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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20190287
Williams County No. 53-2016-CV-01331

R & F Financial Services, LLC,

Plaintiff and Appellants,

v.

North American Building Solutions, LLC
Cudd Pressure Control, Inc., and RPC, Inc.,

Defendants and Appellee.

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

APPEAL OF JUDGMENT ENTERED JULY 22, 2019, IN THE DISTRICT COURT, NORTHWEST JUDICIAL DISTRICT, WILLIAMS COUNTY, NORTH DAKOTA. THE HONORABLE BENJAMEN J. JOHNSON

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1. STATEMENT OF THE COURT'S JURISDICTION

2. The Williams County District Court has general jurisdiction over all civil matters and proceedings in the state, N.D.C.C. § 27-05-06(2). This Court has jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. § 29-28-06.

3. STATEMENT OF ISSUES PRESENTED

4. The trial court erred when it failed to give full effect to the agreement of the parties, NABS and Cudd, under the applicable provisions of the Uniform Commercial Code and determine that a finance lease was created by the parties.

5. If the parties' agreement, making the effective commencement date of the lease June 5, 2012, is for some reason found to be ineffective for purposes of creating a finance lease with respect to the first 28 units, the agreement should be deemed severable and a finance lease should be found to exist with respect to the final 32 units.

6. The trial court erred in finding the defenses of impossibility of performance and frustration of purpose applied to Cudd's breach of the Lease Agreement.

7. The District Court abused its discretion in denying R & F's Motion for attorneys' fees.

8. ORAL ARGUMENT REQUESTED

9. R & F requests oral argument to assist the Court in understanding of the issues presented and that the District Court erred in its findings of fact and conclusions of law, and the legal issues involved in this case.

10. STATEMENT OF THE CASE

11. This action arises out of an equipment lease ("Lease") between North American Building Solutions LLC ("NABS") and Cudd Pressure Control, Inc. ("Cudd") dated

August 30, 2011. The equipment leased consisted of Temporary Housing Modules ("Modules"). The Lease was assigned to R & F Financial Services, LLC ("R & F") to provide the financing for the transaction. At the time the Lease was assigned to R&F, the Lease was guaranteed by RPC, Inc. Cudd's parent corporation. After the Lease term commenced, the City of Williston enacted Ordinance 1026, which terminated the use of temporary housing units in the City of Williston effective July 1, 2016. On March 31, 2016 Cudd sent a letter to NABS and R&F terminating the Lease.

12. R & F filed a claim under the Lease against NABS, Cudd and RPC. The case was tried to the Court on May 23, 2019. On July 10, 2019 the Court issued its Finding of Fact, Conclusions of Law and Order for Judgment. The District Court dismissed R & F's Complaint, finding the Lease was terminated by the doctrines of frustration of purpose and impracticability. Judgment was entered on July 22, 2019.

13. The District Court did not enter judgment on the claim against NABS. A timely notice of appeal was filed. The Supreme Court remanded this case to the District Court for disposition of R & F's claim against NABS. In addition, R&F made a claim against NABS for its attorney fees. The District Court entered Judgment against NABS on April 28, 2020, but denied R&F's claim for attorneys fees. A timely Amended Notice of Appeal was filed.

14. STATEMENT OF FACTS

15. NABS developed the Modules which were portable and could be hauled on a semi-trailer. Tr. 10; 25.

16. NABS Owner Jim Morken ("Morken") began calling on Kelly Kelly, the local Cudd manager, in the spring and summer of 2011. Tr.14; 9-20. At that time,

Cudd had operated a temporary housing site near Williston on property it leased from Blair Town Energy Center, LLC. Tr. 125; 11.

17. Initially, NABS made a proposal to sell Modules to Cudd. Tr. P. 16 L 25. The sales proposal was very similar to the proposal that ultimately became the attachment to the Lease, Exhibit 1. Tr.17; 2-12. Morken testified that Kelly told him that Cudd preferred to lease the Modules. Tr. 17; 17-20, Tr. 20; 2-3. Morken testified: "They asked if I could find somebody else to finance it . . . they'd enter into the lease agreement." Tr. 17; 17-21

18. Mr. Morken testified that initially he made a proposal to lease the Modules for a two-year term. Tr. 18; 7. The proposal was based on the length of term of that William's County would issue a Conditional Use Permits for temporary housing units. Tr. 18; 9-13.

19. In the summer of 2011, Williams County was granting one- or two-year conditional use permits for Workforce Housing. Tr. 18; 9-13. Cudd's Workforce Housing project was located just outside the Williston city limits, abutting a city street. APP. P190.

20. The Temporary Housing Regulation that was enacted at the time the Lease was entered into states: "Temporary Housing Facility," "man camp," "construction camp," or "crew housing facility" means a facility designed and intended to be used for a temporary period of time to house a variety of field-related workers, including oil field, construction, etc." (emphasis added). The Temporary Housing Regulation stated: "A conditional use permit ("CUP") for temporary housing camps will be in effect for two years, except in the case of recreational vehicles, when the permit will be in effect for one

year." Docket #299, Exhibit 134. This uncertain and temporary nature of the CUP required for this type of housing is demonstrated by Cudd's own history with the Williams County Commission. In its renewal application Cudd requested a two-year renewal of its current CUP and requested an increase of 64 beds to a 120-bed facility. The Commission approved only a one-year CUP and no expansion. Docket # 274, Exhibit 109. Cudd negotiated the Lease with a 5-year term, knowing that the CUP, at a maximum, were being granted for 2-year periods and in its own experience only granted for a one-year renewal period. When it took delivery of the first 28 Modules on April 16, 2012, it only had a CUP for an additional 6 months. Docket # 274.

21. Mr. Kelly indicated to Morken that Cudd wanted to stretch the payments out and that Cudd understood there might be risks in going beyond the period of the two-year conditional use permit. Tr. 18; 17-18, 20; 25 – 21; 2. The Parties ultimately negotiated a five-year non-cancelable lease. APP P150. On August 30, 2011, NABS and Cudd signed the Lease. APP P150. Tr. 19; 6-9.

22. When the Lease was signed Morken believed the project would be financed through Fisher Leasing of Fargo by Alerus Financial. Tr. 19; 18-20. Instead, NABS ultimately obtained a financing commitment from R & F Financial Services, LLC (R & F). Tr. 18; 24.

23. In the Lease, Cudd agreed to lease sixty (60) Modules. NABS agreed to deliver and construct the Modules on real property owned by Cudd. It was later learned that the land was leased by Cudd. APP P150 at ¶A and 1.

24. The Lease provided that Cudd was responsible for any conditional use permits, variances or zoning improvements that might be required by any local city, township,

county or state authorities which were necessary for the construction of the Modules upon the property. APP P150 ¶2.

25. Morken testified that due to a lack of funding NABS did not have sufficient funds to complete the Modules. Tr. 24; 20. R & F had agreed to fund the Lease; however, because Cudd was not able to produce a financial statement, R & F required a guaranty by Cudd's parent corporation RPC, LLC. Tr. 24; 22-25. Both RPC and Cudd recognized the importance of R & F's financial commitment and as a result RPC agreed to guarantee the Lease. APP P183. The Guaranty recites the consideration furnished by R & F to Cudd and RPC: "In consideration of the funding by R & F Financial Services, LLC (R&F) of the Lease . . . for the lease . . . modules (lease obligation) . . . RPC Inc hereby guarantees to R&F the performance of Cudd's payment obligations to R & F…" R & F's funding constituted the consideration for this transaction which resulted in the making of the equipment available to Cudd under the Lease. APP P183.

26. James Renner of R & F had 40 years' experience in the equipment leasing business. Renner testified that in any equipment leasing arrangement, the party supplying the capital for the Lease was an important component of the lease arrangement. Tr. 60; 2. Both Cudd and RPC recognized the importance of third-party funding and as a result RPC was willing to guarantee the Lease. Tr. 66; 10. Renner testified that an extremely large number of similar transactions exist where leases are sold in the stream of commerce to raise capital to fund transactions. Tr. 66; 2.

27. On April 18, 2012, Cudd acknowledged 28 of the Modules had been properly delivered and accepted. APP P170. On June 28, 2012, NABS and Cudd executed Lease Schedule 2, wherein Cudd acknowledged that the final 32 modules had been

properly delivered and finally accepted. APP P173. Lease Schedule 2 also established the commencement date of the Lease as June 23, 2012.

28. On April 18, 2012, NABS assigned the Lease to R&F. NABS assigned the Lease with full recourse, so that in the event any of the Lease documents were rescinded, canceled, voided, or otherwise made unenforceable, NABS agreed to repurchase the lease. APP P175 ¶9. NABS warranted that the Lease was "enforceable in accordance with its terms" and agreed to indemnify R & F for all losses or expenses incurred by R & F. APP P175 ¶9. NABS also transferred the Modules and the Lease to R & F. APP P180.

29. The property on which the Modules were located was annexed to the City of Williston on May 24, 2012. APP P117 ¶49. On November 24, 2015 the City of Williston enacted Ordinance No. 1026, which eliminated the use of temporary crew housing in the City of Williston effective July 1, 2016. APP P219. Temporary housing units were heavily regulated by the City of Williston, by Williams County and generally throughout the area making up the Bakken Formation. Periodic moratoria on workforce housing were either in place or shortly thereafter put in place, limiting generally the type and number of temporary units. When the Lease was signed on August 30, 2011, the property on which the Modules were located was adjacent to the city limits of Williston. See APP P190. The City of Williston could have exercised its extraterritorial zoning jurisdiction under N.D.C.C. § 40-47-01.1 at any time, a fact which was, or should have been, known by the parties.

30. By letter dated March 31, 2016, Cudd, through its Senior Attorney, Elizabeth Kelly, terminated the Lease effective July 1, 2016. APP P186. When Cudd terminated

the Lease, an event of default occurred and R & F accelerated the remaining payments due under the Lease, see APP P152 ¶8 (i).

31. Renner testified that there were a total of twelve (12) payments remaining under Lease at the time Cudd terminated the Lease. Tr. 70; 2-8. In addition to the payments due under the Lease, R&F is entitled to 5% late charges and indemnity from Cudd and RPC for all claims, causes of action, damages and liabilities, including reasonable attorney's fees. Tr. 70; 11. APP PP151-152 ¶4, 8.

32. Ordinance 1026 was enjoined by Order of the North Dakota United States District Court, and superseded by Ordinance No. 1050, which changed the effective date of the termination of temporary workforce housing occupancy to September 1, 2016. APP P224.

33. Prior to the parties entering into the Lease there had been substantial publicity and substantial evidence before the Trial Court about numerous news articles about man camps, ongoing governmental regulations and communities wanting to see more permanent housing in place. APP PP195-207. On May 2, 2010, the Bismarck Tribune ran an article quoting Williston's Economic Development Director that only one additional temporary housing site was likely to be approved within the city limits of Williston, and that zoning approval was limited to two years outside the city limits to the City of Williston, subject to review at that time: "We'll all give them a little latitude, but we want to see it settle into something permanent, we're not going to permit these endlessly. We want to see permanent housing developed, though we do know we need a percentage of that (temporary housing)." Lauren Donovan, *Temporary Housing Dots the Landscape of Oil Towns*, Bismarck Tribune, May 2, 2010, available at

http://bismarcktribune.com/news/the-changing-landscape/temporary-housing-dots-the-landscapes-of-oil-towns/article_5f4c4c8c-55ae-11df-998f-001cc4c03286.html. APP P194.

34. Bonding requirements were approved by the Williams County Planning and Zoning Commission for cleanup bonds for all new man-camps to ensure developers were taking preservation of the land and cleanup seriously. Sun Staff, *Man Camp Developers Required to Buy Cleanup Bonds*, The Jamestown Sun, May 22, 2011 available at http://www.jamestownsun.com/content/man-camp-developers-required-buy-cleanup-bonds. APP P201. On August 9, 2011 the Watford City Council put a one-year moratorium on man camps. City of Watford City, City Council Minutes August 9, 2011 at http://cityofwatfordcity.com/Department/Council/2011-Meeting-Minutes. APP P202.

35. On September 12, 2011, not even two weeks after the Lease was signed and prior to the issuance of the CUP, the Williams County Commission put a six-month moratorium on all new applications for temporary housing. Nick Smith, *County: No New Man Camps*, Williston Herald, September 13, 2011, available at http://www.willistonherald.com/news/county-no-new-man-camps/article_d23fc65c-d9ee-5602-82c5-19fa5c1354bf.html. APP P205.

36. Tate Cymbaluk, Williston City Commissioner, was quoted as stating "I personally think the moratorium on man camps is going to stay more than six months." Jill Edson, Williams County Planning and Zoning Administrator stated that the growth of projects throughout the county had spiraled out of control. She stated that Williams County was in the early stages of having a new comprehensive land use plan put together with the goal of having better zoning. Nick Smith, *Real Estate, Zoning Issues Cause Difficulty in*

the Bakken, Williston Herald, October 28, 2011 available at http://www.willistonherald.com/news/real-estate-zoning-issues-cause-difficulty-in-the-bakken/article_622c9971-9968-5785-ac2d-fb9c325b3b7d.html. APP P205.

37. The infrastructure problems associated with man camps were national news: "[T]owns like this one are denying new applications for the camps. In many places they have come to embody the danger of growing too big too fast, cluttering formerly idyllic vistas, straining utilities, overburdening emergency services and aggravating relatively novel problems like traffic jams, long lines and higher crime…In recent weeks, Williams County, where thousands of previously approved camp beds have yet to be built, and Mountrail County, where one-third of the population is living in temporary housing, imposed moratoriums on man camp development." A.G. Sulzberger, *Oil Rigs Bring Camps of Men to the Prairie*, N.Y. Times, Nov. 25, 2011 available at http://www.nytimes.com/2011/11/26/us/north-dakota-oil-boom-creates-camps-of-men.html. APP P207.

38. Regardless of whether this property was to be annexed by the City of Williston, the nature of this type of housing was tenuous even at the county level at the time the Lease was signed. By the very nature of the Conditional Use Permit granted for temporary housing units, the time frame for which the permit was granted was uncertain because the permit and housing were intended to be temporary.

39. **ARGUMENT**

40. **The trial court erred when it failed to give full effect to the agreement of the parties, NABS and Cudd, under the applicable provisions of the Uniform Commercial Code and determine that a finance lease was created by the parties.**

41. The applicable standard of review in relation to the interpretation of contracts has been summarized by this Court as follows:

> Assignments are interpreted in the same manner as contracts. Contract interpretation is governed by N.D.C.C. ch. 9–07. The primary purpose in interpreting contracts ... is to ascertain and effectuate the parties' or grantor's intent.
> The parties' intent is ascertained from the writing alone if possible. The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity. When the parties' intent can be determined from the contract language alone, interpretation of a contract presents a question of law. When an agreement has been memorialized in a clear and unambiguous writing, extrinsic evidence should not be considered to ascertain intent. When a contract's language is plain and unambiguous and the parties' intentions can be ascertained from the writing alone, extrinsic evidence is not admissible to alter, vary, explain, or change the contract. If a contract is ambiguous, extrinsic evidence may be considered to determine the parties' intent, and the contract terms and parties' intent become questions of fact. Big Pines, LLC v. Baker, 940 N.W.2d 616, 619 (N.D. 2020) (citations and quotations omitted).

42. It is worth noting—indeed, it is critical to an understanding of the parties' agreement—that both principals in R&F, James Renner and Alan Fischer, have long been involved in the trade of finance leasing, albeit individually and prior to the formation of R&F. Tr. P. 58-61. As a result, they are familiar with various customs and usages of trade applicable to finance leasing and the creation and operation of finance leases. Thus, they knew and understood that the transaction they were engaging in was a finance lease, and fully expected that it would be treated as such by the courts. Moreover, they therefore presumably knew that under the UCC, a finance lease was not required to take any particular form or use any "magic words" to make clear that the transaction at issue was intended to be a finance lease.

43. It is true that the Comment to Section U.C.C. 2A-103(g) [N.D.C.C. § 41-02.1-03], indicates that "Unless the lessor [R&F] is comfortable that the transaction will qualify as

a finance lease, the lease agreement should include provisions giving the lessor the benefits created by the subset of rules applicable to the transaction that qualifies as a finance lease under this Article." Given their substantial experience with finance leasing, had Messrs. Renner and Fischer been involved at the outset, when the agreement between NABS and Cudd was originally drafted, they undoubtedly would have included a specific provision to the effect that a finance lease was intended. However, nothing in the Code (or elsewhere in the law for that matter) requires that the finance lessor be a part of the transaction from the outset; in fact, the Comment also makes clear that after a prospective financier agrees to finance the transaction, *an existing agreement* may be assigned to the lessor; and while the Comment contemplates in this context that the assignment take place between the lessee (Cudd) and the finance lessor (R&F), followed by a lease-back to the lessee, nothing in the Code requires the transaction to take that form. Indeed, the very next paragraph of the Comment makes explicit that the "definition focuses on the transaction, not the status of the parties . . . Many leases that are leases back to the seller of goods . . . will be finance leases. This conclusion is easily demonstrated by a hypothetical. Assume that B [Cudd] has bought goods from C [NABS] pursuant to a sales contract. After delivery to and acceptance of the goods by [Cudd], [Cudd] negotiates to sell the goods to A [R&F] and simultaneously to lease the goods back from [R&F], on terms and conditions that, we assume, will qualify the transaction as a lease. . . . In documenting the sale and lease back, [Cudd] assigns the original sales contract between [Cudd], as buyer, and [NABS], as seller, to [R&F]. A review of these facts leads to the conclusion that the lease from [R&F] to [Cudd] qualifies as a finance lease. U.C.C. 2A-103, Cmt g. The only differences between that transaction—which is hypothetical and

intended as illustrative—and the transaction in the present case are that the initial arrangement between Cudd and NABS was a lease, rather than a sale, and the assignment of the lease to R&F was made by NABS, rather than by Cudd, but with Cudd's knowledge and participation as evidenced by the guaranty executed by its parent company, RPC.

44. Thus, focusing on the essence or reality of the transaction, rather than the precise form it took, it is clear that the parties intended and effectuated a finance lease. Agreement is defined under the Uniform Commercial Code as follows:

> "Agreement", as distinguished from "contract", means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided under § 1-303.
> N.D.C.C. § 41-01-09

45. While it's true that the *contract* between Cudd and NABS did not by its terms specify that it was a finance lease, it is clear from the facts that *the bargain of the parties in fact* contemplated that a finance lease was intended. This is made abundantly clear from the testimony of Morken—a principal of NABS—who, when questioned about the structure of the agreement testified: "They [Cudd] asked if I could find somebody else to finance it, basically. You know, in other words, they would be more interested in somebody else's money and they'd enter into the lease agreement." Tr. 17.

46. Furthermore, after trying to locate financing from someone he knew in Fargo, Morken found financing from R&F, a fact known to Cudd and its parent company, RPC, as evidenced by the guaranty signed by RPC on June 5, 2012. APP P183. Thus, not only was the transaction properly structured as a finance lease when it is considered in its entirety, the parties' bargain in fact—despite the absence of any "magic words" in the

contract between NABS and Cudd—amply demonstrates that a finance lease was intended, and the trial court erred as a matter of law in determining otherwise.

47. **Under a proper interpretation of the Uniform Commercial Code, NABS complied with the requirements necessary to create a finance lease.**

48. Properly construed, the primary purpose of a finance lease is to enable the lessee—here Cudd—to obtain goods it requires from a supplier—here NABS—through the financing of a third party—here R&F. Essentially, the requirements set forth in §2A-103(g) [N.D.C.C. § 41-02.1-03] regarding the timing of the transaction and the various notice provisions are to ensure that the lessee (Cudd) is protected in the event that there is a problem with the goods, a situation that simply does not exist in this case. See U.C.C. 2A-103, cmt g ("Due to the limited function usually performed by the lessor, the lessee looks almost entirely to the supplier for representations, covenants and warranties."). Cudd, as the lessee, has not asserted that the goods supplied by NABS were in any way defective or did not live up to any promises or warranties regarding the quality of the housing units; nor is there any question regarding whether NABS lived up to its obligations under the parties' agreement. It is well established in both North Dakota law and the common law that the maxim, *cessante ratione legis cessat ipsa lex,* is applicable here: "when the reason for a rule ceases the rule itself ceases." See Nelson v. Ecklund, 68 N.D. 724, 283 N.W. 273 (1938); Allen v. Larson, 64 N.D. 727, 256 N.W. 178 (1934); State v. Blum, 58 N.D. 549, 226 N.W. 694 (1929); Messer v. Bruening, 25 N.D. 599, 142 N.W. 158 (1913). Stated slightly differently, although the law speaks in general terms, it is subject to the restraint that, when the reason on which it is founded fails, it also fails. Id. Thus, to the extent that the reason for the provisions in U.C.C. § 2A-103(g)

[N.D.C.C. § 41-02.1-03] is to protect the lessee by ensuring that it has recourse should the goods that are supplied fail to perform as intended, and that reason is simply inapplicable in the present case, a technical application of that section of the UCC, as the trial court engaged in, was erroneous. It is clear that the reason for the technical requirements of U.C.C. § 2A-103(g) simply do not apply; thus, the trial judge erred in applying them, and especially in applying them in effect by rote.

49. It is, perhaps, understandable that the trial court was confused, and therefore misapplied the UCC's provisions to determine that no finance lease existed, since the nomenclature used by the parties in their original agreement—that of lessor-lessee—although correct, is not the finance lease at issue in the case before the Court. As the Comment makes clear:

> A finance lease is the product of a three-party transaction. The supplier [NABS] manufactures or supplies the goods pursuant to the lessee's specification, perhaps even pursuant to a purchase order, sales agreement *or lease agreement between the supplier and the lessee* [NABS and Cudd]. *After the prospective finance lease is negotiated,* a purchase order, *sales agreement,* or lease agreement *is entered into by the lessor* [NABS] *(as buyer or prime lessee)* or an existing order, agreement or lease is assigned by the lessee to the lessor, and the lessor and the lessee then enter into a lease or sublease of the goods. U.C.C. § 2A-103(g), cmt, g, (brackets and emphasis added).

This is precisely what occurred in the present case: NABS and Cudd had an agreement pursuant to which, at Cudd's request, NABS agreed to supply Modules; thereafter, pursuant to the parties' understanding, NABS assigned that agreement to R&F for the sole purpose of R&F financing the transaction between NABS and Cudd; and RPC, the parent company of Cudd, with the full knowledge and consent of Cudd, and having expressed complete familiarity with the transaction and with Cudd's "affairs, business, operation and condition of Cudd and its assets" (APP P183), agreed to guaranty Cudd's

performance under the original agreement, with the agreed "commencement date" of June 5, 2012. APP P181.

50. **If the parties' agreement, making the effective commencement date of the lease June 5, 2012, is for some reason found to be ineffective for purposes of creating a finance lease with respect to the first 28 units, the agreement should be deemed severable and a finance lease should be found to exist with respect to the final 32 units.**

51. As made clear previously, properly interpreted, U.C.C. 2A-103(g) [N.D.C.C. § 41-02.1-03] permits the parties to agree that a particular transaction is a finance lease even if it might not meet the technical requirements of a finance lease as set forth in the Code, and here, the parties, by specifying the effective commencement date of the lease to be June 5, 2012, and by modifying their original lease in April 2012, manifested their intent that the entire transaction should be viewed prospectively from that point forward, thereby effectively creating a finance lease with regard to all of the housing units. Moreover, even assuming, *arguendo,* that the technical timing requirements of U.C.C. § 2A-103(g) were not met with respect to the first 28 units delivered to Cudd, they were clearly met with respect to the delivery of the final 32 units. As such, if the agreement between the parties is severable or divisible, at minimum, the final 32 units would qualify as having been delivered under a finance lease, and R&F would be entitled to enforce at least that portion of the finance lease as against Cudd and, pursuant to the guaranty, Cudd's parent company, RPC. Moreover, both under the facts and the applicable law, the contract is severable or divisible.

52. North Dakota, like the vast majority of American jurisdictions, accepts and applies the concept of severability or divisibility, so that, even if a portion of the parties' contract is unenforceable or ineffective as a finance lease—as determined by the trial court—that portion can be severed from the contract and the remainder of the contract enforced, as intended by the parties, as a valid finance lease. See generally In re Racing Services, Inc., 594 B.R. 678 (Bankr. D.N.D. 2018) (applying North Dakota law) Hofmann v. Stoller, 320 N.W.2d 786 (N.D. 1982); Matter of Guardianship of Sorum, 273 N.W.2d 710 (N.D. 1979); Kopald Elec. Co. v. Mandan Creamery & Produce Co., 76 N.D. 503, 37 N.W.2d 253 (1949); International Harvester Co. of America v. Olson, 62 N.D. 256, 243 N.W. 258 (1932); Schlosser v. Moores, 16 N.D. 185, 112 N.W. 78 (1907); see also Richard A. Lord, WILLISTON ON CONTRACTS §§ 45:1 through 45:13 (4th Ed. 2014 and Supp. 2019) [hereinafter LORD, WILLISTON]; Restatement (Second) of Contracts § 240 [hereinafter RESTATEMENT (2d)].

53. "It is well established that whether a contract is entire or divisible is controlled by the intention of the contracting parties . . . In this connection, the intent of the parties as revealed by the express contract terms or language is generally held to be the determinative factor in deciding whether a contract is divisible or entire. An express provision that the contract shall be divisible, while not always regarded as conclusive, will generally be given considerable weight." LORD, WILLISTON, § 45:5 (footnotes omitted); see also § 45:6, regarding the effect of a "severability clause", discussed further below.

54. Indeed, both the North Dakota Supreme Court and a federal court applying North Dakota law have indicated or held that the presence of a severability or divisibility

provision in the parties' contract manifests a sufficient intention on their part to conclude that contract is severable. Thus, in International Harvester Co. of America v. Olson, the defendant purchased a combine together with certain attachments for a total price of $2,140.50 plus freight, the contract separately listing the attachments and their respective prices; a clause in the contract also provided: "It is agreed that this order shall be divisible as to each machine and attachment for which a separate price is named, and the failure of any article to fill the warranty shall not affect the liability of the Purchaser for any other article offered." 62 N.D. 256, 243 N.W. 258, 261 (1932). The combine failed to work properly and the defendant so notified the seller, who nevertheless refused to return the notes the defendant had executed for the unpaid purchase price, or to cancel the chattel mortgage on the property sold and other personal property owned by the defendant. The plaintiff asserted numerous bases as to why it was entitled to foreclose the chattel mortgage and otherwise enforce the transaction; the trial court held that the plaintiff was entitled to the price of the attachments—approximately $367—rendering judgment against the defendant for that amount, but also declined to credit the defendant for the cost of the freight he had paid, and failed to cancel the notes and mortgage the defendant had signed. Both parties appealed, and the Supreme Court of North Dakota reversed the judgment in part, holding, *inter alia*, that the defendant had properly rescinded the transaction as to the combine, and was therefore entitled to the return of his notes as well as a proportionate share of the freight paid for the combine. However, the supreme court affirmed, as modified, the trial court's judgment that the defendant had to pay for the attachments, stating: "Though the defendant is not required to pay for the combine, he is required to pay for the attachments. *Each was bought on the separate contract. There was*

no rescission as to them, and the evidence shows he was satisfied with them and agreed to retain them. Hence the decision of the lower court is affirmed in this respect." Id. at 263 (emphasis added).

55. Since the sale of the attachments was set forth in the same contract as the combine, the only way the court could have reached this conclusion was by giving effect to the severability clause quoted above. It thus seems clear that for nearly a century, North Dakota has determined that a severability provision effectively communicates the parties' intent that their contract is to be deemed severable or divisible.

56. That this is so is made even more clear by a recent federal decision, in which the bankruptcy court, applying North Dakota law, specifically held that a severability provision indicated an intent to render a contract divisible. The case, In re Racing Services, Inc., involved a multi-party settlement agreement entered into following a criminal conviction and forfeiture order which were later overturned. 594 B.R. 678, 683 (Bankr. D.N.D. 2018). Following the reversal of the criminal conviction and forfeiture, two parties to the settlement agreement, the United States and the Trustee, in effect rescinded their part of the settlement, and the question was whether this affected the remainder of the settlement agreement, between the Trustee and a major client of the Debtor, PWE. The court said: "The Settlement Agreement contains the following severability provision:

> Partial Invalidity. Any provision of this Agreement which is found to be invalid or unenforceable by any court in any jurisdiction shall, as to that jurisdiction, be ineffective to the extent of such invalidity or unenforceability, and the invalidity or unenforceability of such provision shall not affect the validity or enforceability of the remaining provisions hereof.
> . . .

> The plain language of the severability clause makes clear that the Settlement Agreement is to remain effective even if a portion is invalidated. In the absence of substantial evidence to the contrary, the Court assumes that the unambiguous language of a contract reflects the parties' intentions. Here, the contract language is clear. PWE and Trustee both attest that they intended the severability clause to have its plain meaning at the time they entered into the Settlement Agreement. The severability clause makes clear that, regardless of the actions of the United States, the contract remains enforceable between Trustee and PWE. Id. at 691; Compare Monarch Photo, Inc. v. Qualex, Inc., 935 F. Supp. 1028, 31 U.C.C. Rep. Serv. 2d 340 (D.N.D. 1996) (determining that RESTATEMENT (2d) § 240 reflects North Dakota law, and ruling that the *absence* of a severability clause or other indication that the parties intended their agreement to be divisible resulted in an entire agreement).

57. The court in Racing Services also addressed North Dakota law *in the absence* of a severability clause, essentially reiterating the test set forth in RESTATEMENT (2d) § 240, and stated:

> Even if the Settlement Agreement did not contain a severability clause, the Court would not assume that acts of rescission by one or two parties to a multi-party contract invalidate the entire contract. Under North Dakota law, a contract is severable, even in the absence of a clear severability clause, if the contract has two or more parts that are 'not necessarily dependent on each other.' Hofmann v. Stoller, 320 N.W.2d 786, 789 (N.D. 1982). The test is 'whether or not the parties consented to all the promises as a single whole, so that there would have been no bargain whatever if any promise or set of promises were struck out.' Id. 'Whether or not a contract is severable ordinarily depends upon such factors as "the terms of the contract, its subject matter, and other circumstances disclosed by the evidence, including the conduct of the parties." ' Matter of Guardianship of Sorum, 273 N.W.2d 710, 712 (N.D. 1979) (quoting Kopald Elec. Co. v. Mandan Creamery & Produce Co., 76 N.D. 503, 37 N.W.2d 253, 256 (1949)).
>
> There are two distinct parts to the Settlement Agreement. There is the part between Trustee and the United States and the part between Trustee and PWE. These two parts are related only in the sense that they both settle claims and dispose of property of the bankruptcy estate. They are not 'dependent' on each other. Even if the Court did not find the severability clause enforceable, which it does, the parties' inclusion of that clause in the contract is further evidence that the parties intended the agreement to be severable. The actions of the parties also strongly indicate that they intended it to be severable. The United States returned the property to the bankruptcy estate over a decade ago. Since that time, neither PWE nor Trustee has taken

> any actions to indicate that they consider the Settlement Agreement to be void.
>
> There is no indication in the language of the Settlement Agreement or in the evidence presented by the parties that 'the parties consented to all the promises as a single whole' such that the invalidity of one portion would invalidate the entire agreement. Hofmann, 320 N.W.2d at 789. This Court finds that under the terms of the agreement and North Dakota law, the Settlement Agreement is severable. The Court further finds that any action to void the agreement between Trustee and the United States has no impact on the continuing validity of the Settlement Agreement between Trustee and PWE. Id. at 691-92.

58. In the instant case, the contract between NABS and Cudd contains a severability clause even more clear than that in the Racing Services case. Paragraph 21 of the parties' lease agreement provides:

> The illegality, invalidity or unenforceability of any term, condition, covenant or provision of this Lease shall in no way impair or invalidate any other term, condition, covenant or provision of the Lease, and all such other terms, conditions, covenants and provisions shall remain in full force and effect.
> APP P156.

59. Thus, even if the initial agreement between the parties is ineffective as a finance lease due to a technical failure with respect to the timing of the original transaction between NABS and Cudd, the April 18, 2012, April 23, 2012 and June 5, 2012 transactions—each of which makes clear that it is part and parcel of, or is intended to transfer NABS's interest in the original lease agreement, or both—clearly manifest an intention of the parties to treat the lease as severable, and equally clearly manifest an intention that the 32 units yet to be delivered were to be financed by R&F, under a transaction qualifying as a finance lease.

60. Indeed, no other reasonable reading of the April 2012 documents is possible except to confirm that the parties viewed the lease as severable, and intended to create a finance lease with respect to the final 32 units, even assuming there had been a technical

failure to create a finance lease with regard to the initial 28 units. The trial court's contrary determination regarding both the original lease and the April and June transactions adding R&F is manifestly and clearly erroneous.

61. A review of the documents and the transaction from the outset confirms this beyond question. For example, Paragraph 2 of the lease clearly contemplates that each module or unit would be occupied by Cudd as its construction was completed and, indeed, workers moved in to the units and Cudd paid an agreed pro rata rent as the units were built and made available, as contemplated by Paragraph 4(a) of the Lease. APP P150, 151. This partial performance by the parties strongly suggests that they considered the lease to be divisible, as did the separate acceptance of the first 28 units by Cudd even though NABS had agreed to, and would eventually, deliver all 60 units called for by the Lease agreement. See LORD, WILLISTON, §§ 45:10, 45:11.

62. In addition, Paragraph 3 of the original lease agreement specifically gave Cudd the right to terminate the transaction if NABS failed in any way to perform its duties under the contract. APP P151. Nevertheless, after it had become apparent that NABS had only completed performance with respect to 28 units—and that, well past the contemplated final completion date of November 2011, giving Cudd a right to terminate the agreement—Cudd instead entered into what amounted to a modification or addendum to the original lease pursuant to which it not only agreed to continue occupying the 28 units NABS had delivered, but further agreed to the addition of R&F as the assignee of the lease, thereby in effect creating a finance lease (assuming the original lease did not qualify as a finance lease) with respect to the final 32 units. Importantly, this April 18, 2012 agreement (APP P170), as well as the April 23, 2012 (APP P173), specifically, by

their terms, make clear that they form a part of the original lease—effectively modifying that agreement, so that both transactions together would constitute a finance lease. Moreover, these documents reiterate the separate consideration to be paid for the previously completed and delivered 28 units. Thus, to the extent that, under North Dakota law, the test for severability or divisibility is whether a single consideration is contemplated by the parties, or whether they contemplate a separate consideration for separate parts of their transaction, it is clear that NABS and CUDD, from the outset, and certainly after part performance had been rendered, contemplated a divisible contract. See Nichols & Shepard Co. v. Charlebois, 10 N.D. 446, 88 N.W. 80 (1901). In Nichols, the court said, as to a contract for the sale of a thresher rig consisting of half a dozen listed parts, but calling for a single price or consideration for the machine:

> The contention of counsel for appellant [seller] is that the contract is divisible, and hence that the failure of the separator [one of the listed parts] to conform to the warranty did not authorize defendants to rescind the contract as to the engine and other property purchased by them, and which complied with the warranty.
>
> If the contract was divisible, then, of course, the failure of the separator to comply with the warranty would not authorize defendants to rescind the contract in toto, especially in view of the express provisions of the contract to the contrary. It will be noticed that the contract is for a complete threshing outfit, at the stipulated price of $2,820 and freight. No price was fixed, either in the written contract or otherwise, on any of the separate articles. We are therefore confronted squarely with the question as to whether or not a contract for the purchase of several distinct articles for one consideration may be a divisible contract. The general rule enunciated by the authorities is that if the contract is for the sale of several distinct things, but all for one consideration, it is entire. 'Whether a contract is entire or severable depends, in general, upon the consideration to be paid, not upon its subject. If the consideration is single, the contract is entire; but, if the consideration is expressly or by necessary implication apportioned, the contract is severable. When the consideration is entire and single, the contract must be held to be entire, although the subjects may be distinct and independent items.'

> ". . . [T]he contract in the case at bar must be held to be an entire contract. By the failure of the parties to fix a price on the separate articles, they have made it impossible for the court to treat the contract as divisible, although certain language in the contract indicates that such was their intention." Id. at 82.

63. Finally, with regard both to the severability of the parties' agreement and with regard to its nature as a finance lease, the guaranty signed by Cudd's parent company, RPC, on June 5, 2012, contains a critical acknowledgement in its fourth paragraph: "The guarantor agrees that the guarantor *is now and will be familiar with the affairs, business, operation and condition of Cudd* and its assets." APP P183 (emphasis added). Thus, RPC must be charged with knowledge that Cudd had treated the initial 28 units as a severable portion of the contract for 60 units, and that the remaining 32 units were therefore also considered to be a severable portion of the agreement. Moreover, to the extent that Cudd was aware that NABS had entered into an agreement with R&F for the sole purpose of financing NABS's completion of the remaining 32 units—that is, that NABS, Cudd and R&F had entered into a finance lease and made it a part of the original lease, thereby modifying that agreement—RPC is equally charged with knowledge of that transaction, and, by entering into the guaranty agreement, must be held to have assented to it. No other meaning of the above quoted phrase is reasonable, and the trial court committed reversible error in determining otherwise.

64. **The trial court erred in finding the defenses of impossibility of performance and frustration of purpose applied to Cudd's breach of the Lease Agreement.**

65. The lower court erred in determining that the doctrines of impossibility of performance (or impracticability) and frustration of purpose applied to relieve Cudd from its duty to pay rent under the terms of the Lease. The lower Court found these doctrines applicable and used the same facts and conclusions of law to support its decision: that

despite the foreseeability that the real estate on which the modules were sitting would become annexed into the city limits of Williston and the modules would be prevented from being used for housing, it was a basic assumption of the parties that these events would not occur.

> [T]he doctrine of frustration of purpose [and] the doctrine of impossibility ... are closely related. Frustration of purpose 'occurs when "after a contract is made, a party's principal purpose is substantially frustrated *without his fault* by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made."' The doctrine of impossibility or impracticality [sic] is similarly described as '[w]here, after a contract is made, a party's performance is made impracticable *without his fault* by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary. Huber v. Farmers Union Serv. Ass'n of N. Dakota, 2010 ND 151 ¶17, 787 N.W.2d 268, 274 (quoting Red River Wings, Inc. v. Hoot, Inc.,2008 ND 117, ¶56, 751 N.W.2d 206 (2008)).

66. The doctrines of impossibility and frustration were also discussed in Tallackson Potato Co., Inc. v. MTK Potato Co., 278 N.W.2d 417, 424 n.6 (N.D. 1979). In that case, the plaintiff and defendant, both of whom were members of a cooperative (co-op) that bought and processed its members' potatoes, agreed that the plaintiff would sell, and the defendant purchase, a specified quantity of potatoes. Id. at 420. Subsequently, the co-op informed its members that it would no longer pay for potatoes according to a published schedule, but would instead defer those payments; the defendant buyer argued unsuccessfully that the co-op's failure to remit payments to it relieved it of the obligation to pay the seller. Id. To the buyer's argument that impossibility and/or frustration relieved it of the responsibility to pay, the court noted: "Neither of these doctrines is apposite." Id. at 424 n.6.

> To establish impossibility, MTK [the buyer]must demonstrate that, among other things, its performance is strictly impossible or impracticable 'because

> of extreme and unreasonable difficulty, expense, injury or loss,' [citations, including both the 1st and 2d Restatement of Contracts] and that the Co-op's failure rendered its performance not only subjectively but also objectively impossible or impracticable. . . . In other words, MTK must show that it cannot perform and that performance could not be completed by anyone. MTK has satisfied neither of these requirements. Under the contract, MTK obligated itself to pay money. MTK has produced no evidence to indicate that its performance was strictly impossible or impracticable because of extreme and unreasonable difficulty, expense, injury, or loss. Furthermore, disregarding MTK's individual capabilities, which are irrelevant to the issue of objective impossibility and impracticability, we conclude that the obligation to pay money remained both objectively possible and practicable. . . .
>
> In the words of Restatement of Contracts 2d, s 285, at 77 (Tent. Draft No. 9, 1974) [now found at Restatement (2d) § 265], frustration occurs when 'after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made.' . . . Here, even if we accept the argument that both parties thought the Co-op would continue to honor its payment schedule, the record does not substantiate a conclusion that the nonoccurrence of this event was a 'basic assumption on which the contract was made.' We conclude, therefore, that the doctrine of frustration is also inapplicable.
> Id. (citations omitted)

67. It is clear from the forgoing that, while the doctrines are similar defenses to a breach of contract, they are not the same as the lower court incorrectly concluded in this case.

68. In order to prevail under the doctrine of impossibility, Cudd must show that it cannot perform and that performance could not be completed by anyone. Clearly that is not the case, since the lease allowed Cudd to use the modules for other purposes than short-term housing or to use them elsewhere with the permission of the lessor, or to sublet the modules without the need to obtain prior permission. Moreover, as in the Tallackson case, Cudd's principal obligation is simply to pay money, something it remained capable of doing irrespective of anything external to the parties' agreement.

69. Under the plain language of the contract Cudd agreed to lease from NABS sixty 12'x 24' temporary housing modules and obligated itself to make payments under the Lease to NABS and thereafter to R&F. It presented no evidence to indicate that its performance (paying money) was strictly impossible or impracticable because of extreme and unreasonable difficulty, expense, injury or loss. Cudd's obligation to pay money to R&F remained objectively possible and practicable. After Cudd accepted the modules, its sole obligation was to pay money. The lower court made no findings on objective or subjective impossibility. Whether Cudd had a use for the modules for temporary housing does not relate to its performance, that relates to the purpose that Cudd had for the Lease. Cudd could still objectively pay rent to R&F. In short, its determination that impossibility of performance excused Cudd from its obligations under the lease was erroneous, and the trial court should be reversed on that basis.

70. Nor can Cudd prevail under the related doctrine of commercial impracticability, and the trial court erred in ruling that doctrine applicable. The doctrine of impracticability is a "kissing cousin" of impossibility and the related doctrine of frustration of purpose. Initially developed to ameliorate the harshness of the absolute rule of impossibility which requires that a performance be objectively impossible not only for the defendant, but for any person before the defendant will be excused from performance. See Lord, WILLISTON ON CONTRACTS §§ 77.1 *et seq.* In effect, impracticability requires that the contracted for performance, while capable of being rendered, has, due to unanticipated circumstances at the time the contract was entered, become "impracticable due to extreme and unreasonable difficulty, expense, injury or loss to one of the parties. . . However,

impracticability means more than a mere change in the degree of difficulty or expense . . . unless the increase or other change is well beyond the normal range." Id. at § 77.1

71. Moreover, impracticability remains "a strict standard that can only be called upon when circumstances truly dictate and is not available when under the contract one party assumes the risk that fulfillment of a condition precedent will be prevented." Id. Thus, when, as in the instant case, the alleged cause of the impracticability is foreseeable, and not wholly unanticipated, or one party has assumed the risk that the event allegedly giving rise to the doctrine would occur, impracticability is not available as an excuse for nonperformance. Id.

72. As previously indicated, see ¶¶ 24 *et seq., supra*, it was generally known—as evidenced by the prior actions of the city of Williston and Williams County in adopting increasingly stringent requirements for conditional use permits as well as the numerous media reports, beginning well before the parties in the present case entered into their Lease agreement in August 2011—that the city and county were using moratoria, zoning restrictions and time limitations to restrict the issuance and availability of conditional use permits governing temporary housing units throughout the Bakken Formation. Thus, Cudd, when it entered into the Lease agreement with full knowledge of, or reason to know, that further and more stringent restrictions were not only possible, but likely, should have anticipated the possibility of annexation and/or additional city or county-wide limitations on the construction and use of these or other housing units. As such, the circumstances allegedly giving rise to the defense of impracticability were not unanticipated, and for that reason alone the defense is inapplicable, and the trial court committed reversible error in ruling otherwise.

73. If the foreseeability of these restrictions were not in itself sufficient to overcome the defense of impracticability, the Lease agreement itself places the risk and expense of obtaining any needed permits and otherwise complying with any relevant governmental requirements on Cudd. The Lease, according to its clear terms, placed a continuing obligation on Cudd to see to it at all times during the effectiveness of the Lease that the housing modules complied with all relevant laws or governmental regulations:

> Subject to any other provision of the Lease, Lessee shall throughout the Term, at its sole cost and expense, comply and cause the Modules and Real Property to comply with all laws, ordinances, orders, rules, regulations, and requirements of all federal, state, and municipal governments or other governmental or quasi governmental authorities having jurisdiction over the Modules or Real Property. APP P126 ¶ 26.

74. Nothing contained in the foregoing Lease provision limits Cudd's responsibility to compliance at the time the Lease was entered; indeed, by its terms, the provision contemplates a continuing obligation on Cudd's part to ensure that the modules complied with all governmental requirements imposed on the use of the modules. While Cudd's failure to do so, in and of itself, might not have given rise to an affirmative cause of action in favor of R&F (since whether Cudd ensured compliance with governmental edicts determined whether it could continue to use the modules for oil workers' housing, something that, absent some other breach by Cudd leading to R&F's possession of the units, inured solely to Cudd's benefit), the provision quite clearly placed the risk of a failure to ensure compliance on Cudd. As such, it was the height of perversion of language to misread the provision, as the trial court did in ¶ 102, to mean that Cudd met its responsibility "by not occupying the Modules after June 30, 2016." This reading, which fails to give effect to the plain meaning of the words used by the parties, is clearly erroneous and requires that the trial court be reversed.

75. For similar reasons, the doctrine of frustration of purpose is not available to Cudd, and the trial court erred by determining that it was. The doctrine of frustration is another common law construct designed to ameliorate the harshness of the impossibility doctrine. See generally, LORD, WILLISTON ON CONTRACTS §§ 77.95 *et seq.*

> The common thread in our cases about the application of the doctrine of frustration of purpose to discharge a contractual obligation focuses on the principal purpose or basic assumption of the contract and whether that principal purpose or basic assumption has been substantially frustrated without fault of the parties. Under those cases, the doctrine focuses on whether events have occurred after formation of the contract to frustrate the principal purpose or basic assumption of the contract and involves interpretation of the principal purpose or basic assumption of the contract. City of Harwood v. City of Reiles Acres, 2015 ND 859, ¶23, N.W.2d 13, 22 33, ¶23,(citing Silbernagel, 2011 ND 140, ¶ 16, 800 N.W.2d 320; WFND, 2007 ND 67, ¶ 18; Tallackson Potato, 278 N.W.2d at 424, n.6.).

76. Like impracticability, frustration requires that an event occur, the non-occurrence of which was a basic assumption of the parties, and the effect of which is to substantially frustrate the principal purpose for which the contract was made. Tallackson Potato Co., Inc. v. MTK Potato Co., 278 N.W.2d at 424 n. 6. Moreover, also like the doctrine of impracticability, for frustration to apply, as a general rule, the alleged frustrating event must not have been foreseeable. As WILLISTON puts it,

> Neither of these defenses [impossibility, including its modern counterpart, impracticability, or frustration] is available if the difficulties that frustrate the purpose of [the] contract or make performance impossible reasonably could have been foreseen by the promisor [Cudd] when the parties entered into contract. To apply the doctrine of commercial frustration, there must be a frustrating event not reasonably foreseeable and the value of the parties' performance must be totally, or almost totally, destroyed by the frustrating cause. Many problems are foreseeable and, in such cases, foreseeability will foreclose the use of the impracticability defense. If the risk of impossibility of performance was foreseeable, that contingency should have been addressed in the contract. The absence of such a contractual provision gives rise to an inference that this risk was assumed. The ability to foresee whether performance might become impossible is generally a relevant, but not necessarily dispositive, factor in determining the applicability of an

> impossibility defense; yet, there is no reason to look further when the risk was believed to be more than minimally likely, went to the central purpose of the contract, and could easily have been allocated in a different manner had the parties chosen to do so.
> LORD, WILLISTON ON CONTRACTS § 77.95

77. As noted previously, both the city of Williston and Williams County had for many years before the annexation and enactment of ordinances barring the use of temporary housing modules addressed the concerns related to the growth of this housing. Indeed, at least as early as May 2010—more than a year before the Lease was entered—media reports concerning these and similar housing units in booming oil towns, as well as the local communities' legislative responses to them, were appearing throughout western North Dakota. To suggest, as the trial court's factual and legal conclusions do, that annexation and restrictive zoning policies were unanticipated, is not supported by the record. In this case, it was entirely foreseeable and documented at the time the parties contracted that CUDD's use of the housing modules was for a temporary period of time and in no way guaranteed for the term of the Lease. The permits for these types of units were only granted for 2-year increments and in Cudd's own experience, only for 1 year. The chance that the Modules would only be able used for a temporary period of time was foreseeable. It was widely publicized and Cudd was personally familiar had knowledge because it applied for a 2-year permit and was only granted a one-year permit. APP PP129-211.

78. NABS originally approached Kelly Kelly at Cudd with a 2-year lease proposal and NABS negotiated for a longer 5-year term to lower the monthly payment. Tr. 18 L. 7-15. Jim Morken testified he proposed the two-year lease term because that was what the county was granting CUP: "I came back with a two-year lease proposal. The window

of a guaranteed use was… that's what they were granting was a two-year conditional use permits." Id. Morken testified had discussions with Kelly and Dan Bohannon from Cudd regarding the concerns over long-term permitting. Tr. 20-21.

> …I absolutely did not want to be the one responsible for obtaining permits. And then go beyond, you know, just the whole aspect of that risk of year-to-year wasn't going to be my responsibility in that risk, it was going to be Cudd's responsibility…Tr. 21.
>
> …I can give you the option of a two-year lease within the parameters of what you know we can get a conditional use permit for. You want it for 5 years? It's your responsibility to get permits for that because that's not on me; that's on you… Tr. 22.

Mr. Morken testified that he "absolutely" had discussions with Dan Bohanan and Kelly Kelly at the time they entered into the lease with Cudd, whether you had any discussions about what would happen if the law changed:

> …discussions with Dan Bohannon and Kelly Kelly had to with the fact that you only have two years guaranteed that this is a permit you're going to get. We don't know what the future's going to hold; whether it be the city or the county. The county could have just as well said we're not issuing conditional use permits anymore; we're not renewing your conditional use permit any more. But they still proceed to say, well, that's a risk that we'll have to take. Tr. 48-49.

79. Cudd negotiated the 5-year term of the Lease, under the Lease it was responsible for the permitting requirements and widely publicized governmental regulation of "man-camps" in neighboring Mountrail County, the moratorium on new man-camps in Williams County and the regulations in the largest city in Williams County, Williston.

80. Cudd knew, or should have known, that temporary housing units like those it agreed to lease from NABS would be subject to ongoing and increasingly stringent regulations—and might even be outlawed in some locales. As such, these events were completely foreseeable when the Lease was entered, and the defense of frustration of

purpose is simply unavailable. The trial court's conclusion to the contrary is erroneous, and its decision must be reversed.

81. **The District Court erred in denying R & F's Motion for attorneys' fees as a matter of law.**

82. The Lease Agreement provided in part at paragraph 8 as follows:

> 8. **Default and Remedies**. If a rental . . . If Lessee's default in the terms of this Lease cause Lessor to retain an attorney for the purpose of enforcing this Lease, Lessor shall be entitled to recover from Lessee the reasonable amount of the Lessor's attorney's fees, costs and disbursements in condition (sic) with the enforcement of this Lease. APP P152.

83. The Agreement for Assignment of Lease Agreement dated April 18, 2012 provided in part as follows:

> 4. **NABS' Warranties.** In addition to any and all warranties and representations set forth in the Lease Documents, NABS warrants and represents that: (1) . . . ; (2) . . .; (4) *all disclosures required by law were properly made by NABS to the Cudd*; (5) . . .; (6) *the Lease Documents are enforceable in accordance with their terms*; (7) *NABS has complied with all consumer protection, licensing, insurance, building codes, zoning requirements and other laws and regulations applicable to the Lease and the Modules*; (7) . . . ; (8) *the Cudd has accepted the Modules and the Lease is enforceable in accordance with its terms*; and (9) . . . . APP P175.

NABS also agreed to indemnify R & F to the full extent of all losses or expenses incurred by R & F as a result of such breach or error. APP P76¶9.

84. R & F treated Cudd's attempted cancelation of the Lease as a breach and started this action to enforce the terms of the Lease. Following the trial, the District Court, in its Findings of Fact, Conclusions of Law, and Order for Judgment, failed to address R & F's claim against NABS. The Clerk of the Supreme Court raised the issue of the finality of the Judgment with the parties and the remand resulted.

85. The District Court in its Order Granting Plaintiff's Motion to Amend Judgment

and Entry of Amended Findings of Fact, Conclusions of Law and Order for Judgment dated February 19, 2020 provided in part as follows:

> (2) The following paragraph shall be added to the "Order for Judgment" contained in the Order:
>
> 1. Plaintiff R & F Financial Services, LLC shall have and receive judgment against Defendant North American Building Solutions, LLC in the amount of $429,420.00 plus accrued late fees in the amount of $21,471.00, plus statutory interest from Jun 23, 2017, a the statutory rate of 6% per annum plus costs, plus disbursements and attorney's fees to be subsequently awarded pursuant of Rule 54, N.D. R. Civ. Docket #359.

86. R & F filed an unopposed Motion for attorneys' fees (Docket #361), which was rejected by the Court. The Court in its Order stating it would be inequitable to award R & F attorneys fees for the litigation in this matter. In doing so, the Court ignored the language of the Lease and the Assignment of Lease, which under the circumstances required NABS to indemnify R & F "*to the full extent of all losses or expenses incurred by R & F as a result of such breach or error."* The Court's failure to follow the contractual terms is error as a matter of law.

87. The construction of a written contract to determine its legal effect is a question of law for the court to decide. Dakota Partners, L.L.P. v. Glopak, Inc., 634 N.W.2d 520, 523 (N.D. 2001).

88. It is well established in North Dakota, that attorneys fee clauses in leases are enforceable. "Generally, parties may freely enter into an agreement for payment of attorney fees in a civil action. N.D.C.C. § 28–26–01(1)." T.F. James Co. v. Vakoch, 628 N.W.2d 298, 300 (N.D. 2001). Generally, a district court's decision regarding attorney fees is reviewable only if the district court abused its discretion in making the decision. Fode v. Capital RV Center, Inc., 1998 ND 65, ¶ 34, 575 N.W.2d 682; T.F. James Co. 628

N.W 2d at 300. A district court abuses its discretion when it acts in "an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law." Berg v. Berg, 2000 ND 37, ¶ 10, 606 N.W.2d 903; T.F. James Co., 628 N.W.2d at 300. The District Court abused its discretion in this case when it ignored the contractual language and denied R & F's motion for attorney's fees.

89. CONCLUSION

90. R & F respectfully requests this Court determine that the trial court erred as a matter of law, when it failed to give full effect to the agreement of the parties, NABS and Cudd, under the applicable provisions of the Uniform Commercial Code and determine that a finance lease was created by the parties. In the alternative, this Court should determine the trial court erred in finding the defenses of impossibility and frustration of purpose applied to Cudd's breach of the Lease Agreement. This Court should further find the trial court abused its discretion in denying R & F's Motion for attorneys' fees.

91. R & F respectfully request that this Court reverse the trial court's decision and remand this case for entry of judgment in favor R & F.

Dated this 15 day of June, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for Appellant, R & F Financial Services, LLC, and as the authors of the above brief, hereby certifies, in compliance with Rule 32 of the North Dakota Rules of Appellant Procedure, that the brief was prepared with the proportional typeface (Times New Roman) and does not exceed 38 pages.

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STATE OF NORTH DAKOTA) AFFIDAVIT OF SERVICE
) ss.
COUNTY OF CASS)

1. MELANIE WALKER, being first duly sworn upon oath, deposes and says that she is of legal age; that on June 15, 2020, she served the attached:

Appellant Brief and Appendix

2. Upon the following person(s):

Trevor Hunter
thunter@crowleyfleck.com

Kent Reierson
kreierson@crowleyfleck.com

3. Through ND Supreme Court E-Filing; and

North American Building Solutions LLC
Jim Morken, Registered Agent
1107 10th St. N.
Apt. A
Fargo, ND 58102

4. And by depositing the same with postage prepaid in the United States Mail at Fargo, North Dakota.

/s/ Melanie Walker
MELANIE WALKER

5. Subscribed and sworn to before me on June 15, 2020.

/s/ Joseph A. Turman
(S E A L) NOTARY PUBLIC
My Commission Expires: 8/29/2020

STATE OF NORTH DAKOTA) AFFIDAVIT OF SERVICE
) ss.
COUNTY OF CASS)

1. MELANIE WALKER, being first duly sworn upon oath, deposes and says that she is of legal age; that on June 11, 2020, she served the attached:

Appellant Brief and Appendix

2. Upon the following person(s):

Trevor Hunter
thunter@crowleyfleck.com

Kent Reierson
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