

**IN THE SUPREME COURT  
FOR THE STATE OF NORTH DAKOTA**

Frontier Fiscal Services LLC,

Plaintiff and Appellee,

v.

Pinky's Aggregates, Inc. and Dale Honsey,

Defendants and Appellants.

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Supreme Court No. 20180329

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Appeal from Order Granting Plaintiff's Motions for Summary Judgment as to Defendant  
Pinky's Aggregates, Inc. and Defendant Dale Honsey (dated July 24, 2018) and  
Summary Judgment (dated July 24, 2018)

McKenzie County District Court  
Northwest Judicial District  
The Honorable Daniel S. El-Dweek  
Case No. 27-2016-CV-00400

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**BRIEF OF APPELLEE**

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## **I. STATEMENT OF THE ISSUES**

[1] The district court did not err in granting Plaintiff's Motion for Summary Judgment as to Pinky's.

[2] The district court did not err in granting Plaintiff's Motion for Summary Judgment as to Honsey.

[3] This Court should order Pinky's to pay Frontier Fiscal its actual costs and reasonable attorneys' fees incurred for being required to respond to Pinky's frivolous appeal.

## **II. STATEMENT OF THE CASE**

[4] Plaintiff/Appellee Frontier Fiscal Services LLC ("Frontier Fiscal") served a Complaint on Defendant/Appellant Pinky's Aggregates, Inc. ("Pinky's") and on Defendant/Appellant Dale Honsey ("Honsey") (collectively, "Defendants"). *Appellants' App. 6-11*. The Defendants answered the Complaint. *Appellants' App. 35-37*. Frontier Fiscal filed a motion for summary judgment as to Pinky's on its breach of contract claim and filed a separate motion for summary judgment as to Honsey on its enforcement of personal guaranty claim (collectively, "Motions"). *Appellee's App. 1-153*. A hearing on the Motions was held on June 8, 2018. *Appellee's App. 154-155*. By letter dated June 15, 2018, the district court indicated it was granting the Motions. *Appellants' App. 79-80*. Frontier Fiscal filed its form of proposed order on June 28, 2018. The Defendants were free to file their own form of proposed order but instead elected to object to Frontier Fiscal's form of proposed order in an attempt to relitigate the Motions. *Appellee's App. 206-208*. Frontier Fiscal responded to Defendants' objection and the district court entered

its order granting the Motions on July 24, 2018 (“Order”). *Appellee’s App.* 209-212; *Appellants’ App.* 81-99. The Judgment was also entered on July 24, 2018, with Notice of Entry filed and served on July 25, 2018. *Appellants’ App.* 81-99, 100-108. Defendants appeal from the Order and from the Judgment. *Appellants’ App.* 109-110.

### III. STATEMENT OF FACTS

[5] Frontier Fiscal is in the business of providing invoice factoring services throughout North Dakota. *Appellee’s App.* 23, 26, 98. Pinky’s is in the business of providing mining, including sand, gravel, and other aggregate, excavation, and hauling services and products throughout North Dakota and eastern Montana. *Appellants’ App.* 35; *Appellee’s App.* 22-23, 27, 72. The North Dakota Department of Transportation contracted with Baranko Brothers, Inc. (“Baranko”) for a road project on North Dakota Highway 200 from the junction of U.S. Highway 85 to the junction of North Dakota Highway 22 (“Project”). *Appellants’ App.* 35; *Appellee’s App.* 72.

[6] Pinky’s subcontracted with Baranko to supply gravel and other aggregate for the Project. *Appellee’s App.* 24, 54, 73; *Appellants’ App.* 35. Pinky’s then subcontracted with certain trucking companies and individuals to transport the gravel and other aggregate for the Project from various mines and pits owned, operated, or leased by Pinky’s. *Appellee’s App.* 54, 73; *Appellants’ App.* 35. The trucking companies and individuals included, but were not limited to, the following: Angel Rustrian Ortiz; Charlies Trucking; Currey Enterprises, Inc.; EMK Trucking LLC; Happy Trails Transport; Dennis Olson, Jr., dba Havafun Development & Transportation, dba HDT Trucking; Iron Horse Trucking, LLC; Jim Fuller Trucking; Lucken Oil Field Services LLC; Lynx, LLC; Midwest Express Transport; On Call Trucking LLC; William Daniel

Pitts, Sr., dba Pitts Trucking; Ray's Services LLC; Salazar Service, LLC; and Tommy Greer (collectively, "Vendors"). *Appellee's App.* 54-56; *Appellants' App.* 35. The Vendors worked for and then invoiced Pinky's for their transportation services ("Receivables"). *Appellee's App.* 86; *Appellants' App.* 35. Pinky's, in turn, invoiced Baranko for the Vendors' services and then was to pay the Vendors. *Appellee's App.* 86. Pinky's had written hauling agreements with some of the Vendors for the Project ("Hauling Agreements"). *Appellants' App.* 42-73.

[7] Frontier Fiscal offers a receivables factoring service whereby it purchases vendors' invoices (i.e. their receivables) at a discount in exchange for an immediate cash payment to that vendor of an agreed upon price. *Appellee's App.* 98. As a result of that purchase, the vendors assign the purchased receivables to Frontier Fiscal who becomes the owner of the underlying invoice and is the proper creditor of the person or entity that was originally invoiced by the vendor. *Appellee's App.* 99. Between 2014 and 2016, Frontier Fiscal purchased the Receivables from the Vendors. *Appellee's App.* 56, 99. In connection with those transactions, each of the Vendors, as seller and assignor, executed a written notice of assignment of their past and future accounts receivables due them from Pinky's to Frontier Fiscal, as purchaser and assignee (collectively, "Notices of Assignment"). *Appellee's App.* 99-100; *Appellants' App.* 12-27. Copies of the Notices of Assignment were sent to and received by Pinky's. *Appellee's App.* 57. Pursuant to the Notices of Assignment that Pinky's received, Pinky's was required to pay what was otherwise due by Pinky's to the Vendors—the Receivables—to Frontier Fiscal. *Appellee's App.* 79; *Appellants' App.* 12-27.



[8] Pinky's made some payments to Frontier Fiscal towards the Receivables. *Appellee's App.* 79, 86-87, 100, 108-110. Frontier Fiscal factored for the Vendors prior to approximately late April of 2016 and then ceased additional factoring for the Vendors because Pinky's failed to timely pay Frontier Fiscal for the Receivables. *Appellee's App.* 78-79, 129-130. The Vendors were frustrated with Pinky's for its failure to timely pay Frontier Fiscal because the untimeliness and non-payment by Pinky's caused Frontier Fiscal to cease factoring for the Vendors. *Appellee's App.* 79-80, 129-130. Certain Vendors threatened to quit working for Pinky's on the Project if Pinky's did not catch up Frontier Fiscal. *Appellee's App.* 79-80. Pinky's needed the Vendors to keep working on the Project and Pinky's could not satisfy its obligations to the Project without the Vendors. *Appellee's App.* 80. The Vendors made clear to Pinky's that they would not continue to work for it unless Frontier Fiscal resumed factoring for them. *Appellee's App.* 79-80.

[9] In approximately June of 2016, Frontier Fiscal, Honsey, and Pinky's reached an agreement whereby Frontier Fiscal would only resume factoring for the Vendors if (i) Pinky's agreed to pay the Receivables in full by using the proceeds of a loan from Rolette State Bank ("Loan") within one (1) business day of receiving it, and (ii) Honsey personally guaranteed Pinky's indebtedness to Frontier Fiscal. *Appellee's App.* 130-131; *Appellants' App.* 34. This agreement was memorialized in a Personal Guaranty signed by Honsey ("Guaranty"). *Appellee's App.* 130; *Appellants' App.* 34. The loan was funded, but the \$790,000 was not paid to Frontier Fiscal. *Appellee's App.* 77, 83, 100-101. Pinky's and Honsey were aware that Frontier Fiscal required the Guaranty from Honsey before it would agree to factor additional invoices for the Vendors. *Appellee's App.* 81,

130-131, 133. In exchange for Honsey's execution and delivery of the Guaranty, Frontier Fiscal agreed to, and then actually did, factor additional invoices for the Vendors, and the Vendors then continued to work for Pinky's on the Project. *Appellee's App.* 81, 130-131.

[10] Pinky's has not paid Frontier Fiscal in full for the Receivables despite the Vendors completely performing their services and invoicing Pinky's, Pinky's receiving payment from Baranko, and Pinky's written promise to pay Frontier. *Appellee's App.* 28-33, 58, 79, 82, 85-87, 100-101; *Appellants' App.* 35. Honsey has not performed under the Guaranty. *Appellee's App.* 131.

#### IV. STANDARD OF REVIEW

[11] Summary judgment is reviewed de novo. Hild v. Johnson, 2006 ND 217, ¶ 6, 723 N.W.2d 389, 392. On appeal, the North Dakota Supreme Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Id.

#### V. ARGUMENT

##### **A. Defendants' Appellant Brief is replete with incorrect and misleading statements.**

[12] It will be most clear if Frontier Fiscal summarizes and responds to the incorrect and misleading statements at the outset:

1. Statement: Pinky's was unaware the Vendors assigned their rights to payment to Frontier Fiscal. *Appellants' Br.*, ¶¶ 3, 22. Response: Defendants were aware of and did not dispute that the Vendors assigned their rights to receive the Receivables to Frontier Fiscal. *Appellee's App.* 77, 79, 86. Defendants also received the Notices of

Assignment and admit that they are valid and represented an assignment of the Receivables to Frontier Fiscal. *Appellee's App.* 86.

2. Statement: Frontier Fiscal threatened to discontinue factoring for the Vendors. *Appellants' Br.*, ¶¶ 4, 12. Response: Frontier Fiscal did not merely threaten to discontinue factoring, it actually ceased factoring for the Vendors. *Appellee's App.* 78-79, 129-130.

3. Statement: Frontier Fiscal failed to present evidence that the Vendors were the sub-contractors who performed and completed the Project. *Appellants' Br.*, ¶¶ 5, 16, 22. Response: Pinky's previously admitted that it did not pay the Vendors in full for the Receivables, admitted that the money Pinky's received from Baranko that was intended for the Vendors actually went to other creditors of Pinky's, admitted it was obligated to pay the money to Frontier Fiscal, admitted it failed to pay Frontier Fiscal in full, and admitted that there is no reason why said money is not owed to Frontier Fiscal. *Appellee's App.* 79, 85-87. Moreover, Defendants did not raise this issue to the trial court. Hoerr v. Northfield Foundry and Mach. Co., 376 N.W.2d. 323, 327 (N.D. 1985) ("this court has consistently held that a question not raised or considered in the trial court cannot be raised for the first time on appeal").

4. Statement: Defendants' attempts to tie Frontier Fiscal's claims against them so closely to, and only to, the Guaranty. *Appellants' Br.*, ¶ 5. Response: Frontier Fiscal's claims against Pinky's stem from its failures to pay Frontier Fiscal in full for the Receivables and not just for its breach of the Guaranty. Defendants' characterization is disingenuous at best and conveniently ignores Pinky's breach of its underlying obligations to Frontier Fiscal.

5. Statement: Frontier Fiscal failed to present evidence as to whether and to what extent it was due monies under the Hauling Agreements. *Appellants' Br.*, ¶ 5. Response: Again, Pinky's admitted it was obligated to pay the money to Frontier Fiscal, admitted it failed to pay Frontier Fiscal in full, and admitted that there is no reason why said money is not owed to Frontier Fiscal. *Appellee's App.* 79, 85-87.

6. Statement: The Order includes equitable estoppel as a basis for Frontier Fiscal's relief. *Appellants' Br.*, ¶ 7. Response: The Order does not refer to equitable estoppel as one of the basis for the relief granted Frontier Fiscal. *Appellants' App.* 81-99.

**B. The district court did not err in granting Frontier Fiscal's Motion for Summary Judgment as to Pinky's.**

[13] In granting Frontier Fiscal's Motion for Summary Judgment as to Pinky's, the district court properly determined there were no genuine issues of material fact.

A party resisting a motion for summary judgment may not simply rely upon the pleadings or upon unsupported, conclusory allegations. "Factual assertions in a brief do not raise an issue of material fact satisfying Rule 56(e)." "Nor may a party merely reassert the allegations in his pleadings in order to defeat a summary judgment motion."

In summary judgment proceedings, neither the trial court nor the appellate court has any obligation, duty, or responsibility to search the record for evidence opposing the motion for summary judgment. The opposing party must also explain the connection between the factual assertions and the legal theories in the case, and cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief.

Zuger v. State, 2004 ND 16, ¶¶ 7-8, 673 N.W.2d 615, 619-20 (citations omitted).

**1. Pinky's admitted and agreed that it is obligated to pay Frontier Fiscal.**

[14] Frontier Fiscal served discovery requests on Pinky's and Pinky's provided answers and responses thereto. *Appellee's App.* 23-24. Instead of responding to most, if

not all, of the discovery requests, Defendants just noted that “Pinky’s has acknowledged its obligation to plaintiff.” *Appellee’s App.* 47-52, 63-64. Pinky’s also admitted in discovery that it acknowledged its obligation to pay Frontier Fiscal, that Frontier Fiscal purchased the Receivables and is the owner of the Receivables, that Pinky’s received or otherwise became aware of the Notices of Assignment, and that Pinky’s owes money to Frontier Fiscal in connection with the Receivables. *Appellee’s App.* 47-52, 56-58, 63-64.

[15] Furthermore, Honsey, the sole officer, director, and shareholder of Pinky’s, was deposed, both individually and as the Rule 30(b)(6), N.D.R.Civ.P., representative of Pinky’s itself (“Deposition”), in connection with this action. *Appellee’s App.* 24. Honsey’s testimony at the Deposition and Pinky’s discovery responses make clear that there are no genuine issues of material fact as Pinky’s admits and agrees that it breached the obligation that it has to Frontier Fiscal and owes Frontier Fiscal a sum certain. Specifically, at the Deposition Pinky’s admitted:

(1) It does not contest any assertion made by Frontier Fiscal against it in this action nor does Pinky’s contest the sufficiency or validity of the claims asserted by Frontier Fiscal in the Complaint against Pinky’s. *Appellee’s App.* 85.

(2) It did not pay the Vendors in full for the Receivables and that the money Pinky’s received from Baranko intended for the Vendors actually went to other creditors of Pinky’s. *Appellee’s App.* 86.

(3) It was obligated to pay the money to Frontier Fiscal, it failed to pay Frontier Fiscal in full, and that there is no reason why said money is not owed to Frontier Fiscal:

Q: So then a follow-up question to that would be, you do believe that Pinky's owes monies to Frontier Fiscal for the factoring we've been talking about?

A: Absolutely.

\* \* \*

A: That's the only one. I mean, I owe the money; Pinky's owes the money. I'm not disputing that whatsoever.

\* \* \*

Q: Has Pinky's paid Frontier in full?

A: No.

\* \* \*

Q: So you don't dispute that – you mentioned a figure of 400-something thousand. You don't dispute that Frontier – that Pinky's owes Frontier that amount?

A: No.

\* \* \*

Q: Do you dispute that that money is owed to Frontier?

A: No, I don't dispute that.

Q: So you're not contesting any liability to Frontier as asserted in the complaint?

A: No.

\* \* \*

Q: Do you believe Pinky's has any reason why that money is not owed to Frontier Fiscal today?

A: None, whatsoever.

Q: Any just to confirm, you don't have any documents showing otherwise, right?

A: No.

\* \* \*

Q: I guess, Mr. Honsey, just as a final question, you have no reason at all to contest or otherwise believe that the money that we just talked about is not owed to Frontier, right?

A: No.

*Appellee's App. 79, 85-87.*

(4) It owes a principal amount of \$484,677.65. *Appellee's App. 87.*

(5) It was aware of and did not dispute that the Vendors assigned their rights to receive the Receivables to Frontier Fiscal. *Appellee's App. 77, 79, 86.*

(6) The Notices of Assignment were valid and represented an assignment of the Receivables to Frontier Fiscal. *Appellee's App. 86.*

(7) Pursuant to the Notices of Assignment that Pinky's received, Pinky's was required to pay what was otherwise due by Pinky's to the Vendors—the Receivables—to Frontier Fiscal. *Appellee's App.* 79.

(8) It does not contest any assertion made or claims asserted by Frontier Fiscal against it in this action. *Appellee's App.* 85.

(9) It owes the money to Frontier Fiscal that it seeks in this action, Pinky's failed to pay Frontier Fiscal in full for its obligations, and there is no reason why said money is not owed to Frontier Fiscal. *Appellee's App.* 79, 85-87.

**2. The Vendors' assignments of their rights are enforceable against Pinky's notwithstanding the language in the Hauling Agreements.**

[16] The only evidence presented by Defendants in resistance to the Motions consisted of an Affidavit of Honsey, the Hauling Agreements<sup>1</sup>, and loan documents between Pinky's and Rolette State Bank. *Appellants' App.*, 38-78. The Hauling Agreements were produced for the first time as part of Defendants' defense to the Motion and were never produced in discovery. On appeal, Pinky's cites to certain provisions in the Hauling Agreements and argues that Frontier Fiscal failed to demonstrate that the Vendors complied with them. *Appellants' Br.*, ¶¶ 21-22. **First**, Honsey's affidavit is devoid of any testimony that any of the Vendors failed to comply with any provision of the Hauling Agreements other than their alleged failure to obtain Pinky's permission to assign rights to Frontier Fiscal. *Appellants' App.*, 39. **Second**, Pinky's own admissions and testimony recited above dispose of this argument. Therefore, Pinky's did not present competent admissible evidence by affidavit or other comparable means to raise an issue of material

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<sup>1</sup> Pinky's produced ten (10) Hauling Agreements but there are sixteen (16) vendors.

fact regarding the Vendors' compliance with certain provisions of the Hauling Agreements other than perhaps the assignment of rights issue (addressed below). In fact, Defendants' testimony shows the opposite.

**a. The Vendors' assignments of their rights under the Hauling Agreements are enforceable against Pinky's.**

[17] Frontier Fiscal can enforce the assignments against Pinky's regardless of whether the Vendors obtained prior consent from Pinky's. **First**, the provision cited by Defendants in the Hauling Agreements is merely a prohibition on assignment and is not an invalidation of the assignment. The two forms of anti-assignment clauses are treated differently. Restatement (Second) of Contracts § 322 (1981) provides that "a contract term prohibiting assignment of "the contract" **bars only the delegation to an assignee of the performance by the assignor** of a duty or condition." Restatement (Second) of Contracts § 322 (1981). Such a contractual prohibition does not "forbid assignment of a right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation" but "gives the obligor a right to damages for breach of the terms forbidding assignment **but does not render the assignment ineffective.**" Id. Illustration 2 to Restatement (Second) of Contracts § 322 (1981) is particularly illuminating:

A and B contract for the sale of land by B to A. A fully performs the contract, becomes entitled to specific performance on B's refusal to convey the land, and then assigns his rights to C. C is entitled to specific performance against B without regard to any contractual prohibition of assignment.

See Restatement (Second) of Contracts § 322 cmt. b, illus. 2 (1981). Here, it is undisputed that the Vendors contracted with Pinky's, that the Vendors fully performed under the Hauling Agreements, and that the Vendors had a right to be paid for their work.



[18] The Vendors validly assigned the Receivables (i.e. their rights to receive monies owed for the services they rendered to Pinky's) under their contracts with Pinky's to Frontier Fiscal, which is acknowledged by the Notices of Assignment. *Appellee's App.* 86, 100; *Appellants' App.* 12-27. Thereby, the Vendors assigned to Frontier Fiscal "all present and future Accounts Receivables payments [due] from" Pinky's to the Vendors after a specific date. *Appellants' App.* 12-27. "An assignee of an instrument acquires the rights of the assignor, including the right to enforce the instrument." Indus. Comm'n of N.D. v. Wolf, 588 N.W.2d 590, 592 (N.D. 1999). Pinky's was aware and does not dispute that, by and through this arrangement between the Vendors and Frontier Fiscal, any payable that Pinky's owes the Vendors is to be paid to Frontier Fiscal. *Appellee's App.* 77-79, 83, 86. Thus, as a matter of law, Pinky's is legally obligated to Frontier Fiscal.

[19] **Second**, Pinky's waived that condition precedent in the Hauling Agreement by making direct payments to Frontier Fiscal on the Receivables, by signing and delivering the Guaranty, and by paying Frontier Fiscal a portion of the Loan proceeds per the Guaranty's terms. *Appellee's App.* 77. Pinky's admits that the Hauling Agreements were fully performed by the Vendors. *Appellee's App.* 86. **Third**, Pinky's waived its right to assert the defenses it now asserts on appeal because Pinky's did not allege them as affirmative defenses in its Answer. See N.D.R.Civ.P. 8(c)(1) ("[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense . . ."); see Wineberg v. Park, 321 F.2d 214, 218 (9th Cir. 1963) (noting that failure to set forth affirmative defenses, including failure of a condition precedent, "operates as a waiver of such defense" under F.R.Civ.P. 8(c)). This Court held that "a defense raised in an

affidavit resisting a motion for summary judgment, but not pleaded in the answer” is insufficient and instead a motion to amend the answer to include a new defense must be brought for that defense to be considered. See First Nat’l Bank & Trust Co. of Williston v. Jacobsen, 431 N.W.2d 284, 286-87 (N.D. 1988).

**3. The district court did not err in granting judgment for Frontier Fiscal on its breach of contract claim against Pinky’s.**

[20] Given the above, the district court did not err in granting judgment for Frontier Fiscal on its breach of contract claim against Pinky’s. Specifically, for Pinky’s breach of the Hauling Agreements—given the Vendors’ assignments to Frontier Fiscal—and Pinky’s breach of the Guaranty. WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, ¶ 12, 730 N.W.2d 841, 848 (the elements of a prima facie case for breach of contract are: (1) the existence of a contract; (2) breach of the contract; and (3) damages which flow from the breach). The Hauling Agreements and the Guaranty were legally, binding enforceable contracts between the parties. N.D.C.C. § 9-01-02 (requisites of a contract: (1) parties capable of contracting; (2) the consent of the parties; (3) a lawful object; and (4) sufficient cause or consideration). Pinky’s breached the Hauling Agreements by failing to pay Frontier Fiscal in full for the Receivables (which Pinky’s admits) despite the Vendors fully performing the services for Pinky’s (which Pinky’s admits) and invoicing Pinky’s for that work, Pinky’s receiving payment from Baranko, and Pinky’s written promise to pay Frontier. Abdullah v. State, 2009 ND 148, ¶ 13, 771 N.W.2d 246, 253 (“A breach of a contract occurs when there is nonperformance of a contractual duty”). Pinky’s breached the Guaranty by failing to pay \$790,000 of the Loan proceeds to Frontier Fiscal and by failing to pay it in full per the Guaranty’s terms. Id. Frontier

Fiscal has been damaged by Pinky's failure to pay. N.D.C.C. § 32-03-09 (the measure of damages for the breach of an obligation arising from contract is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby).

**4. This Court should order Pinky's to pay Frontier Fiscal's actual costs and reasonable attorneys' fees incurred for being required to respond to this frivolous appeal.**

[21] "If the court determines that an appeal is frivolous . . . it may award just damages and single or double costs, including reasonable attorney's fees." N.D.R.App.P. 38. "An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which evidences bad faith." Healy v. Healy, 397 N.W.2d 71, 76 (N.D. 1986) (citing Mitchell v. Preusse, 358 N.W.2d 511, 514 (N.D.1984)).

[22] Pinky's appeal is devoid of merit given its admissions in this action which are stated above (including citations to the record) and its actions including that it: (1) admitted twenty-one (21) separate times in its discovery responses that "Pinky's has acknowledged its obligation to plaintiff" and refused to otherwise participate in further discovery based on that admission; (2) did not produce a single document to Frontier Fiscal in this action despite requests; (3) admitted at its Deposition that it had no documents to produce; (4) did not contest any assertion made by Frontier Fiscal against it in this action; (5) did not contest the sufficiency or validity of the claims asserted by Frontier Fiscal; (6) admitted that it was obligated to Frontier Fiscal down to the penny; (7) admitted it made payments to Frontier Fiscal following the Notices of Assignment; (8) admitted it failed to pay Frontier Fiscal in full; and (9) admitted that there is no reason

why the money is not owed to Frontier Fiscal. Notwithstanding this, Pinky's commenced this appeal.

[23] Without being grounded in merit and without having a reasonable expectation of altering the Judgment, the appeal is frivolous. Thus, an award under Rule 38, N.D.R.App., is appropriate.

**C. The district court did not err in granting Frontier Fiscal's Motion for Summary Judgment as to Honsey.**

[24] In granting Frontier Fiscal's Motion for Summary Judgment as to Honsey, the district court properly determined there were no genuine issues of material fact.

**1. The Guaranty was supported by consideration.**

**a. N.D.C.C. § 22-01-04 does not require the Guaranty to express a consideration.**

[25] Defendants argue that the Guaranty altered the terms of payment by Pinky's of the Receivables to Frontier Fiscal, and therefore the transaction falls within the scope of the statute of frauds set forth in N.D.C.C. § 9-06-04(5). *Appellants' Br.*, ¶ 26. The statute of frauds is a defense to the enforcement of an oral contract which is not applicable here. Insofar as the Guaranty is an agreement under subsection 9-06-04(5), N.D.C.C., it need only be in writing and signed by the party to be charged to satisfy the statute of frauds. There is no dispute that the Guaranty exists, that it is in writing, and that it is signed by Honsey (individually and as president of Pinky's), the party to be charged. Thus, the statute of frauds has been met. See N.D.C.C. § 9-06-04.

[26] Defendants then go on to summarily assert that "because the document is not a valid guarantee, N.D.C.C. § 22-01-04 is inapplicable and consideration must be expressed within the writing." *Appellants' Br.*, ¶ 26. The district court rightly

concluded that the Guaranty was a binding, legally enforceable contract between Frontier Fiscal and Pinky's and Honsey. *Appellants' App.* 93-98. Defendants have not given this Court any reason to conclude otherwise. Defendants' argument is wholly unsupported and is only an attempt to get the Guaranty away from section 22-01-04, N.D.C.C., which expressly provides that "a guaranty must be in writing and signed by the guarantor, **but the writing need not express a consideration.**" N.D.C.C. § 22-01-04 (emphasis added). Assuming Defendants' argument here is somehow correct, then it still fails as there is a **statutory presumption** that there was consideration for an agreement (other than an agreement to sell real estate) reduced to writing and the burden of proving lack of consideration lies with the party seeking to avoid it. N.D.C.C. §§ 9-05-10, 9-05-11. Here, the Guaranty was reduced to writing and is not an agreement to sell real estate, so the consideration is presumed.

- b. Assuming the Guaranty is somehow outside of N.D.C.C. § 22-01-04, no consideration need be expressed in the four corners of the Guaranty given that it is not an agreement for the sale of real property.**

[27] Because Defendants assert that the Guaranty is outside of section 22-01-04, N.D.C.C., Defendants go on to argue that the Guaranty is unenforceable as a consideration needs to be expressed in the four corners of the document. *Appellants' Br.*, ¶¶ 26-27. Defendants' argument misstates the law. Defendants rely on Hagen v. Schluchter, Heinzeroth v. Bentz, and Vasichek v. Thorsen in support of their argument but such reliance is misplaced. **First**, Defendants are using these cases for the proposition that all contracts within the statute of frauds must express a consideration in the four corners of the contract. However, these cases all concern agreements for the sale

of real property which the Guaranty is not. **Second**, the analysis in these cases focuses on whether certain writings that purport to reflect oral agreements satisfy the requirements of the statute of frauds. Said differently, the Court in those cases was trying to determine the sufficiency of the “writing” at issue as a contract. Hagen, 126 N.W.2d 899, 902 (N.D. 1964) (whether a *will* that contains provisions to dispose of real property but which contains no reference to a contract or the terms thereof is a sufficient writing to evidence an oral agreement and thereby satisfy the statute of frauds); Heinzeroth, 116 N.W.2d 611, 612 (whether a *deed* that does not recite the actual consideration paid for certain real property is a sufficient writing to evidence an oral agreement to sell that property and thereby satisfy the statute of frauds); Vasichek, 271 N.W.2d 555, 560 (N.D. 1978) (whether a *letter* that does not recite the consideration to be paid for certain real property is a sufficient writing to evidence an oral agreement to sell that property and thereby satisfy the statute of frauds).

[28] Here, the Guaranty is not just some writing that Frontier Fiscal is making into a contract. No court needs to examine the sufficiency of the Guaranty in the same way the will, the deed, and the letter were examined in the above-cases to realize that it is a signed, contractual writing and therefore satisfies the statute of frauds.

**c. The consideration given for the Guaranty was distinct from Pinky’s original obligation to Frontier Fiscal thereby satisfying N.D.C.C. § 21-01-03.**

[29] Defendants argue that the Guaranty is void because it was not supported by consideration. *Appellants’ Br.*, ¶¶ 47-51. The existence of consideration is a question of law. See N.D.C.C. § 9-05-01, 22-01-03; e.g. Maragos v. Norwest Bank MN, N.A., 507 N.W.2d 562, 565 (N.D. 1993). A guaranty that is entered into at a time other than when

the original obligation is accepted or entered into requires “consideration distinct from that of the original obligation.” N.D.C.C. § 22-01-03. Consideration may be defined as **any** benefit conferred or detriment suffered. See N.D.C.C. § 9-05-01. Again, when an agreement is reduced to writing, there is a **statutory presumption** that there was consideration for the agreement. Defendants have no facts to meet their burden and the undisputed facts demonstrate that the Guaranty was supported by separate consideration.

[30] Defendants admit that:

(1) They knew that Frontier Fiscal ceased additional factoring for the Vendors because Pinky’s failed to timely pay Frontier Fiscal for the Receivables. *Appellee’s App.* 78-79, 129-130.

(2) Certain Vendors threatened to quit working for Pinky’s on the Project if Pinky’s did not catch up Frontier Fiscal. *Appellee’s App.* 79-80.

(3) Pinky’s needed the Vendors to keep working for Pinky’s on the Project and that it could not satisfy its obligations to Baranko on the Project without them. *Appellee’s App.* 80.

(4) The Vendors made clear to Pinky’s that they would not continue to work for Pinky’s unless Frontier Fiscal provided additional factoring for them. *Appellee’s App.* 79-80.

[31] Frontier Fiscal provided additional factoring for the Vendors only because of the Guaranty. Because of this additional factoring by Frontier Fiscal, the Vendors could resume work for Pinky’s to its benefit following execution and delivery of the Guaranty. Having the Vendors working for Pinky’s permitted Pinky’s to keep meeting its obligations to Baranko on the Project. Honsey *chose* to enter into the Guaranty so that

Frontier Fiscal would resume factoring for the Vendors, the Vendors would continue on, and the obligations of the Project would be met. Consideration existed with this choice.

[32] Defendants next argue that, even if there was distinct consideration for the Guaranty, the benefit of Frontier Fiscal resuming factoring for the Vendors was a benefit to Pinky's and not to Honsey. **First**, the authorities cited by Defendants are not binding given that they are not North Dakota cases and are clearly distinguishable from the facts of this matter. See Perini v. Sabatelli, 52 A.D.3d 588, 588-89 (N.Y. 2008) (a *New York* case involving enforcement of an *oral* promise to guaranty the debt of another); Friedland v. Citizens & Southern South DeKalb Bank, 218 S.E.2d 302, 303–304 (Ga. App. 1975) (a *Georgia* case involving the enforcement of a guaranty where an *individual* guaranteed the debt of another *individual* and the Court determined that there was a direct benefit to the guarantor in executing the guaranty); Jackson v. First Bank of Clayton County, 256 S.E.2d 923, 925–26 (Ga. App. 1979) (a *Georgia* case where the court interpreted a document as a *suretyship* and not a guaranty and found that no benefit need flow to the guarantor but only to the principal).

[33] **Second**, if Defendants are correct in their argument, then every personal guaranty given on behalf of a corporation or other entity as a required credit enhancement by the lender is invalid. This is certainly not the case. Regardless, there is no doubt that Honsey benefitted here, given that he is the sole shareholder, sole officer and director of Pinky's, and testified at the Deposition that "I'm the only one that is Pinky's." *Appellee's App.* 74, 85. A benefit to Pinky's in reaching an arrangement whereby Frontier Fiscal resumed factoring for the Vendors, the Vendors kept working for Pinky's, and Pinky's continued



to meet its obligations to and get paid by Baranko is clearly also a benefit to Honsey individually (the sole shareholder and sole officer and director of Pinky's).

**2. The validity of the Guaranty is not affected by Honsey's purported unilateral mistake of fact.**

[34] Honsey argues that his consent to the Guaranty is voidable because he believed that he signed the Guaranty on behalf of Pinky's and not individually. *Appellants' Br.*, ¶¶ 43, 45. Honsey's purported unilateral mistake concerning the legal effect of the Guaranty does not affect the enforceability of it against him. Defendants cite to N.D.C.C. § 9-03-13<sup>2</sup>—the North Dakota statute concerning “mistake of fact”—in support of this argument but do not cite to any caselaw. *Appellants' Br.*, ¶ 44. This is unsurprising given that the caselaw reveals that a party's unilateral mistake of material fact is only a defense to enforcement of a contract if the other party had reason to know of the mistaken party's mistake. See, e.g., *Mau v. Schwan*, 460 N.W.2d 131, 135-136 (N.D. 1990) (holding that one party's unilateral mistake of fact defense was unsupported where there was no misrepresentation by the other party and where the other party had no prior knowledge of the mistake claimed by the party asserting the defense).

[35] Here, there is no evidence before this Court that Frontier Fiscal had any reason to know that Honsey did not believe the Guaranty would personally obligate him to Pinky's debt to Frontier Fiscal. In fact, Frontier Fiscal offered evidence that it understood “Honsey agreed to personally guaranty Pinky's indebtedness to Frontier Fiscal” by the Guaranty. *Appellee's App.* 130. Any failure by Honsey to comprehend the legal effect of

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<sup>2</sup> Defendants actually cite to N.D.C.C. § 9-03-14—the “mistake of law” statute—but presumably intended to cite to N.D.C.C. § 9-03-13. *Appellants' Br.*, ¶ 44.

the Guaranty is only evidence of his negligence or carelessness but it does not give rise to a valid defense. See N.D.C.C. § 9-03-13(1).

[36] Defendants points to the Guaranty's signature block as evidence that Honsey did not believe it bound him personally. *Appellants' Br.*, ¶ 45. Besides the language in the Guaranty itself, which obviously distinguishes between Honsey and Pinky's throughout, the signature block clearly indicated that Honsey was signing the Guaranty "[a]s an individual & President of Pinky's Aggregate." *Appellants' App.* 34. There is no other reasonable conclusion than Honsey signed both as an individual and on behalf of Pinky's. See Nat'l Fitness Ctr., Inc v. Atlanta Fitness, Inc., 902 F. Supp. 2d 1098, 1106 (E.D.Tenn. 2012) (noting that where a corporate president signed a guaranty "'individually and as President' could result in no other reasonable conclusion other than that [the corporate president] personally guaranteed performance."); see also Ubom v. SunTrust Bank, 17 A.3d 168, 175 (2011) (holding that when the guaranty language in the body of a guaranty clearly imposes personal liability, "the mere addition of a corporate title does not relieve a corporate officer of personal liability under a signature as a guarantor"). The Guaranty bound both Pinky's and Honsey. Therefore, Honsey's purported unilateral mistake of fact does not affect the enforcement of the Guaranty.

**3. The provision in the Guaranty waiving defenses is not void as a matter of law.**

[37] Defendants argue that the following provision in the Guaranty is violative of section 9-08-05, N.D.C.C., and therefore is void as a matter of law:

To the extent permitted by law, I, Dale Honsey waive all defenses, counterclaims or offsets that are legally available to Frontier with respect to the performance of this agreement and payment of the Frontier Receivables.

*Appellants' Br.*, ¶¶ 28-30. As an initial matter, Defendants did not raise this issue to the trial court so this Court should disregard it. Hoerr, 376 N.W.2d. at 327. Regardless, section 9-08-05, N.D.C.C., does not stand for the proposition that Defendants offer it. Rather, it provides that conditions which restrict enforcement or limit the time to bring an action are void. See N.D.C.C. § 9-08-05; see also, e.g., Storing v. Nat'l Surety Co., 215 N.W. 875 (N.D. 1927) (holding that a contractual provision which varied the limitation of time for bringing an action under the contract was void where said time conflicted with North Dakota law). Defendants did not provide any authority that provides waiver of defenses clauses are unenforceable per se.

[38] Defendants also point to other specific provisions in the Guaranty which they assert are void under North Dakota law and thus that the Guaranty itself should be held unenforceable as a matter of law. *Appellant Br.*, ¶ 40. This position is not supported by North Dakota law. N.D.C.C. § 9-08-01 provides the circumstances where specific contractual provisions are unlawful and therefore unenforceable, but it does not provide that an unenforceable provision in a contract voids the entire contract. See N.D.C.C. § 9-08-01.

**4. The Guaranty is unambiguous as the material aspects of the Guaranty do not give rise to any genuine issues of material fact.**

[39] Summary judgment is the proper method of disposition in a case involving the interpretation of a contract, so long as no genuine issue of material fact exists. Balsam v. Buehner, 278 N.W.2d 425, 428 (N.D. 1979). “The construction of a written contract to determine its legal effect is a question of law for the court to decide” and “[t]he determination of whether or not a contract is ambiguous is also a question of law for the

court to decide.” Miller v. Schwartz, 354 N.W.2d 685, 688 (N.D. 1984). Though the **material** terms of the Guaranty are unambiguous, they are brushed over in Appellants’ Brief:

(1) By the Guaranty, Honsey “do[es] personally guarantee the prompt, full and complete performance of the terms of this agreement and any Pinky’s Payable to Frontier...” *Appellants’ App.* 34.

(2) The signature block clearly indicated that Honsey signed the Guaranty “[a]s an individual & President of Pinky’s Aggregate.” *Appellants’ App.* 34.

[40] Instead, Defendants direct the Court to several immaterial provisions in the Guaranty to argue that “rational arguments can be made to support alternative interpretations of the foregoing clauses.” *Appellant Br.*, ¶¶ 33-42. For example, Defendants point to the fact that Honsey had no right to apply the Loan proceeds to Frontier Fiscal because of the terms of the Loan between Pinky’s and Rolette State Bank. *Appellants’ Br.*, ¶ 36. Frontier Fiscal did not know that fact given it was not a party to those loan documents. The fact that Honsey agreed to do something in the Guaranty that he purportedly had no ability to do has no bearing on the validity or ambiguity of the Guaranty. At most it either gives rise to another instance of breach by Honsey or it sheds light on the carelessness of Honsey’s review of the Guaranty before signing. It is probative of nothing else. Defendants also point out certain scrivener’s and spelling errors, but these errors do not render the Guaranty void.

**5. The district court did not err in granting judgment for Frontier Fiscal on its enforcement of guaranty claim against Honsey.**

[41] Given the above, the district court did not err in granting judgment for Frontier Fiscal on its enforcement of guaranty claim against Honsey. Frontier Fiscal's claim against Honsey is for enforcement of the Guaranty. WFND, LLC, 2007 ND 67 at ¶ 12, (the elements of a prima facie case for breach of contract are: (1) the existence of a contract; (2) breach of the contract; and (3) damages which flow from the breach). A guaranty is a form of contract and the Guaranty was a legally, binding enforceable contract between the parties. N.D.C.C. § 9-01-02 (requisites of a contract: (1) parties capable of contracting; (2) the consent of the parties; (3) a lawful object; and (4) sufficient cause or consideration). Honsey consented to the terms of the Guaranty by, among other things, signing it and performing according to its terms when a portion of the Loan proceeds were paid to Frontier Fiscal. See N.D.C.C. § 9-03-20 ("Performance of the conditions of a proposal, or acceptance of the consideration offered with a proposal, is an acceptance of the proposal"); see also N.D.C.C. § 9-03-25 ("A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known or ought to be known to the person accepting"). It was expressly understood by the parties to the Guaranty that Frontier Fiscal would only provide additional invoice factoring services to the Vendors after Honsey executed and delivered the Guaranty, which Frontier Fiscal then did. *Appellee's App. 81, 130-131.*

[42] By the Guaranty, Honsey is personally liable for Pinky's indebtedness to Frontier Fiscal should Pinky's default on its obligations to Frontier Fiscal. Pinky's failed to pay

Frontier Fiscal in full. Abdullah, 2009 ND 148 at ¶ 13. Frontier Fiscal has been damaged by Pinky's failure to pay and by Honsey's failure to honor the Guaranty. N.D.C.C. § 32-03-09 (the measure of damages for the breach of an obligation arising from contract is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby). Because Pinky's defaulted on its obligations to Frontier Fiscal and has not cured its default, Honsey is personally liable and obligated to Frontier Fiscal for Pinky's obligation. Therefore, the district court did not err in granting Frontier Fiscal's Motion for Summary Judgment as to Honsey.

## VI. CONCLUSION

[43] Frontier Fiscal respectfully requests this Court

- (1) Affirm the Judgment in its entirety, including the Order; and
- (2) Order Pinky's to pay Frontier Fiscal's actual costs and reasonable attorneys' fees incurred for being required to respond to Pinky's frivolous appeal.

[44] DATED this 19th day of December, 2018.

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## VII. CERTIFICATE OF SERVICE

[45] I, Trevor A. Hunter, one of the attorneys of the law firm of CROWLEY FLECK PLLP, hereby certifies that on this 19th day of December, 2018, true and correct copies of the **BRIEF OF APPELLEE** and **APPENDIX OF APPELLEE** were served **by E-Mail** as follows:

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