7-27-2009

Apple's Mobile Catering, LLC v. O'Dell Respondent's Brief Dckt. 36128

THE SUPREME COURT FOR THE STATE OF IDAHO

THOMAS O'DELL and SHEILA O'DELL
Husband and wife,

Appellants,

vs.

APPLE'S MOBILE CATERING, LLC, an
Idaho Limited Liability Company,

Respondent.

Supreme Court No. 36128

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh
Judicial District for Custer County

Honorable Brent J. Moss, District Judge, presiding:

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I. STATEMENT OF CASE[1]

A. Nature of Case

This case involves an oral modification of a written agreement which was fully performed by both parties. Approximately one year after the parties fully performed pursuant to the oral modification, the Appellants attempted to undue their performance and breached the modified contract by reasserting lien rights to vehicles which previously secured the underlying loan between the parties. The instant action was initiated after the Appellants refused to release their illegal liens.

B. Procedural Background

On September 28, 2007, Respondent filed its Verified Complaint against Appellants wherein Respondent set forth the following causes of action: declaratory judgment, breach of contract, accord and satisfaction, conversion, and claim and delivery. (R. pp. 1-18.) In its declaratory judgment claim, the Respondent specifically sought a court order declaring, inter alia, that the debt owed by Respondent to Appellants was satisfied and that the Respondent owned certain vehicles free and clear of any lien or other interest of Appellants. (R. pp. 1-18.) Appellants were served the Verified Complaint on or about October 1, 2007. Appellants' counsel then filed a notice of appearance on November 19, 2007. Pursuant to the parties' Stipulation to Change Venue, the venue was changed from Bingham County to Custer County on December 13, 2007.

[1] Respondent disagrees with Appellants' statement of the case.

Appellants filed their Answer to Verified Complaint and Counterclaim on or about January 4, 2008. (R. pp. 19-28.) In their Answer, the Appellants deny all of Respondent's claims. (*Id.*) In their Counterclaim, Appellants did not plead any recognized cause of action and, instead, seem to have asserted additional affirmative defenses. (*See id.*) Respondent filed their Answer to Defendants' Counterclaim on January 22, 2008. (R. pp. 29-30.)

On June 30, 2008, the Appellants filed a motion for summary judgment requesting that the court grant summary judgment dismissing Respondent's third cause of action which alleged that Respondent's debt was discharged via an accord and satisfaction. (R. pp. 34-39.) Appellants' motion did not address Respondent's other causes of action. (*See id.*) In support of their motion, Appellants only filed a memorandum; they did not file any supporting affidavits. (*See generally* R.) While Appellants originally noticed their motion for hearing, the hearing was vacated as a result of Appellants' pending bankruptcy petition. (*See e.g.* Tr. p. 6, L. 15-23.) The Appellants never re-noticed a hearing of their motion. (*See e.g. id.*) However, it was ultimately heard at the same time as Respondent's motion for summary judgment, which was filed on September 12, 2008. (Tr. p. 7, L. 1-3.)

In its motion, Respondent requested that the trial court grant summary judgment and declare that the Respondent's debt was fully satisfied; Appellants did not have a valid lien on the vehicles which previously secured the debt; and the duplicate titles obtained by Appellants were void. (R. pp. 104-29.) Respondent's motion was supported by an affidavit of David Orr, Respondent's manager, and Donald Cain, who at all times relevant hereto was acting as Appellants' broker and agent. (R. pp. 62-77, 131.) In its motion, the Respondent argued that its

debt to Appellants was discharged pursuant to the terms of the parties' oral agreement which also acted as a compromise and settlement with the Appellants or because the parties had reached an accord and such accord was satisfied in June 2003. (R. pp. 104-29.)

In its Memorandum Decision Re: Pending Summary Judgment Motions, dated November 18, 2008, the trial court granted summary judgment in favor of the Respondent and denied Appellants' summary judgment motion. (R. pp. 224-29.) In doing so, the trial court ruled that the central legal issue was one of oral modification of a contract and that the doctrine of accord and satisfaction was irrelevant. (R. p. 227.) In analyzing the motions before it, the court determined that Respondent, through Mr. Orr's affidavit, brought forth sufficient evidence to establish the existence of an oral modification, including the material terms of the modification, and that the modified contract was fully performed. (*Id.*) Appellants failed to bring forth any evidence or testimony to contradict any of Mr. Orr's statements regarding the oral modification. (R. p. 226.) As such, the trial court found that no genuine issue of material fact existed. (R. pp. 226-27.) The trial court thereafter ruled that the uncontradicted evidence supported a finding of an oral modification of the contract. (R. pp. 227.) Accordingly, in its Order, dated January 6, 2009, the trial court ruled that:

- Respondent's debt was fully satisfied;
- Appellants' counterclaim was dismissed with prejudice;
- Appellants had no interest or lien rights in the vehicles which secured the original debt;
- Respondent was entitled to obtain a Certificate of Title for such vehicles which was free and clear of any lien rights of the Appellants; and

- The Asset Purchase Agreement as well as the parties' other agreements were of no further force and effect.

(R. pp. 248-49.)

Prior to the filing of the trial court's Order, the Appellants filed a motion requesting that the trial court reconsider its Memorandum Decision. (R. pp. 230-31.) In their motion to reconsider, the Appellants argued that the trial court erred in failing to rule, by clear and convincing evidence, that the Respondent met its "burden of proving that the doctrine of part performance provides an exception to the Statute of Frauds." (R. p. 230.) The Appellants also claimed that there was conflicting evidence, that the Respondent's evidence was unreliable, and that the Respondent was required to establish that it relied upon the part performance. (R. pp. 230-31.)

The Respondent opposed Appellants' motion to reconsider and argued that the motion was inappropriate as the Appellants failed to identify the court's exact error or to provide any evidence contradicting the facts set forth by the Respondent or contradicting the factual findings of the trial court. (R. pp. 241-42.) The Respondent also argued that the statute of frauds was inapplicable. (R. p. 242.)

The trial court entered an Order Denying Defendants' Motion to Reconsider on December 16, 2008. (R. pp. 245-46.) In doing so, the trial court ruled that the statute of frauds was inapplicable as only the lender's promise or commitment to lend must be in writing. (R. p. 245.) In its Order, the trial court reiterated that the Appellants "failed to dispute the oral modification or raise an issue of fact regarding its terms-even after being given every opportunity

to do so." (R. p. 246.) Because the trial court found nothing in the Appellants' motion for reconsideration "that would affect the Court's original decision", it denied Appellants' motion to reconsider. (*Id.*)

The Appellants now seek a reversal of the trial court's decision based upon their arguments that (1) the trial court should have denied Respondent's motion for summary judgment as Respondent did not prevail on its "main theory of Accord and Satisfaction"; (2) the statute of frauds required the modification to be written; and (3) allowing an oral modification is a violation of the parol evidence rule. (Appellants' Brief ("App. Br."), filed Jun. 25, 2009, p. 7.)

C. Statement of Facts[2]

1. Original Agreements

In July 2001, Appellants Thomas O'Dell and Sheila O'Dell entered into several contracts, including an Asset Purchase Agreement and Secured Promissory Note, with Respondent Apple's Mobile Catering, L.L.C. wherein Respondent agreed to purchase mobile catering equipment from the Appellants for a purchase price of $340,000, $65,000 of which was paid at closing. (*See e.g.* R. p. 65, ¶ 9.) The $275,000.00 owed on the equipment was financed by the Appellants. (R. p. 295, Exh. 15, § 6.3.) The payment terms required the Respondent to pay $1,829.69 for 60 months and then make a balloon payment by June 30, 2006. (*See e.g.* R. p. 65, ¶ 9.)

The purchase price was secured by the catering equipment, which included more than seven vehicles. (R. p. 295, Exh. 15, § 6.2.) Due to the security interest, the titles for the vehicles

[2] Notably, Appellants failed to include a statement of facts in their Appellants' Brief.

listed Respondent as the owner and Appellants as having a lien on the vehicles. (R. pp. 64-65, ¶ 8; R. p. 295, Exh. 8-14.)

In the Asset Purchase Agreement, Appellants expressly warranted that "as of June 21, 2001, the subject vehicles, equipment and other property have complied with the minimum standards, regulations and/ or requirements of the National Interagency Fire Center." (R. p. 295, Exh. 15, § 11.5.) The Appellants further represented that "[n]one of the representations or warranties of [Appellants] contain or will contain any untrue statement of a material fact or omit or will omit or misstate a material fact necessary in order to make statements in this Agreement not misleading." (*Id.*, § 11.7.2.) Appellants thereafter agreed to indemnify the Respondent for "any losses, liability, deficiencies, claims and expenses ... arising from or in connection with" any inaccuracies in the Appellants' representations and warranties. (*Id.*, § 12.1.) If Respondent informed Appellants of any inaccuracies in the warranties, the Appellants contractually agreed to act in good faith and with reasonable efforts to settle the indemnification claim. (*Id.*, § 12.3.)

2. Contract Modification, Claim Settlement and Compromise, and Accord & Satisfaction

After purchasing the mobile catering equipment, Respondent began readying it for use. (R. p. 66, ¶ 11.) As such, Respondent had the equipment inspected. (*Id.*) This inspection revealed that the mobile catering equipment did not comply with "the minimum standards, regulations and/ or requirements of the National Interagency Fire Center" as warranted by the Appellants. (*Id.*) As such, Respondent contacted the Appellants to discuss its warranty claim and to seek indemnification under the Asset Purchase Agreement. (R. p. 67, ¶ 13.) To resolve

the dispute regarding the condition of the equipment, in August 2002, the parties orally agreed to the following: (1) the remaining balance owed by the Respondent would be reduced to $130,000.00; (2) Respondent would pay the $130,000.00 balance via an accelerated rate; and (3) Respondent would not seek relief from the court for its potential claims, including its potential breach of contract claim, against the Appellants. (*Id.*) According to this modified agreement, there was no payment schedule. (*Id.*) Instead, the Respondent was obligated to make a payment any time such was requested from the Appellants. (*Id.*)

The parties fully performed pursuant to this modified agreement. (R. pp. 67-70, ¶¶ 14-15, 18-19, 22-24.) Specifically, the Respondent paid Appellants $130,000.00 within ten (10) months after the oral agreement was entered. (R. p. 67, ¶ 14.) Appellants thereafter acted in such a manner that established that the Respondent's debt was satisfied. (R. p. 69, ¶ 22.) First, after the June 2003 final payment, the Appellants did not request payment of any additional sums. (R. p. 69, ¶ 21.) Additionally, in May 2004, the Appellants signed the vehicle titles to release the liens on the vehicles which secured the debt owed by the Respondent. (R. p. 70, ¶ 24.) Moreover, in August 2004, the Appellants repurchased one of the several vehicles which originally secured the debt. (R. p. 69, ¶ 23.) Due to the parties' agreement and Appellants' actions, the Respondent reasonably believed that the parties had fully performed all of their obligations under the modified agreement and that Respondent's debt was satisfied.

3. Appellants' Contractual Breach and Bad Faith Behavior

Respondent did not immediately take the titles containing the lien releases to the Idaho Department of Transportation ("Department") to obtain titles free and clear of any liens. (R. p.

70, ¶ 25.) When Respondent attempted to do so, at some time after June 2005, it was informed that the Department could not provide lien-free titles because, in May 2005, the Appellants wrongfully applied for duplicate titles on the basis that the original titles were lost. (*Id.*, ¶ 26.) As such, to obtain lien-free titles, the Respondent was required to either obtain the Appellants' signature on the duplicate titles to release the lien shown therein or to seek relief from the court declaring the duplicate titles invalid. (*Id.*, ¶ 27.)

A review of the duplicate title applications establishes that Appellants knowingly made material misrepresentations to the Department. (R. p. 295, Exh. 1-7.) Specifically, the Appellants represented that the titles to the vehicles were lost and that they owned each of the vehicles. (*Id.*) Contrary to these misrepresentations, the Appellants were aware that the titles were in Respondent's possession, that Appellants released their lien on the vehicles approximately one year prior to filing their applications of lost title, and that the Respondent, and not the Appellants, was the legal owner of the vehicles. (R. p. 70, ¶¶ 24, 26.) Even so and despite repeated demands by the Respondent, to date, Appellants have refused to release the illegal liens identified on the duplicate titles and have refused to allow new lien-free titles to be issued. (R. p. 71, ¶ 28.)

II. ADDITIONAL ISSUES ON APPEAL

3. Whether Appellants' appeal should be denied because Appellants failed to identify any error with the trial court's ruling that an orally modified agreement existed and where the Appellants failed to specifically identify any facts which create a genuine issue of material fact with regard to whether the parties' orally modified their contract and fully performed the terms of the modified agreement.

4. Whether Respondent is entitled to attorney fees and costs on appeal.

III. ARGUMENT

A. Appellants' Brief Should be Stricken and Their Appeal Denied as Their Brief Does Not Comply with the Idaho Appellate Rules.

At the outset, it is important to address the Appellants' failure to comply with the Idaho Appellate Rules. The Idaho Appellate Rules require an appellant to specifically identify the trial court's error and to set forth the evidence and legal authority supporting the appellant's argument that the trial court erred. *See e.g.* I.A.R. 35(a) (requires that "[the] brief of the appellant shall contain ... (3) ... [a] list of the issues presented on appeal, expressed in terms and circumstances of the case . . . [which] shall fairly state the issues presented for review [and] ... (6) ... citations to the authorities, statutes and parts of the transcript and record relied upon"); *Backman v. Lawrence*, 2009 Ida. LEXIS 78, 28-29 (Idaho May 12, 2009); *Huff v. Singleton*, 143 Idaho 498, 500, 148 P.3d. 1244, 1246 (2006); *State v. Hosington*, 104 Idaho 153, 159, 657 P.2d 17, 23 (1983) ("This Court has consistently followed the rule that it will not review the actions of a district court which have not been specifically assigned as error, especially where there are no authorities cited nor argument contained in the briefs upon the question"); *State v. Burris*, 101 Idaho 683, 684 n. 1, 619 P.2d 1136, 1137 n. 1 (1980); *Smith v. State*, 129 Idaho 162, 166, 922 P.2d 1088, 1092 (Ct. App. 1996); *East v. West One Bank*, 120 Idaho 226, 231, 815 P.2d 35, 40 (Ct. App. 1991); *Drake v. Craven*, 105 Idaho 734, 736, 672 P.2d 1064, 1066 (Ct. App. 1983) ("an appellant must identify specific issues to be presented on appeal and present supporting argument with citations to the authorities, statutes and parts of the transcript and record upon which he relies"). A failure to identify the alleged error or to support the alleged error with

argument and authority is deemed a waiver of the issue. *See e.g. Hosington*, 104 Idaho at 159, 657 P.2d at 23; *Burris*, 101 Idaho at 684 n. 1, 619 P.2d at 1137 n. 1; *Smith*, 129 Idaho at 166, 922 P.2d at 1092 (Under I.A.R. 35(a)(6), [t]he failure to support an issue with argument and authority is deemed a waiver"); *East*, 120 Idaho at 231, 815 P.2d at 40 (accord).

In the current action, the Appellants failed to identify any error with the trial court's finding that the parties orally modified their contract and that the parties fully performed in accordance with the oral modification. (*See generally* Appellants' Brief.) Additionally, the Appellants failed to bring forth any evidence to suggest that the trial court's ruling that there existed no genuine issue of material facts with regard to the parties' orally modified agreement was incorrect. (*See generally id.*) In failing to even raise or to support an argument that the trial court erred in holding that the uncontradicted evidence established an orally modified contract, the Appellants have waived this issue on appeal. *See e.g. Hosington*, 104 Idaho at 159, 657 P.2d at 23; *Burris*, 101 Idaho at 684 n. 1, 619 P.2d at 1137 n. 1; *Smith*, 129 Idaho at 166, 922 P.2d at 1092 (Under I.A.R. 35(a)(6), "[t]he failure to support an issue with argument and authority is deemed a waiver"); *East*, 120 Idaho at 231, 815 P.2d at 40 (accord).

Additionally, in failing to set forth a statement of facts or any facts establishing a genuine issue of material fact, the Appellants failed to comply with I.A.R. 35(a)(3)(iii). By not providing this Court with a concise statement that sets out, for example, the facts Appellants contend are disputed or contradicted, Appellants leave the Supreme Court to search the record to determine if the Appellants properly responded to Respondent's summary judgment motion with specific facts showing there is a genuine issue for trial. In doing so, the Appellants have failed to meet

their burden as prescribed by I.A.R. 35. *See also Drake*, 105 Idaho at 736, 672 P.2d at 1066 (Ct. App. 1983) (a general invitation for the appellate court to search the record for error is insufficient under I.A.R. 25 and will not be considered on appeal). For these reasons and due to its procedural inadequacies, the Appellants' appeal should be dismissed and denied in its entirety.

B. Standard of Review

The Idaho Supreme Court employs the same standard as the lower courts when determining whether a ruling of summary judgment was appropriate. *See e.g. Montgomery v. Montgomery*, __ Idaho __, 205 P.3d 650, 654 (2009). Specifically, the Idaho Supreme Court will find summary judgment proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See e.g.* Idaho R. Civ. P. 56(c). The Court will "construe disputed facts and draw all reasonable inferences in favor of the non-moving party." *See e.g. Montgomery*, 205 P.3d at 654. The nonmoving party, however, "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or . . . otherwise . . . , must set forth specific facts showing that there is a genuine issue for trial." Idaho R. Civ. P. 56(e). "A mere scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact...The nonmoving party must submit more than conclusory assertions that an issue of material fact exists to withstand summary judgment." *See e.g. Mendenhall v. Aldous*, 146 Idaho 434, 436, 196 P.3d 352, 354 (2008).

If there is no genuine issue of material fact, only a question of law remains, over which the Idaho Supreme Court exercises free review. *See e.g. Grover v. Wadsworth*, __ Idaho __, 205 P.3d 1196, 1199 (2009).

In the current action, the trial court correctly found that no genuine issues of material facts existed as to whether the parties orally modified their original agreements. As such, the trial court's grant of summary judgment in favor of the Respondent and its denial of Appellants' summary judgment motion was appropriate. *See e.g.* Idaho R. Civ. P. 56(c).

C. The Trial Court Properly Granted Summary Judgment in Favor of Respondent.

In their Appellants' Brief, the Appellants first argue that the trial court erred in granting summary judgment in favor of the Respondent because the trial court allegedly "denied" Respondent's accord and satisfaction claim. (*See generally* App. Br.) Such an argument is without merit for several reasons. First, the trial court did not "deny" Respondent's accord and satisfaction claim. (R. p. 224-27.) In fact, the trial court did not rule on the merits of whether an accord and satisfaction existed. (R. p. 227.) Instead, the trial court simply ruled that the existence of an accord and satisfaction was irrelevant because the crux of the parties' dispute was whether the parties orally modified their original agreements. (*Id.*) Presumably, because the trial court found that sufficient uncontradicted evidence existed to support a finding of a valid modified agreement, the trial court determined that it was unnecessary to address the merits of Respondent's accord and satisfaction claim.

Appellants' contention also fails because it ignores the fact that a plaintiff is entitled to contemporaneously assert and prosecute differing and alternative claims for relief. *See e.g.*

Idaho R. Civ. Proc. 8(a)(1) ("Relief in the alternative or of several different types may be demanded"). Pursuant to Idaho R. Civ. Proc. 8(a)(1), the Respondent was entitled to assert and did assert various causes of action, including, inter alia, accord and satisfaction, breach of contract, and declaratory relief. (*See generally* R. pp. 1-8.) In its motion for summary judgment, the Respondent moved the court to declare that the parties had orally modified their original agreements; the parties' acted in conformance with and performed according to the oral modification; there existed an accord which was fully satisfied; and the duplicate titles obtained by the Appellants were invalid. (*See generally* R. pp. 104-129.) In doing so, the Respondent acted in compliance with the Idaho Rules of Civil Procedure. (Idaho R. Civ. Proc. 8(a)(1)) Because the Respondent argued, in addition to its accord and satisfaction claims, the existence a modified agreement, the trial court did not err in ruling on whether there existed undisputed facts supporting the existence of an oral modification. *See e.g. Sirius LC v. Erickson*, 144 Idaho 38, 43, 156 P.3d 539, 544 (2007) (a trial court has authority to rule on all issues placed before it by the parties' briefing).

Finally, while the trial court did not address the issue, there was sufficient undisputed evidence to support a finding of accord and satisfaction. An accord and satisfaction exists where "the parties knowingly and intentionally accept new obligations or a different contractual relationship." *Hoglan v. First Security Bank of Idaho, N.A.*, 120 Idaho 682, 686, 819 P.2d 100, 104 (1991). To establish an accord and satisfaction, the debtor must prove that the creditor "definitely assented to the new arrangement". *See e.g. Beard v. George*, 135 Idaho 685, 689, 23 P.3d 147, 151 (2001). Where a negotiable instrument is involved as the satisfaction, the debtor

must prove that the creditor was aware that the payment was intended to satisfy the accord. *See e.g.* I.C. § 28-3-310. However, satisfaction can be established without use of a negotiable instrument.

In the current action, the Respondent established all factors necessary for accord and satisfaction. First, the Respondent established, via Mr. Orr's affidavit, there was a dispute during the summer of 2002 regarding the condition of the equipment sold to Respondent. (R. pp. 66-67, ¶¶ 11-13.) To resolve this dispute, the parties verbally agreed to modify their original agreement by reducing the remaining loan balance to $130,000.00 and by accelerating the loan payments. (R. pp. 66-67, ¶ 13.) The parties also agreed that Respondent would make loan payments whenever such were requested by the Appellants. (*Id.*) Notably, Appellants do not contest Mr. Orr's testimony. (*See generally* R. pp. 35-42, 180-193, 226.) The Appellants not only failed to bring forth any testimony to the contrary, but they also failed to even argue that such an agreement was not reached. (*See generally id.*) Because Mr. Orr's testimony establishes that "the parties knowingly and intentionally accept[ed] new obligations or a different contractual relationship", an accord existed between the parties. (*See generally* R. pp. 62-72.)

Likewise, the Appellants' conduct bars them from arguing that the accord was satisfied without their knowledge. The undisputed evidence proves Respondent paid Appellants $130,000.00 from August 2002 until June 2003.[3] (R. p. 67, ¶ 14.) Likewise, the undisputed evidence establishes that the Appellants were aware that Respondent's June 2003 $15,000.00 payment was a final payment and was intended to satisfy Respondent's payment obligations to

[3] Importantly, Appellants do not dispute receiving such amounts.

the Appellants. In fact, the undisputed testimony establishes that the Appellants expressly requested this payment from the Respondent as the "final payment". (R. pp. 68-69, ¶ 18; R. 76, ¶ 11.) Specifically, both David Orr and Donald W. Cain, an agent of the Appellants, testified, in June 2003, the Appellants contacted Mr. Cain so that Mr. Cain would request the final payment from Respondent. (*Id.*) In making this request upon Mr. Cain, the Appellants explicitly stated that, after Respondent made this June 2003 payment, the debt would be paid in full. (*Id.*) Importantly, the Appellants do not deny having such a conversation with Mr. Cain. (*See generally* R. pp. 35-42, 180-193, 226.) They also do not deny asking Mr. Cain to obtain the June 2003 payment from Respondent or informing Mr. Cain that the June 2003 payment would fully satisfy the Respondent's debt. (*See generally id.*)

Due to the Appellants' conversations with Mr. Cain and because of the fact that Mr. Cain, acting as the Appellants' agent, informed the Respondent that the June 2003 payment would satisfy the debt, any argument that the Appellants were unaware that the June 2003 payment was intended to satisfy the Respondent's debt is disingenuous, at best. (*See* R. pp. 68-69, ¶ 18; R. 76, ¶ 11.) In fact, because (1) Respondent made the June 2003 payment pursuant to Appellants' request which also involved the explicit representation, by Appellants' agent, that such payment would satisfy the debt and (2) Appellants have failed to contradict Mr. Cain's or Mr. Orr's testimony as to such matters, the Appellants are barred from arguing that they were unaware that the June 2003 payment was intended to satisfy the debt and that there existed an accord and satisfaction.

Likewise, even if the Court finds insufficient evidence to establish that the Appellants represented the June 2003 payment was a "satisfaction", Appellants are still barred from denying the existence of accord and satisfaction. While the Appellants repeatedly deny receiving the June 2003 check from Respondent, the Appellants have failed to contradict Mr. Orr's testimony that he mailed the Appellants a copy of the check with a letter stating that the check was intended as full satisfaction of Respondent's debt to Appellants. (*See generally* R. pp. 35-42, 180-193, 226; R. p. 69, ¶¶ 20-21.) Mr. Orr testified that he did, in fact, mail the letter to the Appellants. (R. p. 69, ¶ 20.) The Appellants had not contradicted this testimony and have not even testified that they did not receive the letter.[4] (*See generally* R. pp. 35-42, 180-193.) As such, the Appellants are barred from now arguing that they did not receive the letter. Similarly, the Appellants are barred from arguing that the letter did not fully inform them that the Respondent intended for the June 2003 payment to satisfy its debt.

In failing to bring forth testimony rebutting or contradicting that of Mr. Orr or Mr. Cain, the Appellants failed to create a genuine issue of material fact as to the existence of an accord and satisfaction. Accordingly, the evidence presented by Respondent is undisputed and this undisputed evidence is sufficient to establish the existence of an accord and satisfaction.

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[4] The Appellants did not even address the letter in the trial court below. (*See generally* R. pp. 35-42, 180-193.) For the first time on appeal, the Appellants' counsel attempts to have this Court consider his statement that the letter was mailed to the incorrect address. (App. Br., p. 18.) However, such a statement by Appellants' counsel is inadmissible and cannot be considered by this Court on appeal.

D. The Uncontradicted Evidence Establishes A Valid Modified Agreement.

Contrary to the Appellants' arguments, there exists no genuine issue of material fact regarding whether the parties orally modified their earlier agreements and whether the parties fully performed according to their oral modification.

An oral modification of an agreement is sufficient where a party establishes, by clear and convincing evidence, that the parties agreed to the material terms of the oral modification. *See e.g. Scott v. Castle*, 104 Idaho 719, 724, 662 P.2d 1163, 1168 (1983). "The fact of agreement may [also] be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in accordance with the terms of the change proposed by the other." *See e.g. id.* (internal citations omitted).

In the current action, as was explained above, the undisputed evidence establishes the existence of an express and implied oral modification to the parties' original agreements. First, the evidence contains the uncontradicted testimony of Mr. Orr that, in order to resolve a dispute regarding the condition of the equipment at issue in the Asset Purchase Agreement, the parties agreed to modify their original agreements by reducing the remaining loan balance to $130,000.00 and by accelerating the loan payments. (R. p. 66-67, ¶ 13.) The parties also agreed that the Respondent would make loan payments whenever such were requested by the Appellants and that the Respondent would waive any claims it had against Appellants, including a potential breach of contract claim. (*Id.*) As was identified by the trial court, the Appellants never contradicted or even disagreed with Mr. Orr's testimony. (R. p. 226.) As such there is no

genuine issue of material fact with regard to the existence of an oral modification and there exists clear and convincing evidence of an express oral modification to the parties' original agreements.

Even if this Court finds the evidence insufficient to establish an expressly modified contract, the undisputed conduct of the parties establishes an implied modification of the parties' agreements. Immediately after the parties orally modified their agreements, the Appellants began requesting large accelerated payments from the Respondent at least once a month. (R. pp. 67-69, ¶¶ 14, 16-18; R. 75-76, ¶¶ 10-12.) Immediately or shortly after each of Appellants' requests, the Respondent paid the accelerated amounts requested by the Appellants. (R. pp. 67-69, ¶¶ 14-19.) Based upon the agreement to pay $130,000.00 on an accelerated basis, the Respondent paid such sums within ten (10) months time. (R. pp. 67, ¶¶ 14.) Pursuant to the modified agreement, the Appellants ceased requesting payments from the Respondent after the June 2003 payment was received and, in May 2004, the Appellants released their lien rights in the vehicles which originally secured the loan. (R. pp. 69-70, ¶¶ 22, 24.) Later, in August 2004, the Appellants repurchased one of the vehicles it sold to the Respondent and which previously served as security for Appellants' loan to Respondent. (R. p. 69, ¶ 23.) Respondent relied on the Appellants' conduct and ceased making payments after it fulfilled the sums due under the modified agreement. (R. p. 69, ¶¶ 21-22.)

Importantly, none of the aforementioned conduct was disputed by the Appellants. (*See generally* R. pp. 35-42, 180-193, 226; R. p. 69, ¶¶ 20-21.) As such, no genuine issue of material fact exists with regard to such conduct and such undisputed conduct provides clear and convincing evidence of the existence of an implied oral modification to the parties' agreements.

Because the uncontradicted evidence establishes the existence of an express and implied orally modified contract between the parties, the trial court did not err in granting summary judgment in favor of the Respondent.

In their briefing, the Appellants argue that there existed a genuine issue of material fact regarding whether the Appellants received a copy of the Respondent's June 2003 check before such was deposited in the Appellants' bank account. (*See e.g.* App. Br. p. 3-4.) However, in making such an argument, the Appellants do not seem to understand that the existence or non-existence of such a fact is not relevant to the inquiry of whether a modified agreement existed and, therefore, does not affect the trial court's ruling. (R. p. 226.) At best, this fact goes toward the inquiry of whether there was sufficient satisfaction of the parties' accord.

E. The Orally Modified Agreement Does Not Violate The Statute of Frauds.

Contrary to the Appellants' assertions, the statute of frauds does not create an absolute bar to verbally modifying a written contract which falls within its parameters. *See e.g. Rule Sales & Serv., Inc. v. U.S. Bank Nat'l Assoc.*, 133 Idaho 669, 673, 991 P.2d 857, 861 (1999).

In their brief, the Appellants incorrectly argue that I.C. § 28-2-209 applies and prohibits all oral modifications to the parties' agreements. (*See generally* App. Br.) In its ruling, the trial court did not address Idaho's Uniform Commercial Code because, it appears, that the trial court determined that I.C. § 9-505, not I.C. § 28-2-209 governed. (R. pp. 224-27, 245-46.) Such a determination is correct. The oral modification at issue alters the parties' agreement with regard to financing and not the parties' agreement with regard to the purchase of goods, namely the mobile catering equipment. (R. pp. 66-67, ¶ 13.) While not in evidence, the parties' agreement

regarding the financing terms and loan amount is separate from the Asset Purchase Agreement. This financing agreement, in the amount of $275,000.00, is, however, referenced in the Asset Purchase Agreement. (R. p. 295, L. 9, Exh. 15.)

As the trial court correctly ruled, a financing or loan agreement, which falls within the parameters of I.C. § 9-505 can be orally modified. *See e.g. Rule Sales & Serv.*, 133 Idaho at 673, 991 P.2d at 861. In interpreting I.C. § 9-505, the Idaho Supreme Court explained that the statute only requires that the "*lender's promise or commitment to lend*" be in writing. *See id.* (emphasis in original). "Once the loan funds have been delivered to the borrower, so there is no longer an executory promise to make a loan, the statute, by its plain language, has no further application." *See id.*

In the current action, the modified agreement does not involve a promise or commitment to lend money or to grant or extend credit. (R. pp. 66-67, ¶ 13; R. pp. 245-46.) In fact, the Appellants' promise to lend money or extend credit was performed upon the signing of the parties' agreements. (*See generally* R. p. 295, L. 9, Exh. 15; R. pp. 245-46.) The parties' oral agreement to decrease the balance due under their prior written agreement, involving a promise to lend money or extend credit, did not alter the Appellants' promise to lend money. (R. pp. 66-67, ¶ 13; R. pp. 245-46.) As such, I.C. § 9-505 does not apply to the orally modified contract between the parties and the statute of frauds does not preclude the enforceability of the modified agreement. *See e.g. Rule Sales & Serv.*, 133 Idaho at 673, 991 P.2d at 861.

It is noteworthy to mention that, even if the U.C.C. applied, the statute of frauds does not bar the oral agreement at issue herein. *See e.g.* I.C. § 28-2-209(4). As the Idaho Supreme Court

explained, I.C. § 28-2-209(4) provides that a contractual "clause prohibiting unwritten contract modifications may be waived." *See e.g. Rule Sales & Serv.*, 133 Idaho at 676, ftnt. 2, 991 P.2d at 864. This is the same as the general rule in Idaho which provides that "parties to a written contract may modify its terms by subsequent oral agreement..." *See e.g. Scott*, 104 Idaho at 724, 662 P.2d at 1168.

In the current action, Appellants waived any contractual clause prohibiting oral modifications.[5] As explained above, not only did Appellants agree to modify the agreements without a writing, but the Appellants acted in conformance with the oral modification. (R. pp. 66, 69, ¶¶ 13, 21-22; R. 76, ¶ 13.) Such behavior and Respondent's reliance on such behavior implies a waiver of the statute of frauds requirement as well as any contractual clause prohibiting oral modifications. *See e.g. Idaho Migrant Council v. Northwestern Mut. Life Ins. Co.*, 110 Idaho 804, 806, 718 P.2d 1242, 1244 (Ct. App. 1986). Importantly, in exchange for the decreased loan amount, the Respondent contracted and/or acted to its detriment by making accelerated payments and by waiving its potential claims against the Appellants, including it potential breach of contract claim arising out of the Appellants warranty breach. (*See e.g.* R. pp. 65-67, 71, ¶¶ 9-13, 30.) For these reasons, the statute of frauds is inapplicable to the current action and does not bar the parties' orally modified contract.

[5] Notably, the financing agreement between the parties does not contain any provision prohibiting oral modifications.

F. The Orally Modified Agreement Does Not Violate The Parol Evidence Rule.

The oral modification at issue in the current action does not violate the parol evidence rule. Contrary to Appellants' contentions, the parol evidence rule only applies to prior and contemporaneous agreements; it does not apply to subsequent agreements. *See e.g. Brewer v. Pitkin*, 99 Idaho 114, 116, 577 P.2d 1162, 1164 (1978); *Herrick v. Leuzinger*, 127 Idaho 293, 300, 900 P.2d 201, 208 (Ct. App. 1995) (the parol evidence rule "does not preclude evidence of agreements or statements made after the writing"). As the Idaho Supreme Court explained:

> The [parol evidence] rule operates to bar only a prior or contemporaneous oral agreement relating to the same subject matter. The converse, therefore, is clear: It is well known, of course, that the parol evidence rule does not apply so as to prohibit the establishment by parol of an agreement between the parties to a writing, entered into subsequent to the time when the written instrument was executed, notwithstanding such agreement may have the effect of adding to, changing, modifying, or even altogether abrogating the contract of the parties as evidenced by the writing.

Brewer, 99 Idaho at 116, 577 P.2d at 1164 (internal citations omitted). As the oral agreement at issue in this action pertains to a subsequent oral modification of the parties' original written agreement, the parol evidence rule is inapplicable. *See e.g. id.*; *Herrick*, 127 Idaho at 300, 900 P.2d at 208. Therefore, contrary to the Appellants' assertions, it was unnecessary for the court to address the alleged "course of performance" exception to the parol evidence rule.

G. Respondent is Entitled to Attorney Fees on Appeal.

Pursuant to I.A.R. 35(b)(5), Respondent, as the prevailing party, respectfully requests an award of its reasonable costs and attorney fees on appeal. Respondent's request is based upon the agreements between the parties, including the Asset Purchase Agreement, which specifically

provide for an award of costs and attorney fees to the prevailing party on appeal; I.C. § 12-120(3) as the current action involves a commercial transaction; I.A.R. 11.1 and I.C. §12-121 as the Appellants' appeal is frivolous and is not warranted by nor well-grounded in the existing facts or law; Idaho R. Civ. Proc. 54; and any other applicable statute or rule. Respondent further bases its request for attorney fees and costs on the fact that the Appellants' Brief was inadequate under IAR 35(a)(3) and (6) as the Appellants failed to include a statement of facts section in its brief and because it failed to identify any specific facts which contradict the trial court's rulings in its Memorandum Decision Re: Pending Summary Judgment Motion; its Order Denying Defendant's Motion to Reconsider; or its Order, dated January 6, 2009. *See e.g. Sprinkler Irrigation Co. v. John Deere Ins. Co.*, 139 Idaho 691, 698, 85 P.3d 667, 674 (2004) (awarding fees on appeal under I.A.R. 11.1 and I.C. §12-121).

IV. CONCLUSION

For the aforementioned reasons, Respondent respectfully requests that this Court deny Appellants' appeal in its entirety. The trial court acted properly in granting summary judgment in favor of the Respondent on the basis that the parties orally modified their prior written agreement. Likewise, the trial court acted properly in denying Appellants' motion for summary judgment.

DATED this 27th day of July, 2009.

ANDERSON, JULIAN & HULL LLP

By _____
Robert A. Anderson
Yvonne A. Vaughan, Of the Firm
Attorneys for Respondent Apple's Mobile Catering, LLC

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of July, 2009, I served a true and correct copy of the foregoing **RESPONDENT'S BRIEF** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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