2d at 242–43. Although the terms of a real estate contract, including the property description, "may be generally stated," *Olsen v.*

ever "confirmed in writing" that there was an agreement, embodied in the Text messages or otherwise.

Johnston, 2013 MT 25, ¶ 20, 368 Mont. 347, 301 P.3d 795, the description cannot be omitted entirely as happened here:

> Extrinsic evidence may not provide the property description in the first instance, or add terms to an insufficient description. "The distinction ... should always be clearly drawn between the admission of oral and extrinsic evidence for the purpose of identifying the land described and applying the description to the property and that of supplying and adding to a description insufficient and void on its face."

Blazer v. Wall, ¶ 71, 343 Mont. 173, 201–02, 183 P.3d 84, 105, quoting *Lexington Heights v. Crandlemire*, 92 P.3d 526, 531 (2004) (holding the Statute of Frauds was not satisfied where contract failed to contain a sufficient description of real property to be sold); *see also Davison v. Robbins*, 517 P.2d 1026, 1029 (Utah 1973) ("Parol evidence is admissible to apply, not to supply, a description of lands in a contract" and "will not be admitted to complete a defective description…").

The Text Messages do not contain even a "generally stated" description of the Property. There is no description whatsoever of the real property to be sold, and nothing in Montana law allow courts to simply assume, as the District Court did, that the description of the land in question was understood between the parties. Accordingly, the Text Messages do not satisfy the Statute of Frauds.

5. The Texts Do Not Reference a Release of Claims, and Therefore Do Not Contain a Description of the Alleged Consideration.

The consideration to be given in exchange for a purchase of real property is another essential element of any real estate purchase agreement. *Wood,* ¶ 10; *see*

also § 28-2-102, MCA ("sufficient cause or consideration" is "essential to the existence of a contract."). The Grants allege that a release of claims was part of the consideration they were to receive in exchange for the purchase the Property. *See generally* CR 16. There can be no doubt that inclusion of a release as part of the contractual consideration was a material term. *Jarussi*, ¶ 23 ([t]he parties' rights to litigate issues…are matters "central to the very performance of the contract" and are not "subsidiary or collateral."); *Murphy* ¶ 12, (no enforceable settlement agreement existed where correspondence between parties showed that "neither party agreed upon what claims would be released.").

Because a release is a material aspect of the consideration for the alleged contract, it must be part of the writing alleged to memorialize the parties' agreement. *Dineen*, 123 Mont. at 201, 213 P.2d at 244 ("The memorandum, in order to satisfy the statute of frauds, must contain all the stipulations and undertakings of the verbal bargain.") (Emphasis in original). As previously noted, the Text Messages contain no reference at all to a release or settlement of claims and accordingly, an essential component of the consideration for the alleged contract is missing from the writing. The Statute of Frauds is not satisfied.

C. The Perls Have Not Admitted the Existence of the Contract and the Statute of Frauds Should Be Strictly Enforced.

In applying the Statute of Frauds, it is critical to note that the Perls (including Dan Perl) have never admitted to entering the contract alleged by the

Grants. This Court has held that "in cases involving admitted contracts, we have construed the statute of frauds less technically, refusing to allow the statute to be used so as to defeat its purpose to prevent the commission of a fraud." *Ryckman v. Wildwood, Inc.*, 197 Mont. 154, 162, 641 P.2d 467, 471 (1982). This rule makes sense where there has been a clear admission that a contract exists, and there is no doubt about what has been admitted. And indeed, in cases where the Court has applied this rule, it has done so on the basis of clear evidence of exactly what was admitted.

In *Ryckman*, for example, the Court applied this rule where the defendant's pleadings stated:

> Defendant admits that plaintiff Ernie Ryckman and defendant entered into an oral agreement by the terms of which plaintiff Ernie Ryckman would be credited with the finder's fee on certain transactions, which fee would be credited toward the purchase of plaintiff Ryckman's condominium.

Ryckman, 197 Mont. at 162, 641 P.2d at 471.

Similarly, in *Kluver*, the parties completed a full-day mediation that resulted in preparation of a detailed Memorandum of Understanding ("MOU") containing all the essential terms of a real estate contract, settlement agreement and release of claims. *Kluver*, ¶ 4. The MOU noted that all parties and their counsel had reviewed it, and approved its terms. *Id*. In addition to the MOU, there was unrebutted testimony that after the settlement conference, the plaintiff had spoken

with another party and “expressed relief that the case was over” as well as “sadness that he would have to part with some of his land as part of the settlement.” *Id.*, ¶ 5. Thus, there was a clear admission that a settlement contract existed as well as detailed evidence of exactly what terms were in that contract. In those circumstances, the Court held that “because Kluver acknowledged that a settlement agreement had been reached…he cannot now attempt to invoke the statute of frauds to deny the existence of such an agreement.” *Id.*, ¶ 30.

This case stands in stark contrast to *Ryckman*, *Kluver*, and other cases where the Court has found that an admitted contract warranted a “less technical” application of the Statute of Frauds. Although Dan Perl’s text expresses that he was “glad we could reach an agreement,” nothing in the Text Messages sufficiently specifies what the “agreement” was. As noted above, the Text Messages contain no reference at all to a release of claims and they are lacking numerous other essential terms of a real estate purchase agreement, including the identity of the purchaser and the participation and subscription of essential parties to any sale. There is simply no evidentiary basis to determine that Dan Perl was admitting the existence of a settlement agreement, release of all claims, and real estate purchase contract. And in contrast to *Ryckman* and *Kluver*, Dan Perl has never subsequently admitted that the Text Messages formed a settlement agreement. To the contrary, he has expressly and repeatedly denied as much. Appx. 5, ¶¶ 19-23.

Notably, the District Court did not expressly find that a contract was admitted, though did vaguely state that it "does apply the Statute of Frauds in a more flexible manner as there appears to be no real dispute between the parties as to this portion of the agreement." Order, p. 6. But the District Court's suggestion that there is "no dispute" about whether the Text Messages formed a contract is simply insupportable in light of Dan Perl's affidavit, which directly refutes the Grants' contentions that there was an agreement for a release of claims and a sale of the property to Jay Grant. Consequently, there is no factual or legal basis for the District Court taking a "more flexible" approach of the Statute of Frauds. Rather, the Court should apply the Statute of Frauds strictly and according to its terms, and find that there was no enforceable settlement agreement.

D. This Matter Exemplifies the Policy Rationale for the Statute of Frauds.

This case is a prime example of why the Court continues to strictly apply the Statute of Frauds, and stress the importance of its policy. "[T]he statute of frauds is designed to decrease uncertainties, litigation, and opportunities for fraud and perjury, and to discourage false claims based upon oral promises by requiring written evidence that the contract exists." *Hinebauch v. McRae*, 2011 MT 270, ¶ 23, 362 Mont. 358, 364, 264 P.3d 1098, 1103. In addition to preventing fraud, "the Statute ensures that the parties will act with deliberation and not improvidently, suggesting not only an evidentiary, but also a cautionary function." Williston on

Contracts § 21:1; *see also McCormick v. Brevig*, 1999 MT 86, ¶ 79, 294 Mont. 144, 163, 980 P.2d 603, 615 (conveyances of land may only be accomplished through writing because they "are supposed to be made upon greater deliberation and with greater solemnity" than other transactions).

This "cautionary function" explains the formalities required to bind parties to carry out real estate transactions. Real estate purchases are among the most expensive contracts most people will ever enter; they are not simply "contracts," but very important contracts that must be memorialized in a writing that sufficiently describes all material terms and is subscribed by the parties to be bound thereby. These formalities serve as a reminder of the gravity involved with real estate transactions and ensure, to the best possible extent, that conscious deliberation has been made. The formalities also build certainty into the transaction because the duties and obligations of each party are clearly spelled out in a written document which each party must sign.

Text messages, on the other hand, reflect the antithesis of the caution and deliberation contemplated by the Statute of Frauds. By their very nature and due to the medium of their transmission (over handheld devices), they are abbreviated and cursory communications. They typically lack nuance and detail, and are frequently composed in hasty fashion with little or no deliberation, and often while performing other tasks. They are a poor medium for full expression of meaning

and a woefully inadequate method of communication for negotiation of significant disputes or transactions. Moreover, the formalities required to consummate a real estate transaction are generally known even to lay persons and few (if any) people would reasonably expect that a brief exchange over text message is sufficient to bind them to the purchase or sale of a high-value real estate asset, as the District Court ordered in this case.

Given the importance and complexity of the contract the Grants are alleging in this case—i.e., a purported settlement of valuable tort and contract claims, requiring the sale and purchase of a multimillion-dollar property and necessarily requiring assent and participation of multiple individuals and entities—the Statute of Frauds requires a high degree of detail in the written note or memorandum that is purported to memorialize any agreement. *See Dineen*, 123 Mont. at 201-202, 213 P.2d at 244 (degree of detail required in the writing may vary, and greater detail may be required "in a more involved transaction and agreement.") While it may in theory be possible to negotiate and memorialize a real estate contract with sufficient detail to satisfy the Statute of Frauds over text message, the undisputed facts show that did not happen here. As set forth above, there are gaping holes in whatever agreement may be suggested by the Text Messages: identification of the purchaser, the subscriptions and assent of necessary parties, and other essential terms (such as a release of claims) are entirely absent from the Text Messages.

Those terms can only be supplied by extrinsic evidence, in contravention of the Statute of Frauds. Moreover, the extrinsic evidence as to those issues is vigorously disputed, as shown by the competing affidavits of Jay Grant and Dan Perl. *Compare* Appx. 5 and Appx. 6. For all these reasons, this case is fraught with exactly the uncertainties and opportunities for fraud and mischief that the Statute of Frauds was designed to prevent. It was clear error for the District Court to order the Perls to sell their home and release their claims on the basis of such a manifestly insufficient writing.

II. THE DISTRICT COURT ERRED IN DETERMINING THERE WAS AN ENFORCEABLE SETTLEMENT AGREEMENT.

In addition to failing to satisfy the Statute of Frauds, the evidence before the District Court was insufficient to establish the formation of an enforceable settlement agreement under Montana law.

Settlement agreements are contracts subject to contract law. *Murphy*, ¶ 8. Formation of an enforceable contract requires the following essential elements: (1) identifiable parties capable of contracting; (2) consent between those parties; (3) a lawful object; and (4) consideration. *Jarussi*, ¶ 17. Where there is conflicting evidence as to these elements, summary judgment is improper and it is the province of the jury to determine whether a contract was formed. *Smith* ¶ 19; *Masters Group*, ¶ 92.

Despite an abundance of conflicting evidence in the record of this case, the District Court held as a matter of law that "the agreement between the parties contained all of the essential elements of the contract," and stated that those essential elements were as follows:

> The Grants, including Jay, were to purchase the property for $2.8 million, which was a stretch, and in exchange the Perls would release the Grants from all future claims related to the property.

Order, p. 8. The District Court misapprehended the evidence, which shows that there was no agreement on the foregoing terms. Consequently, summary judgment should have been granted to the Perls as a matter of law on the issue of whether a settlement contract existed. At a minimum, there are numerous genuine issues of material fact as to whether the parties ever agreed to the foregoing terms, precluding summary judgment in favor of the Grants.

The failure of the evidence to establish the essential terms of a contract has already been discussed above in connection with the Statute of Frauds, but some additional discussion is warranted here to address the District Court's conclusion that the parties reached an enforceable settlement agreement. Regarding the first essential contract element, "identifiable parties," there is no substantial evidence to support the District Court's determination that the parties agreed that "[t]he Grants, including Jay, were to purchase the Property." Order, p. 8. The Text Messages certainly do not supply such evidence. *Supra*, § I(B)(1). Moreover, even though

the District Court found there was an agreement that "the Grants…were to purchase the Property" (Order, p. 8), counsel for the Grants drafted and sent a proposed Buy-Sell that did not obligate Chris Grant, Grant Construction, or the Grant Revocable Trust as purchasers. Appx. 9. Rather, the Grants' proposed Buy-Sell identified Jay Grant, a non-party, as the sole purchaser. *Id*. Thus, the writings and statements of the Grants' own counsel directly contradict the District Court's findings and demonstrate there was no mutual assent or meeting of the minds on this point. *Supra*, § I(B)(3). Furthermore, Dan Perl was not "capable of contracting" to sell the Property without the participation and consent of Sandra Perl, who was a co-trustee of the Perl Trust that owned the Property. *Supra*, § I(B)(2). Finally, as noted above, there was no agreement as to consideration, because it remains vigorously disputed whether the consideration for any agreement would include a release of claims. *Supra*, § I(B)(5). Based on all the foregoing, the Court should find that as a matter of law that there was no agreement about the identity of the contracting parties.

In finding that there was an enforceable settlement agreement, the District Court relied heavily on *Kluver v. PPL Montana,* and *Hetherington v. Ford Motor Co.*, 257 Mont. 395, 849 P.2d 1039 (1993), both of which are highly distinguishable from this case. *Hetherington* involved a settlement agreement that was completed with assistance of counsel for the parties. After the Hetheringtons

met with their counsel and gave him authority to accept the defendants' offer, their counsel sent written acceptance of the offer to the defendants' counsel as follows:

> 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.

Hetherington, 257 Mont. at 397, 849 P.2d at 1041. The Hetheringtons then changed their mind, fired their counsel, hired different counsel, sued the defendants, and took the position that "our right to bring the claim…would not be lost until [a] written settlement agreement was formally approved and executed." *Id*., 257 Mont. at 398, 849 P.2d at 1041.

This court rejected the Hetherington's argument because they had unconditionally accepted the defendants' settlement offer. *Id*., 257 Mont. at 399, 849 P.2d at 1042. Their consent, given through prior counsel, did not include language indicating it was contingent on a written settlement agreement, and any latent intent the Hetheringtons might have had not to be bound until a written agreement had been signed did not prevent contract formation. *Id*.

In contrast to *Hetherington*, the Perls are not claiming that they had a "latent intent" or understanding that a prior agreement would not be binding until execution of a formal release. Rather, it is the Perls' position that there never was any acceptance and formation of a settlement agreement <u>in the first place</u>. And

unlike *Hetherington*, where there was a clear and unequivocal written acceptance by counsel that included an instruction to opposing counsel to send the Hetheringtons "the appropriate release," in this case it is undisputed that the Text Messages make no mention whatsoever of either the disputed construction defect claims, or a release of any such claims, whether formally or informally. *See* Appx. 7. Dan Perl has denied ever agreeing to sign a release in connection with the proposed Buy-Sell (*see* Appx. 5, ¶ 19), and it is undisputed that there is no evidence of Sandra Perl, an essential party, ever agreeing to anything. This is not a "latent intent" case comparable to *Hetherington*.

Kluver is equally inapposite. As noted above, *Kluver* involved a settlement resulting from a full-day mediation that culminated in preparation of a detailed MOU containing: (1) all the essential terms of a real estate contract in substantial detail sufficient to satisfy the Statute of Frauds; (2) an agreement to settle and release all claims; and (3) a statement that the MOU had been reviewed and approved by all parties and their counsel. *Kluver*, ¶ 4. Moreover, unlike the Perls, the plaintiffs in *Kluver* had separately admitted to their co-plaintiffs that the mediation resulted in a settlement agreement, thereby preventing reliance on the Statute of Frauds. *Id*., ¶¶ 5, 30. In contrast to the MOU in *Kluver,* the Text Messages are entirely unclear as to essential material terms of the alleged agreement including the parties, consent of all essential parties, and existence of a

release. There is abundant evidence that the contract terms alleged by Jay Grant (and the other Grants that are parties to this suit) are not the same terms Dan Perl contemplated. Consequently, the Perls are not invoking the Statute of Frauds to prevent enforcement of an admitted agreement, as happened in *Kluver*, because there is no evidence the material terms of the alleged agreement were ever determined by mutual assent.

For all these reasons, the District Court committed clear error when it denied Perls' motion for summary judgment. The Judgment of the District Court should be reversed and the case should be remanded with instructions that the Perls are entitled to judgment as a matter of law that there was no enforceable settlement agreement. Alternatively, at a minimum, the Court should find that material issues of fact preclude summary judgment in favor of the Grants as to that issue.

CONCLUSION

For all the foregoing reasons, the Perls respectfully request the Judgment of the District Court be reversed and the matter be remanded for further proceedings as requested above.

DATED this 3rd day of October, 2022.

CROWLEY FLECK PLLP

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CERTIFICATE OF COMPLIANCE

I certify that Plaintiffs/Appellants' foregoing Brief is double spaced, proportionately spaced, has a Times New Roman typeface of 14 points, and contains 9,845 words, excluding the caption, Table of Contents, Table of Authorities, and Certificate of Compliance.

/s/ Kenneth K. Lay
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CERTIFICATE OF SERVICE

I, Kenneth K. Lay, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-03-2022:

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