IN THE SUPREME COURT OF IOWA

No. 19-1572
Jackson County No. LACV028137

EARL FREER, Successor Administrator to SHELLI R. FREER, as Administrator of the Estate of NICOLE J. SANSOM and MICHAEL SANSOM, individually,

Plaintiffs-Appellants,

vs.

DAC, INC., d/b/a PRAIRIE HOUSE,

Defendant-Appellee.

APPEAL FROM DISTRICT COURT
OF IOWA, IN AND FOR JACKSON COUNTY
HON. JOHN TELLEEN, JUDGE

APPELLEE'S FINAL BRIEF AND REQUEST FOR NONORAL SUBMISSION

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ROUTING STATEMENT

Defendant/Appellee, DAC, Inc., (hereinafter "DAC") disagrees that the present case presents a case of first impression or questions enunciating or changing legal principles; rather, it is DAC's position that there is no appealable issue in this case and if a question remains it is whether Plaintiffs/Appellants, Earl Freer, as Successor Administrator of the Estate of Nicole J. Sansom, and Michael Sansom, Individually, (hereinafter "Freer") breached the contract of settlement, which is yet to be litigated and which is appropriately addressed in a separate action. Alternatively, at this point, this case presents well-established principles of contract law properly referred to the Court of Appeals.

REQUEST FOR NONORAL SUBMISSION

The Defendant-Appellee, DAC, Inc., d/b/a Prairie House, respectfully requests that this case be submitted without oral argument.

STATEMENT OF THE CASE

This matter comes back to the Appellate Court after the Supreme Court held in its opinion filed June 14, 2019, that "Freer has **not preserved any issues** for appellate review" and that "DAC's cross-appeal is dismissed as moot." *Shelli R. Freer, Individually and as Administrator of the Estate of Nicole J. Sansom, and Michael Sansom, Individually v. DAC, Inc., d/b/a Prairie House*, 929 N.W.2d 685, 688 (Iowa 2019) (emphasis added). After entry of the Procedendo on July 15, 2019, which ordered that this case was **concluded**, Plaintiffs filed a Motion to Enforce the Settlement Agreement they earlier repudiated and breached. (App. 60; 44) (emphasis added). Recognizing that the Supreme Court meant what it said in its June 14, 2019, Decision, the District Court dismissed Freer's Motion, finding that the case was over. (App. 83-84). It is from the District Court Ruling and Order that Plaintiffs once again seek appellate relief in this case.

Previously, on the morning of July 19, 2017, while the jury was deliberating, the parties, through their attorneys, entered into a high-low settlement agreement whereby DAC, Inc. agreed that the minimum amount it would pay to Plaintiffs was $100,000 and the maximum exposure to DAC, Inc. was $1,000,000. (App. 10). It was further understood that a verdict in favor of the Plaintiffs between $100,000 and $1,000,000 would be paid as

rendered. *Id.* The jury determined DAC, Inc. was not liable and awarded no damages. Rather than proceed with the settlement, Plaintiffs filed post-trial motions for a new trial and change of venue. (App. 13-15). In response, DAC filed a motion to enforce the binding settlement agreement entered into on July 19, 2017. (App. 17-18). DAC further moved to strike Plaintiffs' post-trial motions as moot. Alternatively, DAC resisted Plaintiffs' post-trial motions as the same were without merit. *Id.*

On October 13, 2017, the District Court, at a hearing on the record, refused to hear Plaintiffs' post-trial motions. (App. 29:6-12). Instead, the District Court properly found that a contracted-for settlement agreement had been entered into by the parties on the morning of July 19, 2017, and that the settlement agreement was to be enforced and further, that Plaintiffs' post-trial motions were moot. *Id.*

STATEMENT OF THE FACTS

The trial of this case was submitted to the jury on July 18, 2017, at 11:55 a.m. (Trial Transcript Vol. II, p. 210:4-9).[1] On the morning of July 19, 2017, while the jury was in deliberations, DAC, by its attorney, Patrick L. Woodward, verbally communicated an offer via voicemail to Plaintiffs' attorney, Thomas Kyle, offering to enter into a high-low settlement agreement with a minimum recovery of $100,000 and a maximum recovery of $1,000,000. (App. 22). At 9:48 a.m., Attorney Kyle responded in an email stating, "they agree to the high/low of 100K to $1,000,000." (App. 10). At 9:58 a.m., counsel for DAC, Patrick L. Woodward, confirmed receipt of Attorney Kyle's email and the acceptance of the high-low settlement agreement. (App. 10). Subsequent to the settlement agreement, on July 19, 2017, the jury returned its verdict finding that DAC was not negligent and was not at fault for the death of Nicole Sansom. (App. 2).

Rather than accept the tender of the $100,000 as agreed to on July 19, 2017, Plaintiffs filed post-trial motions for new trial and change of venue. (App. 13-15). In response, DAC filed a Motion to Enforce the Settlement

[1] References to the Trial Transcript are made to the original page and line number, in compliance with Iowa R.App.P. 6.904(4)(b).

Agreement of July 19, 2017 and alternatively, filed resistances to Plaintiffs' post-trial motions. (App. 17-19).

A hearing on post-trial motions was held on October 13, 2017, at which time the District Court stated in relevant part:

> The Court: Mr. Kyle, you filed a motion for new trial. The verdict was for the defense, meaning there was no damages awarded to the plaintiff. When I notified you of that verdict by phone . . . your words were "thank God we entered into a high-low settlement agreement."
>
> . . .
>
> The Court: You sent Mr. Woodward an email on July 19, 2017, at 9:48 a.m. indicating they agree to the high-low of $100,000 - $1,000,000.
>
> Mr. Kyle: And I will agree that that is the email I sent . . . .

(App. p. 25:13–p. 26:9). The Court then enforced the parties' settlement agreement and struck the plaintiffs' post-trial motions as moot. (App. p. 27: 22-24; p. 28:6-11).

DAC attempted to tender the $100,000 to Plaintiffs, but Plaintiffs would not respond; instead, Plaintiffs repudiated and breached the settlement agreement and appealed, which was the subject of the Supreme Court's June 14, 2019, Decision. *Freer v. DAC, Inc.*, 929 N.W.2d 685 (Iowa 2019). Now, after being told that they had waived all of their issues, Plaintiffs seek to enforce the settlement agreement it previously sought not to be bound by.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT AGREEMENT IN THE PRESENT ACTION AND SHOULD BE AFFIRMED.

Preservation of Error

Contrary to the assertion of Plaintiffs, they preserved no error in the matter of *Shelli R. Freer, Individually and as Administrator of the Estate of Nicole J. Sansom, and Michael Sansom, Individually v. DAC, Inc., d/b/a Prairie House*, 929 N.W.2d 685, 688 (Iowa 2019) litigated in the Iowa District Court for Jackson County, and the subject of any appeal in the Iowa Supreme Court in that case is over. After the Supreme Court's Decision was filed June 14, 2019, no Petition for Rehearing was filed and the Procedendo issued on July 15, 2019, stated, "the appeal is concluded." (App. 60). There was no remand to the District Court; no issues were therefore preserved.

Standard of Review

The standard of review of the District Court's interpretation of the Supreme Court's Decision under the facts of this case is de novo. As to the enforcement of a settlement agreement, DAC agrees that the proper standard of review would be correction of errors at law. *Wright v. Scott*, 410 N.W.2d 247, 249-50 (Iowa 1987).

A. Introduction

DAC does not dispute that a contract for a high-low settlement agreement was entered into between it and the plaintiff, Freer, during jury deliberations and prior to the entry of judgment. As held by the District Court:

> **THE COURT:** [T]o me, this matter—the Motion for New Trial is moot, because you contracted with counsel to agree that if the jury verdict exceeded 1 million, then the $1 million would be the high; and if the jury verdict was less than a hundred thousand, the low amount would be 100,000.
> . . .
>
> [A] contractual agreement would negate any jury verdict that came about if it was less than a hundred thousand or more than 1 million. The jury verdict was less than a hundred thousand dollars, so, again, I'm just enforcing the settlement that was agreed on.

(App. p. 27:1-6; p. 27:20-24).

Further, based on the holding of the Supreme Court in the *Freer* Decision, there are no issues from which plaintiffs can appeal. Procedurally,

as the District Court found, that case is over. All issues were waived by the Plaintiffs and the Procedendo was issued.

Not only are Plaintiffs barred from raising this issue, it is clear that Plaintiffs breached the settlement agreement by filing post-trial Motions for New Trial and Change of Venue and then, after the trial court reinforced the terms of the settlement agreement, appealed to the Iowa Supreme Court. (Plaintiffs' Combined Motions for New Trial under Iowa R. Civ. P. 1.1004 and Change of Venue under Iowa R. Civ. P. 1.801(3); Notice of Appeal). As plaintiffs breached the contract, enforcement of the settlement agreement is therefore solely up to DAC.

B. The District Court Properly Denied Freer's Motion to Enforce Settlement Agreement.

In its Decision of June 14, 2019, the Iowa Supreme Court held:

> [G]iven the procedural circumstances of this case, Freer **has not preserved any issues** for appellate review.

Freer v. DAC, Inc., 929 N.W.2d 685, 688 (Iowa 2019) (emphasis added). Freer did not file a Petition for Rehearing pursuant to Iowa Rule of Appellate Procedure 6.1205.

Therefore, as difficult as it may seem, the original action and the issues inuring to the Supreme Court's June 14, 2019, Decision are concluded. As stated in the Procedendo filed July 15, 2019, "[T]he appeal is now

concluded." (App. 60). This was not an Order returning the case to the District Court on remand or for further action. The Order ended the litigation, and the judgment entered on July 25, 2017, entering judgment for DAC was final.

Plaintiffs, ignoring the finality of the Decision, seek to improperly use the Appellate Court to litigate an issue which, due to their own conduct, potentially requires the introduction of evidence as to Plaintiffs' breach of contract regarding the high-low settlement agreement and whether it is now enforceable.

The District Court in its Ruling and Order of August 23, 2019, reviewed both the majority in the June 14, 2019, Opinion and what the dissent said and found in relevant part:

> In fact the Supreme Court's majority opinion clearly states: "We, therefore, affirm the district court's July 25, 2017, Order entering judgment for DAC." Nothing in this language allows for any wiggle room. The undersigned must conclude that the Court meant what it said. Judgment was entered for the Defendant. This case is at an end.

(App. 3).

Nowhere do Plaintiffs cite any authority in support of their proposition that they get to reopen a case which is over; the Plaintiffs had an appeal and this matter was finally decided. All matters arising out of that original case are concluded and as the District Court stated, this case is at an end.

C. Freer Breached the Contract For a High-Low Settlement and, Therefore, Has No Legal Right to Enforce the Same.

1. Introduction

If it is somehow determined that Plaintiffs' case is not over, the Court should hold as a matter of law that Plaintiffs have no right to seek enforcement of the settlement agreement; instead, that right rests exclusively with DAC. Settlement agreements are treated and enforced as any other contract. *Phipps v. Winneshiek County*, 593 N.W.2d 143, 146 (Iowa 1999); *see Cox v. Dunakey & Klatt, P.C. (Estate of Cox)*, 893 N.W.2d 295, 302 (Iowa 2017); *Sierra Club v. Wayne Weber LLC*, 689 N.W.2d 696, 702 (Iowa 2004); *accord Wright v. Scott*, 410 N.W.2d 247, 249 (Iowa 1987). While Plaintiffs now concede that a valid contract for settlement was entered by the parties, they only concede this after first repudiating the settlement agreement by arguing that a finding of no fault did not trigger the high-low settlement agreement as no amount of money was awarded to Plaintiffs.

Further, Plaintiffs then breached the contract of settlement by first filing post-trial motions for new trial and change of venue, and then appealing the Ruling of the District Court which found they were bound by the high-low settlement agreement. Now, after losing, Plaintiffs assert they have a right to enforce the settlement agreement and further, that they may do so in the present action without a trial as to the merits of its breach. (App. 44).

2. High-Low Settlement Agreements

It is well recognized that high-low agreements are valid and enforceable and are nothing more than conditional settlement agreements. *See Thompson v. T.J. Whipple Construction Co.*, 985 A.2d 221, 224 (Pa. Super. Ct. 2009); *Employers Reinsurance Corp. v. Gordon*, 209 S.W.3d 913, 917 (Tex. App. 2006). In *Pike v. Premier Transportation & Warehousing, Inc.*, the U.S. District Court for the Northern District of Illinois aptly described high-low agreements as follows:

> A high-low agreement, when initially reached by the parties . . . is, in fact, a conditional settlement. The condition of the agreement is that the jury render[s] a verdict that falls outside the range of the high-low agreement. When a verdict is rendered outside of the agreed-upon range, the condition is triggered and the "high" or the "low" becomes binding upon the parties as a settlement. By contrast, when a jury renders a verdict within the range of the high-low agreement, the condition is not met and the high-low agreement is rendered academic.

Pike v. Premier Transp. & Warehousing, Inc., No. 13 C 8835, 2017 WL 951323, at *2 (N.D. Ill. Mar. 10, 2017) (quotations omitted).

In the present case, the District Court properly concluded that a valid and enforceable contractual settlement agreement was reached between the parties. The Plaintiffs and DAC agreed to settle their claims for either $1,000,000 or $100,000, conditioned on the jury returning a verdict either above or below those numbers, or at the amount between it so rendered by the

jury, which agreement became binding on the plaintiffs when the jury returned a defense verdict. (App. 44). The intent of the high-low agreement was clear from the outset - to fully and finally settle the Plaintiffs' claims should the jury's verdict fall below the minimum recovery or above the maximum recovery. An objective standard is used to determine the intention of the parties in creating a contract, using "...what a normally constituted person would have understood [the parties' words and actions] to mean, when used in their actual setting." *Great Lakes Commun. Corp. v. AT&T Corp.*, 124 F. Supp. 3d 824, 846 (N.D. Iowa 2015) (citations omitted).

One of the fundamental purposes of high-low settlement agreements is to dispense with post-trial motions and appeals. *Tauer v. Secura Ins.*, 2001 U.S. Dist. LEXIS 19846; 2001 WL 1516723, at *2(D. Minn. Nov. 26, 2001) (unpublished opinion). As stated in the well-reasoned opinion, the United States District Court for Minnesota stated as follows:

> [Movant's] motions must be denied **because one of the fundamental purposes of high-low agreements is to dispense with post-trial motions and appeals.** High-low agreements are regarded as partial settlements in which the plaintiff and the defendant agree to abide by the jury's verdict on liability. Regardless of a higher or lower jury verdict on damages, Plaintiff agrees to collect no more than a maximum amount and defendant agrees to pay no less than a minimum amount. Accordingly, each party insures the other against an extreme jury verdict.

> The high-low agreement thereby reduces the risks of trial to a range of numbers acceptable to both parties. It is a partial settlement. Courts may enforce high-low agreements like any other settlement agreement. By negotiating a high-low agreement, parties intend to have the case quickly resolved by a jury verdict and eliminate further litigation and expenses. *See, e.g., Smith v. Settle,* 492 S.E.2d 427, 429 (Va. 1997) (refusing to read into a high-low agreement any right to seek post-trial relief). Unless such a right is explicitly reserved, the parties' high-low agreement should not be rewritten to impose a right to post-trial or appellate relief that is neither stated nor implied therein. *See id.* ***Because continued litigation is contrary to the purposes underlying a negotiated high-low agreement, [movant's] motions are denied.***

Id. (emphasis added). As stated in *Tauer*, the primary purpose of a high-low agreement is to ensure against extreme verdicts while disposing of post-trial motions and appeals. Permitting a post-trial motion or appeal would be contrary to that very purpose. Here, Plaintiffs' conduct in refusing to accept the tendered settlement of $100,000 and continuing to attack the jury verdict, including filing a Motion for Change of Venue, breached the settlement contract.

3. Breach of Contract

In Iowa, where there has been a material breach of a contract, the nonbreaching party has the right to rescind the agreement. *Beckman v. Kitchen*, 599 N.W.2d 699, 701 (Iowa 1999); *Krotz v. Sattler*, 586 N.W.2d 336, 339 (Iowa 1998). "Equity will not permit a party to enjoy the fruits of a contract when he deliberately refuses or makes impossible of performance the obligations imposed therein." *Maytag Co. v. Alward*, 253 Iowa 455, 465-66, 112 N.W.2d 654, 660 (1962) (citations omitted).

It is elementary that in order to bring an action to enforce the contract, a party has to establish that it has not breached the contract. In the present case, Plaintiffs' repudiation and breach of the contract end Plaintiffs' ability to maintain an action to enforce the settlement agreement. Instead, as the non-breaching party, it is entirely up to DAC to determine whether it wants to enforce the agreement or at this point, rescind it. Where one party to a contract repudiates the contract before the time for performance has arrived, the other party is relieved from its performance. *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 241 (Iowa 2001); *See* Restatement (Second) of Contracts § 253(2) (1981); 13 Richard A. Lord, *Williston on Contracts* § 39:37, at 663 (4th ed. 2000).

4. Summary

As a matter of law, this Court can find that the high-low agreement was an enforceable contract, that Plaintiffs breached the contract by filing post-trial motions and an appeal and finally, that DAC, not the Plaintiffs, is the only party with the right to enforce the terms of the contract at this point. Alternatively, the Court should find that in the procedural status which this case is, ruling on Plaintiffs' "appeal" is not appropriate and that Plaintiffs be required to file a separate action to attempt to enforce the settlement agreement where the issues regarding Plaintiffs' breach of contract can be flushed out. In other words, this case is not "ripe" for appellate review as presented.

CONCLUSION

It is DAC's position that this matter is not properly before the appellate court based upon the Supreme Court's opinion in the matter of *Shelli R. Freer, Individually and as Administrator of the Estate of Nicole J. Sansom, and Michael Sansom, Individually v. DAC, Inc., d/b/a Prairie House*, 929 N.W.2d 685 (Iowa 2019). As set forth in that opinion, "Freer has not preserved any issues for appellate review" and "DAC's cross-appeal is dismissed as moot." *Shelli R. Freer, Individually and as Administrator of the Estate of Nicole J. Sansom, and Michael Sansom, Individually v. DAC, Inc.*,

d/b/a Prairie House, 929 N.W.2d 685, 688 (Iowa 2019). Procedurally, this case is over. Alternatively, this Court should find as a matter of law that the high-low agreement was a valid contract, that a fundamental purpose of a high-low agreement is to dispense with post-trial motions and appeals, and by filing post-trial motions and appeals, Freer breached the contract thereby barring Freer's right to seek enforcement thereof under long recognized and established principles of contract law.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENT

1. This brief complies with the type-volume limitation of Iowa R. App.P. 6.903(1)(g)(1) or (2) because:

   This brief contains 3,178 words, excluding the parts of the brief exempted by Iowa R.App.P. 6.903(l)(g)(l).

2. This brief complies with the typeface requirements of Iowa R.App.P. 6.903(l)(e) and the type-style requirements of Iowa R.App. 6.903(1)(f) because:

   This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point.

February 6, 2020

/s/ Patrick L. Woodward
Patrick L. Woodward AT0008728

CERTIFICATE OF FILING

I, Patrick L. Woodward, hereby certify that the attached Appellees' Final Brief, Argument, and Request for Nonoral Submission was filed in the Supreme Court on the 6th day of February, 2020, by filing this brief through electronic means and EDMS, to the Clerk of the Supreme Court, Iowa Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa 50319.

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CERTIFICATE OF SERVICE

I, Patrick L. Woodward, hereby certify that on the 6th day of February, 2020, that the Appellees' Final Brief, Argument, and Request for Nonoral Submission was served upon the Attorneys for Appellant through electronic means and EDMS, in full compliance with Rules of Appellate Procedure.

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