**IN THE SUPREME COURT OF IOWA**

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**No. 19-1572**

**JACKSON COUNTY NO. LACV028137**

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

**Plaintiffs-Appellants**

**v.**

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

**Defendant-Appellee**

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**APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR JACKSON COUNTY**

**THE HONORABLE JOHN TELLEEN**

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# APPELLANTS' FINAL REPLY BRIEF

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## ARGUMENT

### I. THIS APPEAL IS PROPERLY BEFORE THE COURT AND DEFENDANT CITES NO APPLICABLE IOWA STATUTORY OR CASE LAW SUPPORTING ITS CONTRARY POSITION.

Iowa Rule of Appellate Procedure 6.903(3) requires an appellee (here, the Defendant) to conform with the requirements of Rule 6.903(2)(g)(3). Under that rule, Defendant, in making its argument, must cite the authorities relied on and refer to the pertinent parts of the record to support its contentions. Iowa R. App. P. 6.903(2)(g)(3)(n). Defendant's Proof Brief substantially fails to comply with this requirement and fails to address the issues raised by Plaintiffs in their Proof Brief.

#### A. PLAINTIFFS' APPEAL ARISES FROM A DISTRICT COURT ORDER DENYING THEIR MOTION TO ENFORCE AND IS NOT PRECLUDED BY THE PRIOR APPEAL.

As stated in Plaintiffs' Brief, the Supreme Court's decision in the first appeal precluded Plaintiffs' challenge of the jury verdict based on Plaintiffs' waiver of their post-trial motions by taking an appeal prior to the district court's entry of a written ruling on the motions. The Court's opinion did not examine the enforceability of the high-low settlement agreement, leaving that issue up in the air. Thus, Plaintiffs are not attempting to relitigate a dead issue. Plaintiffs have appealed from a separate district court order denying their Motion to Enforce filed after the first appeal. The issues raised in the Motion to Enforce are distinct from the issues raised in the first

appeal that the Supreme Court deemed to be waived. The issue before the Court in the present appeal is whether the district court erred in holding the Court's affirmance of the jury verdict precludes enforcement of the high-low settlement agreement that relies on that jury verdict to be binding. Although Defendant faults Plaintiffs for not filing a petition for rehearing in the prior appeal, any petition for rehearing that could have been filed by the Plaintiffs *could not have addressed* the enforceability of the settlement, an issue not reached in the first appeal. It is of note that Defendant fails to cite any authority to support its view that a petition for rehearing was Plaintiffs' only recourse in this case. It further fails to explain how Plaintiffs are barred from attempting to use the court system to enforce the agreed upon settlement. The Plaintiffs have properly brought this action before the Court today.

In addition, the Defendant mischaracterizes the holding of the Court's June 14, 2019, opinion and ignores the context of the portions of the opinion that it cites. The Supreme Court held Plaintiffs had waived the issues raised in their post-trial motions by prematurely filing a notice of appeal. Freer v. DAC, Inc., 929 N.W.2d 685, 688 (Iowa 2019). The first appeal considered whether Plaintiffs could challenge the jury verdict in light of a high-low agreement that did not include any explicit language precluding Plaintiffs from being able to do so. After holding Plaintiffs had waived their post-trial motions, the majority deemed Defendant's

cross-appeal, which contended the district court erred in denying Defendant's motion to exclude expert testimony and erred in granting Plaintiffs' motion in limine, as moot. Neither of these cross-appeal issues involved the issue before the court today: whether or not the high-low settlement agreement that relied on the verdict to become binding still stands after the Supreme Court affirmed that verdict. The high-low settlement was not addressed in the majority opinion. While the *dissenters* speculated that Plaintiffs may be left with nothing as a result of the majority opinion, they wondered what would happen should Defendant disavow the settlement agreement. Freer v. DAC, Inc., 929 N.W.2d 685, 690 (Iowa 2019). This is exactly what has occurred: Defendant is now seeking to avoid performance of the settlement agreement. Plaintiffs are not attempting to get a new trial or argue that the majority opinion was in error for determining Plaintiffs waived their challenge to the jury verdict. Plaintiffs are just trying to enforce the settlement agreement that relies on the affirmed jury verdict, a settlement agreement Defendant sought to enforce throughout the prior appeal. For these reasons, Plaintiffs' appeal is properly before the Court today.

## II. DEFENDANT FAILS TO CITE RELEVANT AUTHORITIES OF CONTRACT LAW TO SUPPORT ITS ASSERTION PLAINTIFFS HAVE NO LEGAL RIGHT TO ENFORCE THE HIGH-LOW SETTLEMENT AGREEMENT.

As mentioned above, the Iowa Rules of Appellate Procedure require Defendant, in making its argument, to cite the authorities relied on and refer to the pertinent parts of the record to support its contentions. Iowa R. App. P. 6.903(2)(g)(3). Failure to cite authority in support of an issue may be deemed waiver of that issue. *Id*. Rule 6.904(3) discusses legal propositions that are deemed so well established that authorities need not be cited in support of them. The only legal proposition relevant here is this: in the construction of written contracts, the cardinal principle is that the intent of the parties must control, and except in cases of ambiguity, this is determined by what the contract itself says. Iowa R. App. P. 6.904(3). Defendant makes multiple assertions within its Brief that go beyond this legal proposition, yet fails to cite authority to support those assertions.

### A. CASE LAW CITED BY DEFENDANT IN ADDRESSING PLAINTIFFS' ALLEGED "BREACH" DOES NOT ACTUALLY BOLSTER OR PROVE THE CONTENTIONS MADE BY DEFENDANT.

In the section of its Brief discussing high-low settlement agreements, Defendant cites an unreported United States District Court opinion from Minnesota.[1] In that opinion, the court does note the fundamental purpose of a high-low settlement agreement is to dispense with post-trial motions and appeals. Tauer v. Secura Ins.,

[1] It is of note that Defendant states within its routing statement that the present appeal presents well-established principles of contract law, but Defendant cites multiple cases from outside jurisdictions in arguing Plaintiffs breached the high-low settlement.

2001 WL 1516723, at *2 (D. Minn. Nov. 26, 2001) (unpublished opinion). It also does state that 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 within. *Id.* While the Minnesota federal district court did deny the movant's post-trial motions, the court also found that the movant's post-trial motions **did not constitute a material repudiation of the high-low agreement**. Tauer v. Secura Ins., Id. This case is the only one Defendant cites to support its contention that Plaintiffs breached the settlement agreement, but it, in fact, states the opposite. Defendant has failed to demonstrate that Plaintiffs' conduct in "refusing to accept the tendered settlement of $100,000 and continuing to attack the jury verdict…breached the settlement contract." Defendant's Proof Brief, p. 21.

The Defendant contends that in Iowa, where there has been a material breach of contract, the non-breaching party has the right to rescind the agreement. Not only has Defendant failed to demonstrate there was a material breach of the high-low settlement agreement here, it also relies on inapplicable case law. *Beckman v. Kitchen*, cited by Defendant, involved a purchaser seeking specific performance of a real estate purchase agreement by a vendor. Beckman v. Kitchen, 599 N.W.2d 699 (Iowa 1999). This case did not involve a high-low settlement agreement. While rescission is a recognized remedy upon proof of breach, the party attempting to rescind must prove a breach occurred. Id. Other than claiming the Plaintiffs' filing

of post-trial motions constituted a breach, a claim Plaintiffs have shown has no merit, Defendant has cited no action by Plaintiffs that would constitute a repudiation of the agreement. Both parties have admitted to there being an enforceable agreement. The issue was whether or not that agreement precluded post-trial motions. Based on the *Tauer* decision—were this court to find it persuasive—Plaintiffs' filing of post-trial motions did not constitute a material repudiation. Therefore, the high-low agreement still stands and is enforceable.

Defendant has also misstated the burden of proof in this case. It states that in order to enforce a contract, a party has to establish that it has not breached the contract. Defendant cites no applicable case law or statutory provision that establishes this proposition. Actually, in order to rescind the contract, which the Defendant argues it has a right to do, **that party must establish that the other is in breach**. Beckman, 599 N.W.2d 699, 701 (Iowa 1999) (discussing that the issue in the case was whether Kitchen, the rescinding party, had shown Beckman to be in breach of the contract). Here, Defendant has not established breach or repudiation. *Conrad Brothers. v. John Deere Ins. Co.*, an insurance case cited by Defendant, states that repudiation requires evidence the repudiating party cannot or will not perform. Conrad Brothers v. John Deere Ins. Co., 640 N.W.2d 231, 240 (Iowa 2001) (citations omitted). Here, Defendant's purported "right to rescind" rests on the assumption that filing post-trial motions constituted a material breach and

repudiation. To the contrary, when two parties differ as to the interpretation of a contract, the mere demand by one party that the contract be performed according to its interpretation does not in and of itself constitute repudiation. Conrad, at 241. The demand must be accompanied by a clear expression of intent not to perform if that party's terms are not accepted. *Id*, at 242. Defendant has cited no support in the record showing Plaintiffs demanded performance beyond the terms of the contract **coupled with a clear expression of intent not to perform if those terms were not accepted**. Plaintiffs have a right to enforce the settlement agreement and this Court should enter the relief sought.

## CONCLUSION

Plaintiffs respectfully request that this Court reverse the district court's denial of Plaintiffs' motion to enforce the parties' high-low settlement agreement, and remand this case to the district court with instructions to enter an order granting Plaintiffs' motion and requiring that Defendant pay to Plaintiffs the agreed upon amount of $100,000.00 with interest.

## COST CERTIFICATE

I hereby certify that the cost of producing necessary copies of the foregoing brief, exclusive of stenographic expense, was $ 0.00.

## CERTIFICATE OF COMPLIANCE

This brief has been prepared in a proportionally-spaced typeface using Times New Roman in fourteen (14) font and contains one-thousand-six-hundred-and-seventy (1670) words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Respectfully submitted,

**Hupy and Abraham, s.c., p.c.**

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