

NO. A05-2287

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Cargill, Incorporated,
Plaintiff/Appellant,

v.

Jorgenson Farms, a family farm corporation,
Defendant/Respondant.

**APPELLANT CARGILL,
INCORPORATED'S REPLY BRIEF**

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REPLY TO JORGENSEN FARMS' STATEMENT OF THE CASE AND FACTS

Appellant/Plaintiff Cargill, Incorporated, disputes Respondent/Defendant Jorgenson Farms' characterization of the record on numerous points. As detailed in the Argument section below, Jorgenson Farms' responsive brief repeatedly and inaccurately presents arguments and inferences as if they were undisputed facts supported by the record. In its Statement of Facts and throughout its brief, Jorgenson Farms disregards the requirement that the record must be viewed in the light most favorable to non-movant *Cargill*, and all inferences must be drawn in *Cargill's* favor.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR JORGENSEN FARMS.

A. The record contains sufficient evidence of an oral contract to preclude summary judgment at this early stage before discovery.

✓ In Section I.A.1 of its initial brief, Cargill set out in detail specific facts in the record which constitute substantial circumstantial evidence from which reasonable persons could conclude that Jorgenson Farms and Cargill entered into a legally binding contract for the sale of 80,000 bushels of corn.² Even the trial court in this case acknowledged that the evidence of a contract presented by Cargill would "ordinarily constitute a binding agreement between the parties...."³ Nothing in Jorgenson Farms' response refutes the specific facts set out by Cargill in its initial brief.

² (App. Br. at 17).

³ (AA-70).

On the contrary, Jorgenson Farms makes key admissions in its responsive brief that *add* to the circumstantial evidence favoring Cargill. Jorgenson Farms' position throughout this case has depended on the mistaken premise that July 17, 2003 is the only possible day on which former Cargill employee Ben Presthus and Jorgenson Farms could have orally formed the 80,000-bushel corn contract. Yet Jorgenson Farms itself now admits that July 17, 2003 is *not* the first or only day in the summer of 2003 on which representatives of Jorgenson Farms and Cargill discussed contracts for the sale of corn.⁴ Further, Jorgenson Farms now admits that on July 17, 2003, Jorgenson Farms and Cargill priced at least four corn contracts, not just two contracts as Presthus stated in his affidavit.⁵ By contrast, Presthus' affidavit states, "My daily records only show the 100,000 and 135,000 bushel contract that was performed by Jorgenson Farms."⁶

In view of these admissions, the curiously qualified denials that appear throughout the affidavits and other papers submitted by Jorgenson Farms, which equivocally deny that an oral 80,000-bushel contract was made "on or about July 17, 2003" or "in or about July of 2003" take on added significance.⁷ These admissions and inconsistencies further

⁴ (Resp. Br. at 5-6).

⁵ (Resp. Br. at 5-6).

⁶ (AA-28).

⁷ Even Jorgenson Farms' own counsel, in his affidavit, states only that Presthus and James Jorgenson told him they did not enter into or discuss an 80,000-bushel corn contract "on or about July 17, 2003." (AA-32). Jorgenson Farms misconstrues the record in asserting that "Presthus and Jorgenson unequivocally testified that no such contract was ever discussed, much less agreed to, between Cargill and Jorgenson Farms." (Resp. Br. at 14-15; *id.* at 12). In fact, neither Presthus nor Jorgenson "unequivocally" denied under oath that the contract was ever discussed or agreed to, but as Cargill pointed out in its initial brief, the Presthus and Jorgenson affidavits are carefully qualified and equivocal. (App. Br. at 19-23).

underscore the need for discovery and an opportunity to cross-examine Presthus and the Jorgensons under oath about their affidavits and records.

Cargill need not have direct evidence of the precise conversation in which the oral contract was formed in order to survive summary judgment and obtain such discovery. “An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.” Minn. Stat. §336.2-204(2). Jorgenson Farms essentially concedes, as it must, that Cargill could withstand summary judgment either by presenting “testimony from someone who witnessed the oral agreement *or some other record of that interaction.*”⁸ As Cargill detailed in Part I.A. of its initial brief, there are numerous specific facts which constitute just such a record of the formation of an oral contract.

Jorgenson Farms’ only response to those specific facts is to try to explain them away by drawing inferences that are not supported by the record and/or that violate the requirement that the record must be viewed in the light most favorable to Cargill. To the extent that Jorgenson Farms cannot “explain” away the facts favoring Cargill, it tries to obscure and suppress them with red-herring objections and arguments that were not presented to the trial court and thus were waived.

1. Jorgenson Farms disregards the requirement that all evidence and inferences be viewed in Cargill’s favor.

Jorgenson Farms’ response fails to acknowledge that the evidence and all reasonable inferences that may be drawn from the evidence must be viewed in the light

⁸ (Resp. Br. at 19, italics added).

most favorable to Cargill, the non-moving party. *See, e.g., Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981). When the record is viewed in the light most favorable to Cargill, as it must be, most of Jorgenson Farms' response evaporates. "Summary judgment is not a substitute for trial," *Bixler v. J.C. Penney Co., Inc.*, 376 N.W.2d 209, 215 (Minn. 1985), and is not warranted merely because it may appear that the non-moving party will have difficulty proving its case at trial. *See, e.g., Writers, Inc. v. West Bend Mut. Ins. Co.*, 465 N.W.2d 419, 422 (Minn. App. 1991). Jorgenson Farms' disregard for the summary judgment standard pervades its response, but the following examples illustrate the point.

- According to Jorgenson Farms, the Court can infer from the fact that Cargill did not place the two July 17, 2003 contracts for 100,000 and 135,000 bushels of corn into the trial court record that those two contracts probably contained terms identical to the terms of Contract #27985.⁹ Setting aside the obvious rejoinder that Jorgenson Farms also chose not to put the 100,000 and 135,000 bushel contracts into evidence, which it could have done had they favored *its* position, Jorgenson Farms' suggestion that the Court should view evidence that is not even in the record in the light *least* favorable to Cargill is obvious, plain error. To the extent any inferences can be drawn about documents that neither party made part of the trial court record, those inferences must be drawn in favor of Cargill, the nonmoving party.

- According to Jorgenson Farms, Brad Morrison's statement that Contract #27985 contained unusual terms¹⁰ is not credible because Morrison did not spell out in detail

⁹ (Resp. Br. at 6 n.2, 20).

¹⁰ (AA-52).

what the unusual terms were.¹¹ But Jorgenson Farms, which did not to submit any evidence disputing the fact that Contract #27985 contains unique terms, forgets that credibility is an issue for the jury. *See, e.g., Stringer v. Minnesota Vikings Football Club LLC*, 705 N.W.2d 746, 754 (Minn. 2005) (noting that on summary judgment court must not “determine the credibility of affidavits or other evidence”).

- According to Jorgenson Farms, the “only inference” that can be drawn from the fact that Cargill recorded Contract #27985 in its books after Presthus called in the contracts he had formed with Jorgenson Farms is that Cargill made an error in recording the contract.¹² But it requires little reflection to realize that a jury could also the draw the alternative inference that Cargill recorded Contract #27985 after Presthus’ phone call because Presthus told Cargill to do so. This inference is further supported by the fact that Presthus agreed with the placement of a put option on Contract #27985 in October 2003,¹³ which is inconsistent with his later statements that Contract #27985 was an error. It is also supported by the undisputed evidence in the record that Cargill’s system for recording and processing corn contracts contains confirmation requirements that make it very unlikely that a contract could be recorded in error.¹⁴ Questions about Presthus’ credibility, and about which of these alternative inferences is correct are for the jury.

- According to Jorgenson Farms, the Court should not infer from the fact that James Jorgenson referred to Contract #27985 by number during a meeting with Brad Morrison

¹¹ (Resp. Br. at 20).

¹² (Resp. Br. at 20).

¹³ (AA-57).

¹⁴ (AA-55).

that Jorgenson had seen or received a copy of the written contract confirmation, but instead should infer that Jorgenson got the contract number from the put option notice that was mailed in October 2003.¹⁵ But it is for the jury to determine which of these two inferences is correct. Moreover, Jorgenson Farms compounds its error on this point by mistating the record: Jorgenson Farms baldly asserts, with no record support, that when Presthus and James Jorgenson placed put options on Jorgenson Farms' corn contracts, including on Contract #27985, "neither party specifically referred to contract numbers or bushel totals."¹⁶ This embellishment of the record is another example of Jorgenson Farms' pattern of drawing inferences and viewing the evidence in its favor, rather than in nonmovant Cargill's favor.

- According to Jorgenson Farms, the Court should place more weight on the equivocal, limited denials in the Presthus and Jorgenson affidavit that Jorgenson Farms did not enter into the disputed contract at any time in July 2003 than on the countervailing circumstantial evidence that Presthus and Jorgenson Farms did make an oral contract for 80,000 bushels of corn at some point in 2003, which was recorded by Cargill on July 17, 2003 following Presthus' called-in report of new contracts with Jorgenson Farms. But Jorgenson Farms disregards the well-settled law that weighing of the evidence is a fact question for the jury. *E.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997); *Clemens v. The Committee, Inc.*, 2004 WL 117536, *3-*4 (Minn. App.). Jorgenson Farms never confronts the central problem with its position, which is that a

¹⁵ (Resp. Br. at 21).

¹⁶ (Resp. Br. at 7).

court cannot grant it summary judgment without determining that the affidavit testimony in its favor is more credible and weighty than the circumstantial evidence in Cargill's favor.

2. Jorgenson Farms' arguments regarding Kurt Peterson's affidavits misconstrue Cargill's position and were waived.

Perhaps hoping to distract the Court from the substantial circumstantial evidence favoring Cargill's position, Jorgenson Farms argues at length about a non-issue: whether Kurt Peterson may testify about the content of conversations between Presthus and Jorgenson Farms that occurred out of Peterson's presence.¹⁷ But as Cargill's opening brief makes clear, Cargill does not claim that Peterson was a direct witness to any such conversations or that he is a direct witness to the formation of the oral contract. Peterson's affidavits do, however, contribute important circumstantial evidence relating to the formation of the oral contract that favors Cargill, and none of Jorgenson Farms' objections to Peterson's affidavits affect this evidence. For example, Peterson's affidavits establish that:

- Peterson is Cargill's manager for the area including Jorgenson Farms and is familiar with Cargill's business records of its dealings with Jorgenson Farms.¹⁸
- Cargill and Jorgenson Farms were parties to numerous grain sales contracts over the course of several years. The normal course of dealing between the parties was for the

¹⁷ (Resp. Br. at 15-18).

¹⁸ (AA-14).

parties to make an oral agreement, which Cargill would then record, and memorialize in a writing that Cargill would mail to Jorgenson Farms.¹⁹

- Peterson is familiar with Cargill's system for recording and processing corn contracts and it is a complicated system with confirmation requirements that make it "extremely unlikely" that a contract could be recorded in error.²⁰

- Cargill's business records show that Cargill recorded an 80,000 bushel corn contract with Jorgenson Farms, on or about July 17, 2003.²¹

- Cargill's business records show that when Jorgenson Farms placed put options on its corn contracts in October 2003, Ben Presthus assisted in placing a put option on Contract #27985,²² the same contract Presthus now states was not agreed to by Jorgenson Farms "in or about July of 2003."²³

- When the three Jorgenson brothers met with Peterson in April 2004, none of them claimed that Brad Morrison had ever agreed that the 80,000-bushel contract was a mistake, as Jorgenson Farms now claims.²⁴

Jorgenson Farms dismisses, without explanation, the business records attached as exhibits to Peterson's second affidavit as "hearsay notes."²⁵ This argument fails. Even assuming for the sake of argument that Jorgenson Farms had sufficiently developed its objections to these exhibits to permit review by this court, Jorgenson Farms waived any

¹⁹ (AA-15).

²⁰ (AA-55).

²¹ (AA-14).

²² (AA-55, 57).

²³ (AA28).

²⁴ (AA-54-55).

objections to these documents by failing to raise those objections before the trial court. *See, e.g., Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Further, the trial court's order does not contain any evidentiary ruling indicating that the trial court disregarded or excluded any evidence submitted on evidentiary grounds,²⁶ meaning that all of the evidence submitted to the trial court remains part of the record. *See Fairview Hosp. v. St. Paul Fire & Marine*, 535 N.W.2d 337, 341 (Minn. 1995) (reversing trial court's grant of summary judgment and noting, with respect to evidence whose admissibility was in dispute, that "the district court did not make an evidentiary determination, but rather it improperly weighed the evidence"); *Nelson Design Group LLC v. Scoville Press, Inc.*, 2005 WL 1432197, *5 (Minn. App.) (reversing trial court's grant of summary judgment and noting, with respect to evidence whose admissibility was in dispute, that "we are unable to adequately determine on review whether the exclusion was in fact an evidentiary ruling or the result of weighing the evidence"). The record here indicates that the trial court considered all the evidence presented, including the circumstantial evidence described above, determined that Cargill's evidence was not "credible,"²⁷ and improperly weighed the evidence in concluding that Cargill did not "adequately address[]"²⁸ the countervailing evidence presented by Jorgenson Farms.

²⁵ (Resp. Br. at 17-18).

²⁶ (AA-64-71).

²⁷ (AA-65).

²⁸ (AA-71).

3. Jorgenson Farms' response further undermines the weight and credibility of the affidavits of Ben Presthus and James Jorgenson.

a. Affidavit of Ben Presthus.

Jorgenson Farms' response brief actually highlights and deepens the credibility questions regarding Ben Presthus' affidavit, further underscoring the need for discovery and depositions. Presthus stated in his affidavit that his daily records for July 17, 2003 "only show the 100,000 and 135,000 bushel contract that was performed by Jorgenson Farms."²⁹ Yet Jorgenson Farms' response contradicts Presthus and asserts that, in fact, Presthus' records show that he and Jorgenson Farms discussed *four* contracts on July 17, 2003. Despite Presthus' statement in his affidavit to the contrary, and despite the position Jorgenson Farms argued to the trial court, Jorgenson Farms now claims that "[o]n July 17, 2003, James Jorgenson ... met with Presthus ... and negotiated the pricing of four contracts between Jorgenson and Cargill. Presthus and Jorgenson priced two existing 10,000 bushel contracts of corn, and formed a new 100,000-bushel and another 135,000-bushel contract for corn."³⁰

Jorgenson Farms also asserts that "there is no notation whatsoever relative to Contract #27985" in Presthus' notes from July 17, 2003.³¹ But apart from Presthus' statement in ¶7 of his affidavit that his "daily records only show the 100,000 and 135,000 bushel contract[s]" – a statement that even Jorgenson Farms now disbelieves, as noted above – there is nothing in the record to indicate that this handwritten statement in

²⁹ (AA-28).

³⁰ (Resp. Br. at 5-6).

Presthus' daily planner does not refer to Contract #27985: "Jorgensons→ Set Basis on N/C."³²

Jorgenson Farms claims that doubts about Presthus' credibility are refuted if the first meeting with Presthus, Brad Morrison and James Jorgenson occurred before Presthus left Cargill for Pro Pig on December 12, 2003.³³ But the record, viewed most favorably to Cargill, does not establish that the first meeting occurred before December 12, 2003, but rather, reasonably supports an inference that this December 2003 meeting took place *after* Presthus left Cargill. Presthus left Cargill's employ on December 12, 2003 to work for Pro Pig.³⁴ Although the record does not clearly indicate the date of any December 2003 meeting between Presthus, James Jorgenson and Brad Morrison, the only specific December date suggested by the record is December 15, 2003, three days *after* Presthus left Cargill.³⁵ Moreover, even if the first meeting did occur shortly before Presthus actually left Cargill on December 12, 2003, the credibility issue remains, as the record supports an inference that Presthus knew he would be leaving Cargill for Pro Pig in the next week or so. Presthus' ongoing interest in remaining in the good graces of Jorgenson Farms is demonstrated by his voluntary appearance at a meeting in January, 2004 where he took Jorgenson Farms' side of the dispute.³⁶

³¹ (Resp. Br. at 6).

³² (AA31).

³³ (Resp. Br. at 8, 22).

³⁴ (AA-27).

³⁵ (AA-58). Presthus' affidavit refers to a meeting in "late 2003." (AA-28). Jorgenson's affidavit refers to a meeting in "December 2003." (AA-47). Brad Morrison's notes refer to a discussion on "December 15." (AA-58).

³⁶ (AA-29).

b. Affidavit of James Jorgenson.

Jorgenson Farms mistakenly claims there is “nothing in the record to contradict Mr. Jorgenson’s testimony that [the written confirmation of Contract #27985] was never received by Jorgenson.”³⁷ In fact, as noted in Cargill’s initial brief, the record does contain such evidence, in the form of an admission by James Jorgenson himself (in addition to the affidavit testimony of Kurt Peterson). Even though Jorgenson claims he never received the written confirmation, he referred to the contract number printed on the confirmation in conversations with Brad Morrison of Cargill,³⁸ supporting an inference that he had in fact received the written confirmation. Although Jorgenson Farms offers an alternative explanation for how Jorgenson learned the contract number, as noted above, it is for the jury to determine which of these alternative explanations is correct. At this stage the parties and the Court must accept Cargill’s explanation as true.

Jorgenson Farms asserts in its brief that when Presthus and James Jorgenson placed put options on Jorgenson Farms’ corn contracts, including on Contract #27985, “neither party specifically referred to contract numbers or bushel totals.” (Resp. Br. at 7). This is an unsupported embellishment of the record, and a further illustration of Jorgenson Farms’ reliance on improper evidentiary inferences in its favor, rather than in nonmovant Cargill’s favor.

³⁷ (Resp. Br. at 7).

³⁸ (AA-61).

B. The trial court abused its discretion in rejecting Cargill's request for time to take discovery before ruling on Jorgenson Farms' summary judgment motion.

Jorgenson Farms' principal argument on this point is that Cargill should have engaged in civil discovery before the court ruled on its motion to compel arbitration, which essentially would have defeated the very purpose of the motion to compel arbitration. From a logical and practical point of view, the issue of arbitrability is antecedent to any other issue. The purpose of an arbitration clause such as the one Cargill sought to have enforced in this case is to *avoid* the expense and formality of civil discovery. It substantially diminishes the value of an arbitration provision if a party must wait until after such discovery has already been conducted before requesting the court to determine the arbitration question. It was reasonable for Cargill to seek a resolution of the arbitrability issue *first*, before conducting discovery.³⁹ It simply does not follow from the fact that Cargill sought to resolve the arbitrability issue first that Cargill should have been forced to oppose a premature summary judgment motion before any discovery had taken place, and before a scheduling order had even been issued.

Jorgenson Farms makes the puzzling claim that *Cargill* controlled the timing of *Jorgenson Farms'* summary judgment motion: "the timetable for the motion hearings was set by Cargill itself."⁴⁰ Obviously, it was Jorgenson Farms, not Cargill, that brought

³⁹ It is also worth noting that Jorgenson Farms suffered no prejudice, and does not argue that it did, as result of Cargill seeking to resolve the arbitrability issue before conducting discovery.

⁴⁰ (Resp. Br. at 24).

the summary judgment motion and set it on for hearing. Cargill's position was clear throughout, as explained by Cargill's counsel at the hearing on August 26, 2005:

[W]e are just requesting arbitration; and therefore, there has been no discovery. There has been no deposition of witnesses. The affidavits lay out, I think, specific fact disputes. And I would say if the Court denies arbitration, the matter should proceed at least to discovery to see what these witnesses really say under oath and cross-examination. ... And Cargill, accordingly, is requesting arbitration; or, in the alternative, this matter be allowed to proceed to discovery and to a jury trial.⁴¹

Likewise, in its brief in opposition to Jorgenson Farms' summary judgment motion, Cargill stated,

Cargill submits that this dispute should be ordered to binding arbitration or, in the alternative, be allowed to proceed with discovery and towards a jury trial. ... The Court should order this matter into arbitration or, in the alternative, allow the parties to proceed with discovery and towards a jury trial.⁴²

As the foregoing passages demonstrate, Jorgenson Farms' assertion that Cargill did not request time to conduct discovery is without merit.⁴³ Further, contrary to what Jorgenson Farms suggests, a formal request for a continuance under Rule 56.06 is not required. *See Bixler v. J.C. Penney Co., Inc.*, 376 N.W.2d 209, 216 (Minn. 1985). There

⁴¹ (Transcript of August 26, 2005 Hearing, at pp. 11-12, 13).

⁴² (Responsive Memorandum of Cargill, Incorporated to Motion for Summary Judgment and Motion for Sanctions Brought by Jorgenson Farms, at pp. 4, 6)

⁴³ Cargill's specific, repeated requests for time to conduct discovery also distinguish this case from *Vosbeck v. Lerdall*, 72 N.W.2d 371 (Minn. 1955). In *Vosbeck*, unlike here, "[a]t the hearing on the motion for summary judgment, no further evidence was submitted; no suggestion was made that evidence could be produced which would support a claim of negligence ... and no continuance was sought for the purpose of producing such evidence by deposition or otherwise..." *Id.* at 373. This case is likewise distinguishable from *Boulevard Del, Inc. v. Stillman*, 343 N.W.2d 50, 52-53 (Minn. App. 1984), where the nonmoving party neither submitted any evidence in opposition to the summary judgment motion, explained that it needed more time to obtain such evidence, nor held off on discovery pending resolution of a preliminary issue such as arbitrability.

is a “presumption in favor of granting continuances to allow sufficient time for discovery” and they “should be liberally granted,” *Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982), “especially when the party seeking more time is doing so because of insufficient time to conduct discovery.” *Bixler*, 376 N.W.2d at 216.

Normally, the court will grant additional time to the nonmoving party to obtain the facts if the reason is a matter of insufficient time. A continuance or permission to engage in further discovery should not be denied to a party except in the most extreme circumstances.

Rice, 320 N.W.2d at 412-13 (holding that trial court erred in rejecting request for additional time for discovery).

Nor is Cargill’s request for discovery a “fishing expedition,” as explained in detail in Cargill’s initial brief, and as further underscored by Jorgenson Farms’ recent admissions that Presthus and Jorgenson discussed corn contracts on at least one day prior to July 17, 2003, and discussed at least two additional contracts on July 17, 2003 that Presthus failed to disclose in his affidavit. The cases relied on by Jorgenson Farms are distinguishable in that the parties in those cases had already conducted discovery, including depositions, and consequently the courts in those cases were not persuaded that yet more discovery would change the key facts that had already been discovered. *See Vosbeck v. Lerdall*, 72 N.W.2d 371, 373 (Minn. 1955) (deposition discovery); *Rice v. Perl*, 320 N.W.2d 407, 413 (Minn. 1982) (expedited written and deposition discovery). Nor is this a case in which Jorgenson Farms has conceded the truth of all of the allegations in Cargill’s complaint for purposes of summary judgment, as the defendant did in *Meany v. Newell*, 367 N.W.2d 472, 476 (Minn. 1985) (summary judgment was

appropriate without further discovery where defendant “conceded that all of the allegations set forth in plaintiff’s complaint against [defendant] were true”).

Here, there has not yet been *any* discovery. After resolution of the preliminary issue of arbitrability and before resolution of Jorgenson Farms’ summary judgment motion, Cargill should have been allowed time to conduct discovery, including at a minimum depositions of Presthus and the Jorgenson brothers.

II. THE DISTRICT COURT’S ORDER DENYING CARGILL’S MOTION TO COMPEL ARBITRATION SHOULD BE VACATED.

For the reasons stated in its initial brief, Cargill requests that this Court vacate the trial court’s order denying Cargill’s motion to compel arbitration.

III. THE DISTRICT COURT ERRED IN GRANTING JORGENSON FARMS’ MOTION FOR SANCTIONS UNDER MINN. STAT. §549.211.

The trial court’s sanctions decision was based on Minn. Stat. §549.211.⁴⁴ As Jorgenson Farms agrees, the trial court neither considered nor ruled upon the potential for sanctions under any other rule or statute, but “relied only upon Minn. Stat. §549.211 in reaching its decision.”⁴⁵ Consequently, the only issue on review before this Court is whether trial court erred in awarding sanctions under Minn. Stat. §549.211.

The trial court made no finding that Cargill acted in bad faith before imposing sanctions under Minn. Stat. §549.211,⁴⁶ even though “[a]n award of sanctions under that statute requires a finding that an attorney or party acted in bad faith.” *Peterson v. Albert*,

⁴⁴ (AA-65, 70-71).

⁴⁵ (Resp. Br. at 31).

⁴⁶ (AA-65, 70-71).

2000 WL 720011, *2 (Minn. App.)⁴⁷ On the contrary, the trial court specifically acknowledged that the evidence presented by Cargill “could ordinarily constitute a binding agreement between the parties.”⁴⁸ However, the trial court then improperly weighed the evidence and made credibility determinations, and concluded that Cargill’s evidence was not “credible”⁴⁹ and did not “adequately address[]” the countervailing evidence relied on by Jorgenson Farms.⁵⁰ As explained in Cargill’s initial brief, it was a clear error of law and abuse of discretion for the trial court to impose sanctions under Minn. Stat. §549.211 on this basis.

Rather than directly defend the trial court’s imposition of sanctions under Minn. Stat. §549.211, Jorgenson Farms cobbles together a lengthy discussion from case law interpreting different rules and from other jurisdictions. Although this case involves Minn. Stat. §549.211, not Rule 11, Jorgenson Farms accuses Cargill of disingenuousness

⁴⁷ See also *Alexander v. DaimlerChrysler Services North America, L.L.C.*, 2003 WL 22183564, *4 (Minn. App.) (same); *Whitehead v. Arthur K. Hagen, Inc.*, 2003 WL 22846290, *2 (Minn. App.) (“Hagen argues the district court may not award attorney fees without making a specific finding of bad faith pursuant to either Minn.Stat. §549.211 (2002) or Minn. R. Civ. P. 11. We agree.”); *WJO5, Inc. v. Holter*, 2005 WL 2277299, *4 (Minn. App.) (reversing trial court’s award of fees under Minn. Stat. §549.211 where trial court’s order did not include “any specific findings of bad faith conduct that would support an award under section 549.211”); *Herseth v. Narbo*, 2005 WL 2429912, *3 (Minn. App.) (“Minn.Stat. § 549.211 (2004) permits a district court to award attorney fees as a sanction when, after notice to the offending party and an opportunity to respond, the district court determines that a party has acted in bad faith.”); *Back & Neck Pain Clinic, Inc. v. Mount Vernon Fire Ins. Co.*, 2002 WL 378163, *4 (Minn. App.) (“For an award of fees to be granted under rule 11 or Minn.Stat. §549.211, there must be some showing of bad faith on the part of the party being sanctioned.”).

⁴⁸ (AA-70).

⁴⁹ (AA-65).

⁵⁰ (AA-71).

in citing unpublished⁵¹ cases interpreting Minn. Stat. §549.211, while not citing *Peterson v. Hinz*, 605 N.W.2d 414 (Minn. App. 2000), a case that involved Rule 11 and did not involve Minn. Stat. §549.211. In any event, Jorgenson Farms' quibble over how bad faith should be defined is a non-issue, as the cases cited by Jorgenson Farms do not establish a definition of bad faith that meaningfully differs from the definition Cargill set out on page 27 of its initial brief, in a quotation from *Radloff v. First Am. Nat'l Bank*, 470 N.W.2d 154, 156 (Minn. App.1991), a case that Jorgenson Farms also cites.

Finally, it is ironic that in the course of arguing that Cargill should be sanctioned for making claims without adequate support, Jorgenson Farms charges without foundation that "Cargill took no steps to investigate" the validity of its position before filing the Complaint with the District Court. (Resp. Br. at 11, 26). Jorgenson Farms has no way of knowing all the steps Cargill may have taken to investigate the claim and cites no documentation to back up its charge.

Nothing in Jorgenson Farms' response alters the fact that, even before *any* discovery occurred, Cargill's claim was supported by evidence that would ordinarily be sufficient to establish the existence of a contract, as the trial court recognized. For the reasons detailed in Cargill's initial brief and above in Part I of this reply brief, Cargill did and does have reason to believe that its claims have evidentiary support and will continue

⁵¹ Although Jorgenson Farms is correct that unpublished opinions of the Minnesota Court of Appeals are not binding precedent, unpublished opinions are "of persuasive value" and this Court has cited and relied on them as such. *Becker v. State Farm Mut. Auto Ins. Co.*, 596 N.W.2d 697, 700 (Minn. App. 1999) (citing *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993)), *rev'd on other grounds*, 611 N.W.2d 7 (Minn. 2000); *see also Lee v. Hunt*, 642 N.W.2d 57, 61 n.2 (Minn.App. 2002) (same).

to have evidentiary support after a reasonable opportunity for discovery. Accordingly, the trial court's award of sanctions under §549.211 was an abuse of discretion.

CONCLUSION

For the reasons set forth above and in Cargill's initial briefing, Cargill respectfully requests that the Court reverse the trial court's grant of summary judgment in favor of Jorgenson Farms, vacate the trial court's order denying Cargill's motion to compel arbitration, reverse the trial court's award of sanctions against Cargill under Minn. Stat. §549.211, and remand this case for discovery and trial.

Dated: January 23, 2006

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**STATE OF MINNESOTA
IN COURT OF APPEALS**

Cargill, Incorporated,

Plaintiff/Appellant,

v.

Jorgenson Farms, a family farm corporation,

Defendant/Respondant.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 5,679 words. This brief was prepared using Microsoft Office Word 2003 software.

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