DA 22-0343

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 13

DANIEL PERL, 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, the Grant Revocable Trust Dated July 18, 2008, and GRANT CONSTRUCTION, LLP,

Defendants and Appellees.

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

Third Party Plaintiffs,

v.

GENERAL ONE, INC., W.I.N. CONSTRUCTION, INC., MONTANA INSULATION CONTRACTORS, INC., RILEY LANDSCAPE CONSTRUCTION, and JOHN DOES 1-5,

Third Party Defendants.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DV-21-126
Honorable Amy Eddy, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Kenneth K. Lay, Crowley Fleck PLLP, Helena, Montana

For Appellees:

James R. Zadick, Ugrin Alexander Zadick, P.C., Great Falls, Montana

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Submitted on Briefs: March 1, 2023

Decided: January 30, 2024

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Plaintiffs and Appellants Daniel Perl (Dan), Sandra Perl (Sandra), Individually and as Trustees and Settlors of the D. & S. Perl Family Trust Dated August 24, 1998 (Perl Trust) (collectively "the Perls") appeal from the November 16, 2021 Order and the accompanying June 13, 2022 Final Judgment issued by the Eleventh Judicial District Court, Flathead County. The District Court's order granted the summary judgment motion of Defendants and Appellees Christopher Grant (Chris), Individually and as Trustee and Settlor of the Grant Revocable Trust Dated July 18, 2008, the Grant Revocable Trust Dated July 18, 2008 (Grant Trust), and Grant Construction, LLP (Grant Construction) (collectively "the Grants"), and denied the Perls' cross-motion for partial summary judgment, determining the parties had entered into an enforceable settlement agreement regarding the purchase of real property and the release of claims related to the construction of the property.

¶2 We address the following restated issue on appeal:

> *Did the District Court err by granting the Grants' motion for summary judgment and denying the Perls' motion for summary judgment?*

¶3 We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 In 2019, the Perls, through the Perl Trust, purchased a home located at 149 South Shooting Star Circle in Whitefish from the Grant Trust for $1,775,000. Grant Construction was the general contractor for the construction of the home. After buying the house, the Perls hired Grant Construction to do additional remodeling and improvements under two

separate contracts—a $38,408 Home Improvement Contract and a $130,276 Deck Improvement Contract.

¶5 The Perls were dissatisfied with the quality of the construction and informed Chris and his wife, Rachelle Grant, about their dissatisfaction with the work performed. After several discussions attempting to reach a solution, Chris informed Dan he would no longer speak about the issue with him. Dan began communicating with Chris's brother, Jay Grant (Jay), an independent consultant who worked with Grant Construction regarding the development of homes, including the subject property, in Whitefish. Throughout September and October of 2020, Dan reached out to Jay with four options for settling the Perls' claims. One of Dan's proposed options was for the Grants to buy back the property for $2,800,000 in exchange for settling the Perls' claims regarding the house. Jay communicated the offer to the Grants, who countered with a purchase price of $2,500,000. Jay communicated the counteroffer to Dan, who rejected it.

¶6 Late in the evening of October 19, 2020, after the Grants' $2.5 million counteroffer was rejected, Jay texted 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

Dan responded to Jay the next morning:

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

Jay then replied to Dan:

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

At the direction of the Perls and the Grants, counsel for both parties spoke about the terms of the settlement, agreed to memorialize the terms in a buy-sell agreement and a separate general release, and agreed Attorney Travis would draft the documents. On October 30, 2020, Travis emailed the documents to counsel for the Perls. In her email to Attorney Rudbach, Travis wrote:

> Thanks for the call last week on this case. As we discussed, attached are proposed Buy:Sell Agreement and Release for the Perls' review. These documents have been approved by the Grants. You will notice that Jason Grant (Chris' brother) will be the Buyer- I believe he and Mr. Perl have had direct communication on this. . . .

The Perls reviewed the documents and rejected several terms contained within. Dan then instructed his attorney to send a counteroffer to the Grants' attorney.

¶7 The Perls filed the instant lawsuit on February 9, 2021, asserting numerous claims against the Grants regarding the construction and sale of the house. After filing an Answer, followed by an Amended Answer which brought a third-party complaint against subcontractors, the Grants moved for summary judgment on June 18, 2021. The Grants' motion asserted the parties had entered into a binding, enforceable settlement agreement. The Perls thereafter filed a cross-motion for summary judgment asserting that, under the undisputed facts, the parties did not have an enforceable settlement agreement as a matter of law. The District Court held oral argument on the competing summary judgment motions on November 16, 2021. At the close of the hearing, the court ruled from the bench, granting the Grants' summary judgment motion and denying the Perls' cross-motion for

summary judgment. The court determined the statute of frauds was satisfied and the parties entered into an enforceable settlement agreement for the purchase of the property in exchange for the release of claims related to the construction of the property. The court further ordered the parties would have 120 days to finalize the agreement for the purchase of the property and stipulate to dismissal, and set a show cause hearing for May 31, 2022, in the event the agreement was not completed, at which time the court would be prepared to order specific performance of the agreement. The District Court's written order followed that same day.

¶8 On November 17, 2021, the day after the District Court's order on the competing summary judgment motions, the Perls filed a Notice of Dismissal of Lawsuit with Prejudice. The Perls' notice recognized the District Court had ordered "that the parties finalize a settlement," but stated the Perls "instead dismiss their Complaint against the Defendants with prejudice and relieve Defendants of any settlement obligations." The same day, the Grants filed a Response in Objection to Plaintiffs' Notice to Dismiss with Prejudice. On February 7, 2022, the District Court issued an Order denying the Perls' Notice to Dismiss with Prejudice, noting that "[u]ntil a joint stipulation is filed showing clear evidence that the Property has been purchased as agreed to in the settlement agreement, the [c]ourt will not dismiss the suit." On March 25, 2022, the Perls filed a Motion to Certify Order for Immediate Appeal. The Grants filed a brief opposing immediate certification on April 8, 2022. On April 25, 2022, the District Court issued an Order denying the Perls' motion for immediate certification.

¶9 The District Court held the previously-scheduled show cause hearing on May 31, 2022, at which time the court determined it was the "proper junction in this proceeding . . . to certify the order is final for purposes of appeal[.]" On June 1, 2022, the court issued an Order which certified both the November 16, 2021 Order and the February 7, 2022 Order as final pursuant to M. R. Civ. P. 54(b). The court thereafter issued its Final Judgment on June 13, 2022. The Perls appeal. Additional facts will be discussed as necessary below.

STANDARD OF REVIEW

¶10 We review a district court's grant or denial of summary judgment de novo, applying the same criteria as M. R. Civ. P. 56. *Dewey v. Stringer*, 2014 MT 136, ¶ 6, 375 Mont. 176, 325 P.3d 1236. Summary judgment is only appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Schweitzer v. City of Whitefish*, 2016 MT 254, ¶ 9, 385 Mont. 142, 383 P.3d 735.

DISCUSSION

¶11 *Did the District Court err by granting the Grants' motion for summary judgment and denying the Perls' motion for summary judgment?*

¶12 This matter comes to us following cross-motions for summary judgment where the parties each asserted no material facts were in dispute. "Where the material facts are undisputed, the court must simply identify the applicable law, apply it to the uncontroverted facts, and determine who prevails." *Broadwater Dev., LLC v. Nelson*, 2009 MT 317, ¶ 15, 352 Mont. 401, 219 P.3d 492. The Perls argue there was no enforceable settlement agreement as the text messages between Dan and Jay did not comply with the statute of frauds and were insufficient to establish the formation of an enforceable contract in any

case. The Grants contend the Perls are advancing "latent, hyper-technical statute of frauds arguments to avoid the evidence, the law, [and] their acknowledged Settlement Agreement." The District Court determined the statute of frauds was satisfied and the agreement between the parties contained all the essential elements of a contract.

¶13 "Settlement agreements are contracts, and are subject to the provisions of contract law." *Murphy v. Home Depot*, 2012 MT 23, ¶ 8, 364 Mont. 27, 270 P.3d 72 (citing *Dambrowski v. Champion Int'l Corp.*, 2003 MT 233, ¶ 9, 317 Mont. 218, 76 P.3d 1080). The existence of a contract is a question of law, which we review for correctness. *Murphy*, ¶ 6 (citing *Lockhead v. Weinstein*, 2003 MT 360, ¶ 7, 319 Mont. 62, 81 P.3d 1284).

¶14 We begin, like the District Court, with the statute of frauds. "In general, the 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, 264 P.3d 1098 (citations omitted). In Montana, the "statute of frauds is codified in §§ 28-2-903 and 70-20-101, MCA." *Kluver v. PPL Mont., LLC*, 2012 MT 321, ¶ 21, 368 Mont. 101, 293 P.3d 817; *see also Zier v. Lewis*, 2009 MT 266, ¶ 19, 352 Mont. 76, 218 P.3d 465 (citing §§ 28-2-903 and 30-11-111, MCA). Section 70-20-101, MCA, 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.

In addition, the relevant language of § 28-2-903, MCA, provides:

> 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 . . . 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.

Section 28-2-903(1)(d), MCA.

¶15 To comply with the statute of frauds, the relevant note or memorandum may consist of several writings and need not be in any particular form or contain the entire contract. *Wood v. Anderson*, 2017 MT 180, ¶ 10, 388 Mont. 166, 399 P.3d 304. "As long as the writing or writings include all the material terms, even if such terms are stated generally, the contract is valid." *Wood*, ¶ 10 (collecting cases). "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." *Olsen v. Johnston*, 2013 MT 25, ¶ 21, 368 Mont. 347, 301 P.3d 791 (citation omitted). "Subsidiary matters, collateral matters, or matters that go to the performance of the contract, do not constitute material terms." *Olsen*, ¶ 21 (collecting cases).

¶16 In determining whether the statue of frauds was satisfied, the District Court "appl[ied] the Statue of Frauds in a more flexible manner as there appears to be no real dispute between the parties" as to the essential terms of the contract. The District Court correctly noted that "[t]his Court has taken the position on several occasions that it will not allow the statute of frauds, the object of which is to prevent fraud, to be used to accomplish fraudulent purposes." *Hayes v. Hartelius*, 215 Mont. 391, 396, 697 P.2d 1349, 1353 (1985)

(collecting cases). In accordance with our directive that the statute of frauds not be used to accomplish fraudulent purposes, in cases where contracts are admitted, we "construe[] 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." *Hillstrom v. Gosnay*, 188 Mont. 388, 396, 614 P.2d 466, 470 (1980).

¶17 The Perls contend the District Court correctly determined the statute of frauds was applicable but erred by determining the statue of frauds was satisfied, asserting none of the material terms were present in the text messages. The Grants assert the District Court correctly applied the statute of frauds in a more flexible manner, both because Dan admitted to the agreement in his text message and because counsel for the Perls admitted there was an agreement for the Perls to sell the property for $2.8 million in exchange for releasing all claims related to construction of the property during oral argument on the competing summary judgment motions. The Perls, in reply, contend their counsel's statement at the hearing was not a judicial admission and the Grants are "taking a one-word response out of context in order to suggest an 'admission' that never happened."

¶18 The disputed exchange between the District Court and counsel for the Perls provides:

> THE COURT: So, let me back up real quick. Do your clients agree that they agreed uh, to sell the home for 2.8 million dollars?
>
> [COUNSEL]: The reality of the agreement was that, given that this was a negotiation for the purchase and sale of real property they expected that there would be continued discussions on the details. But I don't think that's something that the parties agree on.

> THE COURT: Well, even in reading Mr. Perl's affidavit, it appeared to me that he agreed to sell the property for 2.8 million dollars in exchange for releasing all claims related to construction of the property. That there was an agreement at least to that extent.
>
> [COUNSEL]: Sure.

"For a statement to constitute a judicial admission, three criteria must be met: 1) the statement must be made to the court; 2) the statement must be made by a party, or a party's attorney; and 3) the statement must be a statement of fact, and not a statement of opinion or law." *Adami v. Nelson (In re J.K.N.A.)*, 2019 MT 286, ¶ 40, 398 Mont. 72, 454 P.3d 642 (citing *Bilesky v. Shopko Stores Operating Co., LLC*, 2014 MT 300, ¶ 13, 377 Mont. 58, 338 P.3d 76). Whether a statement constitutes an admission is left to the discretion of the district court. *In re J.K.N.A.*, ¶ 40. It does not appear from the record that the District Court treated counsel for the Perls' response of "[s]ure" to its question regarding the settlement agreement as a judicial admission. The court issued its ruling from the bench at the close of the hearing and did not mention this exchange when giving its reasoning for granting the Grants' motion and denying the Perls' cross-motion for summary judgment. The court also did not address the exchange in its written order. We also need not address whether counsel's response constitutes a binding judicial admission in this case, as the text messages and affidavits of the parties make clear the statute of frauds is satisfied.

¶19 "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." *Olsen*, ¶ 21. The Perls assert none of these material terms were met. They are incorrect.

¶20 Regarding the parties, the District Court found there was no genuine dispute the parties to the contract were identified because Jay's text message to Dan noted he "talked with Chris and Rachelle (MacKenzie says hi) and *we* are happy with all the terms you laid out. . . ." (Emphasis added.) The court noted Jay's use of "we" in his message to Dan and found it was clear that a "plain reading of this language identifies the parties to the contract as the Perls, Grants and Jay Grant." The Perls quibble with this conclusion, but we agree with the District Court that a plain reading does lead to the conclusion the parties are "the Perls, Grants and Jay Grant." Dan acknowledged as much in his text message which asked Jay, "What is the name and contact points of *your* attorney?" (Emphasis added.) Dan's newfound surprise at Jay's involvement is unavailing in the face of the plain language of the text messages between Jay and Dan. The Perls also attempt to concoct a second reason for claiming the parties were not identified, asserting 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." (Emphasis omitted.) Once again, this newfound objection is belied by the content of the text messages. The negotiations regarding the house began with Dan and Sandra informing Chris and Rachelle of the alleged defects and then, once Chris refused to speak to them about the matter further, Dan continued to negotiate with Jay. Immediately after asking Jay for the name and contact points of his attorney, Dan wrote to Jay that "*[o]urs* is Karl Rudbach and Ramlow & Rudbach in Whitefish."

(Emphasis added.) This reference makes it abundantly clear Dan was negotiating on behalf of both himself and Sandra, not attempting to somehow segregate any claims he may have from those of Sandra. The Perls' contention that Sandra is not referenced in the text messages is simply incorrect.

¶21 Turning to the remaining material terms, the purchase price of $2.8 million is readily apparent in the text messages. The mutual assent of the parties is found in their plain language, as Dan texted Jay that he was "[g]lad we could reach agreement," to which Jay responded, "[m]e too." These admissions allow the statute of frauds to be applied in a less technical manner, because the agreement is admitted by both parties. *Hillstrom*, 188 Mont. at 396, 614 P.2d at 470. Like in *Hayes*, in this case "it would be a fraud on the defendant[s] to allow plaintiffs to admit to the contract, and then allow them to avoid its obligations by asserting the statute of frauds." *Hayes*, 215 Mont. at 396, 697 P.2d at 1353. And finally, the subject matter and description of property finds no genuine dispute. Jay's text identifies specific terms regarding items in the house set forth by Dan in his settlement offer to which the Grants agreed, as Jay noted "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)." In addition, the parties had long been negotiating towards a settlement agreement regarding the house. There can be no serious contention that somehow the parties were confused regarding which property they had been negotiating over for quite some time.

¶22 "Subsidiary matters, collateral matters, or matters that go to the performance of the contract, do not constitute material terms." *Olsen*, ¶ 21. The material terms regarding the

settlement agreement are found within the text messages and the statute of frauds, applied less technically to prevent the commission of a fraud, is satisfied. With the statute of frauds satisfied, we turn to whether the text messages between Jay and Dan constituted an enforceable settlement agreement.

¶23 "To be enforceable, a contract must contain four essential elements: 1) identifiable parties capable of contracting; 2) consent between those parties; 3) a lawful object; and 4) consideration." *Jarussi v. Sandra L. Farber Trust*, 2019 MT 181, ¶ 17, 396 Mont. 488, 445 P.3d 1226 (citing *Kortum-Managhan v. Herbergers NBGL*, 2009 MT 79, ¶ 18, 349 Mont. 475, 204 P.3d 693).

¶24 As we have already discussed in relation to the statute of frauds issue, the identifiable parties capable of contracting are the Perls, the Grants, and Jay. The lawful object is property located at 149 South Shooting Star Circle in Whitefish. To determine whether there is an enforceable settlement agreement in this case we need only address whether there was consent and consideration.

¶25 Regarding consent, the "intentions of parties are those disclosed and agreed to in the course of negotiations." *Kluver*, ¶ 33 (citing *Hetherington v. Ford Motor Co.*, 257 Mont. 395, 399, 849 P.2d 1039, 1042 (1993)). "A party is bound to a settlement agreement if 'he or she has manifested assent to the agreement's terms and has not manifested an intent not to be bound by that assent.'" *Kluver*, ¶ 33 (quoting *Lockhead*, ¶ 12). If parties unconditionally consent to an agreement they are bound and their "latent, or undisclosed, intention not to be bound does not prevent the formation of a binding contract." *Kluver*, ¶ 33 (citing *Murphy*, ¶ 8). The disclosed intention of Dan to be bound by the settlement

agreement, which, again, he unilaterally proposed, is apparent from his text message which stated he was "[g]lad we could reach agreement" after Jay accepted Dan's settlement offer. Dan, who the District Court noted was "sophisticated in the areas of real estate, business and lending," did not use any conditional language in his text message. The Grants' intention to be bound is apparent in Jay's text message accepting all of Dan's terms, and was reaffirmed by Jay responding "[m]e too" to Dan's "[g]lad we could reach agreement" text. It is also clear that the parties' attorneys were tasked with actually creating the formal documents necessary to memorialize this settlement agreement. "This Court has held that where parties intend to form a binding agreement, the fact that they plan to incorporate it into a more formal contract in the future does not render it unenforceable." *Kluver*, ¶ 36 (citing *Steen v. Rustad*, 132 Mont. 96, 104, 313 P.2d 1014, 1019 (1957)). There is nothing in the text messages between Dan and Jay "that indicates the parties' intent was for it to be anything but an enforceable agreement." *Kluver*, ¶ 39. As such, the consent requirement is met.

¶26 The final issue relates to consideration. The Perls now contend that consideration is lacking. However, the unrebutted affidavit of Jay makes clear that Dan presented the Grants with options for resolving the Perls' alleged construction defects and "unilaterally proposed the $2,800,000 buyback in full resolution of the Perls' alleged claims regarding the residence." The consideration here is the Perls receiving $2.8 million and the Grants buying back the house and receiving a release of the Perls' claims regarding the house. The District Court correctly found there was no genuine issue of material fact regarding

the essential elements of a contract and rejected Dan's latent intention to not be bound by his own settlement offer.

¶27 In this case, Dan unilaterally proposed a $2.8 million buyback of the home the Perls claimed to be full of construction defects, seeking a premium of nearly $1 million above what the Perls paid the Grants for the house and its improvements in exchange for releasing their claims regarding those construction defects. After Chris declined to speak with Dan on the matter any further, Jay took over the settlement negotiations. After the Grants had their counteroffers for less than $2.8 million rejected by Dan, they ultimately agreed to Dan's settlement offer. Dan acknowledged as much in his text message, and the parties directed their attorneys to iron out the remaining details. Specifically, the Perls requested the Grants' attorney to draft the necessary documents to memorialize the settlement agreement. Later, Dan rejected some of those details once the documents were prepared by the Grants' attorney and attempted to disclaim the fact that a settlement agreement—one that was both proposed and acknowledged by Dan—ever existed. The District Court correctly rejected Dan's attempt to disclaim his own settlement agreement based on his objections to non-material terms.

¶28 The text messages between Dan and Jay both satisfied the statute of frauds and constituted an enforceable settlement agreement. As such, the District Court correctly granted the Grants' motion for summary judgment and denied the Perls' cross-motion for partial summary judgment.

CONCLUSION

¶29 The District Court correctly granted the Grants' motion for summary judgment and denied the Perls' cross-motion for partial summary judgment as the parties entered into an enforceable settlement agreement.

¶30 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR

Justice Laurie McKinnon, dissenting.

¶31 I agree with the Court that the Statute of Frauds applies in this case. However, I disagree with the Court's conclusion that the requirements of the statute of frauds have been met. "Under §§ 28-2-903(1)(d), 70-20-101, and 30-11-111, MCA, an agreement for the sale of real property is invalid under the statute of frauds unless the agreement, or some note or memorandum of the agreement, is in writing and subscribed by the party to be charged." *Wood*, ¶ 10. Although the writing need not be in a specific form and does not need to contain the entire contract, it must "include all the material terms, even if such terms are stated generally. . . ." *Wood*, ¶ 10. Material terms for the sale of real property "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." *Olsen*, ¶ 21.

¶32 This is an action initiated by the Perls against Chris Grant, Grant Construction, and the Grant Revocable Trust alleging negligence, breach of contract, breach of warranty, violation of the Montana Consumer Protection Act, and construction defects in their home. The District Court determined an agreement involving Jay Grant was enforceable and barred Perls' lawsuit against Chris Grant and the other named defendants. The underlying dispute involves a furnished multi-million dollar home which is alleged to have been constructed in an unworkmanlike manner. The resolution sought by the parties was complicated and involved the sale of the home, in addition to the Perls foregoing their potentially valuable tort claims and releasing Chris Grant, the original builder, and other named defendants from liability. Dan and Sandra Perl are co-trustees of the Perl Trust and owners of the home in controversy. The Perls purchased the home from Chris Grant, Grant Construction, and the Grant Revocable Trust in 2019. Chris Grant and Grant Construction built the home. The Perls allege their home has pervasive defects in its construction and notified Chris Grant on numerous occasions of these defects. Chris Grant eventually refused to discuss the defects with the Perls. However, Chris Grant's brother, Jay, continued the discussion about the construction defects with Dan Perl. Dan Perl believed Jay was attempting to negotiate a global resolution on behalf of Chris Grant, Grant Construction, and the Grant Revocable Trust. Jay never represented to the Perls that he was negotiating the transfer *on his own behalf*, and Dan Perl provided an affidavit stating he would never have sold his home to Jay Grant. The Grants assert that an agreement was

reached between Jay Grant and the Perls where Jay Grant would purchase the home for $2.8 million in exchange for a release of the Perls' claims against Chris Grant, Grant Construction, the Grant Revocable Trust, Rachelle Grant, and Jay Grant.

¶33 Three text messages make up the entirety of the "writing" the Court concludes satisfy the requirements of the Statute of Frauds. The messages begin with Jay texting 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.

Dan responds to Jay stating:

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

Jay responds stating:

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

¶34 To begin, some general observations are in order. Significantly, the text exchange is only between Jay Grant and Dan Perl. Not included in these texts are Chris Grant, Rachelle Grant, and Sandra Perl. There is no evidence in the record that Dan had authority to negotiate on behalf of Sandra who, as co-trustee, was an owner of the home. Similarly, there is nothing in the record establishing that Jay Grant had authority to negotiate on behalf of Chris and Rachelle Grant, Grant Construction, or the Grant Revocable Trust. On its face, the text messages do not state whether Chris Grant, Rachelle Grant, Grant Construction, the Grant Revocable Trust, or Jay Grant would be the purchasers of the home. The text messages do not specify by whom and to whom the promises are made.

Further, Dan Perl could not have known from the text messages that Jay Grant rather than Chris Grant was the purchaser. The Perls' claims of construction defects were not against Jay; rather, they were against Chris and Rachelle Grant, Grant Construction, and the Grant Revocable Trust. There was no mention in the text exchange of a release of these claims. Finally, it is undisputed the Perls immediately rejected the Grants' proposal and release of liability prepared and offered by the Grants' attorney.

¶35 Thus, missing from the text exchange are the material terms necessary to satisfy the Statute of Frauds. "Generally speaking, a memorandum in writing meets the requirements of the statute of frauds that certain contracts shall be evidenced by writing if it contains the names of the parties, the terms and conditions of the contract, and a description of the property, sufficient to render it capable of identification." *Dineen v. Sullivan*, 123 Mont. 195, 200, 213 P.2d 241, 243-44 (1949) (quoting 49 Am. Jur., "Statute of Frauds," sec. 321, p.635). The promises of the parties must all be included in the memorandum so that parol evidence will not be necessary to ascertain anything which the parties have undertaken to do or to omit:

> Every written contract pre-supposes a prior verbal agreement which it embodies--in fact, the writing is the *evidence* of the agreement, and not the essence of it. *The memorandum . . . must contain all the stipulations and undertakings of the verbal bargain*. If any of these stipulations are omitted, then the memorandum--although the facts which it does contain might, by themselves, make a complete contract--is not a note or memorandum of the agreement as required by the statute, and cannot be enforced at law or in equity.

Dineen, 123 Mont. at 201, 213 P.2d at 244 (quoting Pomeroy's Work, Specific Performance of Contracts (3rd Ed. 1926), sec. 91, p. 225). Thus, even though the contract appearing in the memorandum "seems to be complete upon its face, if, in fact, there were

additional terms, the memorandum is insufficient because the memorandum must state the essential terms of the oral contract." *Dineen*, 123 Mont. at 201, 213 P.2d at 244 (quoting 2 Williston on Contracts, Rev. Ed., 1645, sec. 575).

¶36 The three text messages do not memorialize the verbal contract reached by the parties. First, as pointed out, the texts do not identify the parties. Jay indicating that "we are happy with all the terms you laid out . . ." is not sufficient to bind Sandra Perl and it does not indicate who the purchasers are. If the texts were sufficient to bind the parties under a contract, then it would have been unnecessary for the Grants' attorney to subsequently identify that Jay Grant would be the purchaser. Even assuming that these texts were enough to allow the District Court to infer that Jay, Chris, and Rachelle were all in agreement, there certainly is no indication that it was in fact Jay alone who planned to purchase the Perls' home.

¶37 Second, there is no indication in these texts that Dan and Jay had mutually assented to all essential terms of the sale. To meet the requirements of mutual assent, a writing must contain "all essential terms to form a binding contract." *Lenz v. FSC Secs. Corp.*, 2018 MT 67, ¶ 18, 391 Mont. 84, 414 P.3d 1262. Furthermore, "in order to effectuate a contract there must be not only a valid offer by one party, but also an unconditional acceptance, according to its terms, by the other." *Lenz*, ¶ 18. In *Jarussi*, this Court held that even where parties agree that a settlement agreement has been reached for the purchase of real property, if the agreement does not adequately set forth the essential terms, then there is no mutual assent even though the existence of the agreement is undisputed. *Jarussi*, ¶¶ 21-22. In *Jarussi*, a counteroffer was accepted through email but a question remained whether

the acceptance concluded all litigation. *Jarussi*, ¶¶ 4-5. This Court held that although both parties believed there was an unconditional agreement, the messages established they were not in agreement about the litigation and therefore did not have a meeting of the minds. We concluded the agreement was not enforceable. *Jarussi*, ¶¶ 22-23.

¶38 Similarly, the texts exchanged between Dan and Jay only vaguely reference terms of the sale of the home; lacking are any clear terms of the agreement and identity of the sellers and purchasers. Jay indicates that "2.8 is a stretch for us" to which Dan responds "[g]lad we could reach agreement." Although Chris and Rachelle are referenced, it was Jay alone who intended to purchase the Perls' home. "These activities are not those of two parties who have had a 'meeting of the minds.'" *Patton v. Madison County*, 265 Mont. 362, 367, 877 P.2d 993, 996 (1994). Here, while Dan Perl's text message does reference an "agreement," the scope and terms of the agreement are not set forth. The underlying dispute between the Perls and Chris Grant about construction defects in the home provides context to the texts. Jay Grant attempted to negotiate a sale of the home and, as evidenced by the subsequent actions of his attorney, sought a release of the Perls' claims on behalf of his brother. Nowhere, however, do the texts mention a release of the Perls' claims. The texts are silent as to Perls' construction defect claims or any settlement and release of those claims. Thus, if there is a warranty, or a condition of approval by the buyer, or a term of credit, or security, or if the place or time of delivery or payment is agreed upon, these must be included in the Memorandum." *Dineen*, 123 Mont. at 201, 213 P.2d at 244 (emphasis omitted).

¶39 Third, the text messages between Dan and Jay were not subscribed to by Sandra Perl. Sandra co-owns the home with her husband and to satisfy the Statute of Frauds the messages serving as the memorandum must be subscribed to by the "party sought to be charged." *Kluver*, ¶ 25. "[A]ny mark affixed to a writing with the intent to authenticate it constitutes a sufficient subscription by the party sought to be charged." *Kluver*, ¶ 25. However, the texts between Dan and Jay are insufficient to serve as a subscription by Sandra Perl and cannot bind her to the terms of an agreement reached by Dan. Even assuming the District Court was correct to conclude the numbers associated with the texts were sufficient for the Statute of Frauds regarding Dan and Jay, there is nothing to indicate that Sandra subscribed to the texts. Sandra Perl was never mentioned in the texts. The Court notes Dan's use of the word "our" instead of "my" as an indication that Sandra was a party to these discussions. However, following that same logic, Jay's use of the word "we" indicates that Jay, Chris, and Rachelle, all intended to purchase the home rather than just Jay. There simply is nothing in the record to support the contention that Sandra subscribed to these messages as required by the Statute of Frauds. Sandra Perl's subscription is not a mere formality, it is indispensable because she is a "party to be charged." As a co-trustee for the Perl Family Trust, her consent was required for the sale of the home. Moreover, Dan was not Sandra's agent. 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." Section 28-2-903(1)(d), MCA; see also 30-11-111, MCA; *Zier*, ¶ 21 (holding a person cannot bind another to a contract involving the sale of real property without written

authority to do so). The subscription requirement was also not met for Chris Grant, Rachelle Grant, Grant Construction, and the Grant Revocable Trust through a text message associated with Jay Grant's phone. There was similarly no writing evidencing Jay was an agent for Chris Grant, Rachelle Grant, Grant Construction, or the Grant Revocable Trust. The Statute of Frauds exists to protect against drawing inferences regarding the sale of real property; inferences the Court makes here.

¶40 Finally, the texts do not identify the real property to be transferred without relying on oral extrinsic evidence. While the terms of a real estate contract may be generally stated, the property's description cannot be completely omitted as it was here. In *Blazer v. Wall* we held:

> [E]xtrinsic 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."

2008 MT 145, ¶ 71, 343 Mont. 173, 183 P.3d 84 (quoting *Lexington Heights Dev., LLC v. Candlemire*, 140 Idaho 276, 281, 92 P.3d 526, 531 (2004)) (holding the Statute of Frauds was not satisfied where contract failed to contain a sufficient description of the real property sold). Here, the texts provide no description of the property to be sold. The Statute of Frauds is not satisfied when the memorialization, here three texts, does not contain any description of the property. The Statute does not allow for the property's description to be inferred or based on extrinsic parol evidence.

¶41 In my opinion, this case represents the quintessential example of what the statute is designed to guard against. "[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*, ¶ 23. The Statute protects against not only fraud and perjury, but serves a cautionary function as well. It is designed to ensure that land purchases are made with deliberation. In *McCormick v. Brevig*, we explained:

> . . . a grantor who delivers a signed deed, which contains no description of the property intended to be conveyed, cannot by parol contract authorize the grantee to fill in the description. . . . Deeds are evidence of a higher nature than parol contracts, and there are great and important distinctions between the operation and effect of these different species of contracts. The reason of which is that, the first are supposed to be made upon greater deliberation and with greater solemnity; they are first to be written, by which they are exempted from that uncertainty arising from the imperfection of memory, to which unwritten contracts must always be exposed; they are then to be sealed by the party to be bound, and lastly, to be delivered by him which is the consummation of his resolution; none of this deliberation, and little of this solemnity is to be found in the signing and sealing of a blank piece of paper, on which anything may afterwards be written, and whether with or without the consent of the person who signed it, must depend entirely on oral testimony, subject not only to the uncertainty arising from the imperfection of human memory, but exempted from those checks on perjury, which would exist in the case of a deed regularly executed, which could only be altered by erasure or interlineation.

1999 MT 86, ¶ 79, 294 Mont. 144, 980 P.2d 603 (Citations omitted). The formalities of the Statute of Frauds build certainty into the transaction and remind the parties of the gravity of real estate transactions and the need to exercise caution. As the Perls point out, text messages, in contrast, are the antithesis of caution and deliberation contemplated by the Statute of Frauds. They are abbreviated, cursory communications that lack detail.

Given the importance and complexity of this agreement—the relinquishment of valuable tort claims, a significant purchase price, and a multitude of persons and entities—the Statute of Frauds requires a high degree of detail in a written memorialization. See *Dineen*, 123 Mont. at 198, 213 P.2d at 242 (degree of detail in the writing may vary, and greater detail may be required "in a more involved transaction and agreement."). Aside from whether text messages could ever set forth in adequate detail the terms of a real property contract, they fail to do so here. The three texts the Court holds sufficient to meet Statute of Fraud requirements fail to identify the purchaser, fail to contain subscriptions and assents of the necessary parties, and fail to contain the release of claims. These terms may not be supplied by extrinsic parol evidence.

¶42 For these reasons, I respectfully dissent.

/S/ LAURIE McKINNON

Justice James Rice and Justice Beth Baker join in the dissenting Opinion of Justice Laurie McKinnon.

/S/ BETH BAKER
/S/ JIM RICE