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6/20/2019 7:03 PM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

ALSCO, INC.,

Plaintiff-Counterdefendant-Respondent,

v.

FATTY'S BAR, LLC, an Idaho limited liability company,

Defendant-Counterclaimant-Appellant.

And

CLAY ROMAN, an individual dba FATTY'S,

Defendant.

Supreme Court Docket No: 46184-2018
Ada County No.: CV01-17-8091

OPENING BRIEF OF DEFENDANT-COUNTERCLAIMANT-APPELLANT FATTY'S BAR, LLC

Appeal from the District Court of the Fourth Judicial District of the State of Idaho In and For the County of Ada

Honorable Steven Hippler Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This appeal raises questions of law related to the legal standards and application of the doctrine of successor liability – a limited judicial exception to the general rule that a company purchasing the assets of another company is not liable for its debts. Appellee Alsco, Inc. ("Alsco") obtained a judgment against its former customer, Appellant Fatty's Bar, LLC ("Fatty's LLC"), on the alleged basis that Fatty's LLC wrongfully discontinued its services in violation of a contract which Alsco had entered into with a wholly different entity that operated a previous restaurant/bar at the same location. Even more concerning is that Appellant Fatty's Inc. was found not to be liable for an unpaid debt of the prior company– but instead was ordered to pay liquidated damages because it discontinued the services of Alsco which Alsco claimed to be a breach of five-year automatic renewal clause in a contract. Thus, Appellant has been found liable as if it were a signatory on a five-year contract signed by another company before Appellant was even in existence – and which it undisputedly did not even see until the alleged breach occurred.

The judgment based on successor liability must be set aside because 1) Alsco did not state a sufficient claim and present sufficient evidence to meet its burden of proving Fatty's LLC was a successor corporation to Alsco under the doctrine of successor liability; 2) the statute of frauds precludes Alsco from enforcing a five-year auto-renewal and liquidated damages clause against Fatty's LLC because it did not sign the contract; and 3) successor liability does not allow a purchasing company to be held liable in an amount in excess of the amount which the purchasing company paid for the assets of the predecessor company.

This case presents legal issues of first impression in Idaho as they relate to the application of the doctrine of successor liability. That doctrine was designed to be an exception to the general rule that a purchasing corporation is not liable for the debts of a selling corporation. The trial court greatly expanded the doctrine of successor liability beyond its established use in order to find Fatty's LLC liable for liquidated damages in a contract Fatty's LLC never signed. This appeal is based on undisputed facts established during the court trial. Appellant requests the Court review the doctrines of successor liability and the statute of frauds as they apply to these undisputed facts.

B. Statement of Facts.

As explained in detail in the Course of Proceedings section below, this case was tried before the trial court without a jury. Alsco appeared through a local corporate representative, Mike Ginnetti, who did not work for Alsco until 2015 and therefore had no personal knowledge of the events leading up to the alleged breach of contract. Alsco called only four witnesses: Mike Ginnetti; Justin Zora (via deposition testimony); Defendant Clay Roman; and Steve Masonheimer, the owner of Appellant Fatty's LLC. The facts are, for the most part, undisputed.

1. Plaintiff/Respondent Alsco, Inc.

Alsco, Incorporated ("Alsco") is a linen supply company that is headquartered in Salt Lake City, Utah, with a local office in Boise, Idaho. Alsco is in the business of supplying and servicing food and beverage linens. Alsco provides these linen services to its customers on a regular, usually weekly, basis by supplying linens such as bar towels, napkins and table cloths to the business for use, and then services the business by picking up, laundering, and delivering the supplies on a regular (usually weekly) basis. R. p. 2.

Customers obtain services from Alsco by signing long-term pre-printed form textile rental service agreements wherein they state the items they are wanting Alsco to provide. Tr. p. 66 LL 5-8, p. 69 LL 1-3. Alsco claims it will not provide any services until the textile services agreement is signed. Tr. p. 66 LL 16-23. Alsco has been using the same pre-printed form contract since at least 2011. Tr. p. 66 L 19 – p. 70 L. 16. The purpose of the form textile services agreement, according to Alsco, is for the customer to identify which products Alsco will supply. Tr. p. 67 LL 10-15. These items are identified using a detailed "Schedule A," which is attached to a one-page "Terms and Conditions" sheet. Tr. Exh. 1. The Terms and Conditions Sheet is in smaller print, with fifteen enumerated terms containing legalistic language and conditions. Tr. Exh. 1.

In the fine print of the Alsco Contract, under terms and conditions, Alsco includes a section titled "Term," which sets forth a five-year auto-renewal clause:

> 2. **Term.** This Agreement shall remain in full force and effect for a period of 60 months, commencing on the date of installation of the goods, and shall be automatically renewed for consecutive 60 month periods thereafter unless either party shall give to the other party written notice of termination by registered mail at least 90 days prior to the expiration of the term then in effect.

Trial Exh. 1. Tr. pp. Tr. p. 66 L 19 – p. 70 L. 16

Another term inserted by Alsco in its form contract obligates any customer who cancels prior to the expiration of the contract to pay liquidated damages:

> 8. **Liquidated Damages**. Customer acknowledges that since Supplier owns the goods covered hereby and that such goods may be unique to Customer's requirements and that the value of such goods is depreciating with time, the damages which Supplier may sustain as a result of Customer's breach or premature termination of this Agreement would be difficult, if not impossible, to determine. The parties therefore agree that in the event of Customer's failure to timely pay the fees and charges provided for herein, or in the event of any other breach or premature termination of this Agreement by Customer, Customer shall pay to Supplier as liquidated damages, and not as a penalty, a sum equal to the number of unexpired weeks remaining in the term then in effect multiplied by fifty percent (50%) of the average weekly charge for goods and services during the 10 weeks

> immediately preceding such failure to pay, breach or premature termination. The parties further agree that this formula is reasonable

Tr. Exh. 1, p. 1.

The Alsco form Textile Services Agreement is an exclusive one – stating that Alsco "shall be the exclusive supplier to Customer of the services and goods" Tr. Exh. 1.

Despite the fact that the Alsco form contract contains onerous, self-perpetuating clauses that can bind a company for 5 years or more, Alsco admitted to taking no steps to ensure that the customer has a fair opportunity for an owner or an owner's designated representative to review the agreement. Tr. pp. 88-89. Alsco's local corporate representative, Mike Ginnetti, testified about Alsco's business practices when it comes to obtaining signatures on the required Textile Services Agreement. It is not Alsco's practice to learn the identity of the actual owner of a particular business prior to asking them to sign a long-term textile services agreement, and ownership of the business is not Alsco's "concern." Tr., pp. 88-89. Instead, it has been Alsco's practice (from 2011 until the time of trial) to have its driver present the long-term contract to whoever appears to be in charge at the place of business:

> Q. Alsco does business with companies, not individuals, is that true?
>
> A. That's true.
>
> Q. And it's not Alsco's concern who owns the business that's one of their customers, is that right?
>
> A. Our main concern is our relationships with our customers and our ability to keep them happy and provide them with service. We don't go to the lengths of finding out who truly does legally own a business.
>
> Q. You would agree that Alsco is not concerned with who owns a business that's your customer?
>
> A. I would agree that's not our principal concern, no.

Q. We are dealing in a double negative, but it's a yes, you agree with what I said?

A. I do.

Q. And really Alsco doesn't care who owns the business, correct?

A. Define "care."

Q. .Well, I think that was your word and – I guess we can just agree it means the same thing as you're not worried about, care about, who owns the business with respect to who owns he business that's your customer, correct?

A. That's agreeable, yeah

Q. And so when Alsco—in your experience when Alsco has a contract that looks like Exhibit 1, these form contracts, they don't ask who the owner is, right?

A. We do not.

Q. And they don't even ask who the manager is, right?

A. We don't' ask who the manager is.

Q. You just show—Alsco shows a contract that looks like Exhibit 1 to whoever they are delivering the linens to and asks for a signature, true?

A. We ask for a signature and title, yes.

Id.

2. <u>Tons of Fun, LLC and Clay Roman.</u>

In 2010, Justin Zora started a company named Tons of Fun, LLC, for the purpose of operating a restaurant/bar in downtown Boise which it called "Fatty's" ("Tons of Fun"). Tr. p. 29 LL 13 – p 30 LL 3. Tons of Fun, LLC was owned solely by Justin Zora. *Id.* Zora operated the restaurant/bar in the name "Fatty's" but failed to register this name with the Idaho Secretary of State because he was unaware he needed to do so. Tr. p. 16 LL 18 – p. 17 LL. 14.

In October of 2010, Tons of Fun employed Defendant Clay Roman to work as an employee and bar manager at the Fatty's bar. R. p. 2. It was undisputed Roman was never an owner of Tons of Fun. *Id.* On March 3, 2011, Roman was approached by a representative of Alsco during a shift and, at his request, signed Alsco's form Textile Services Agreement ("the Alsco Contract"). Tr. Exh. 1. The signature line on the Alsco Contract has Roman's signature, and above the signature Roman's name is spelled out and the words "partner, owner" are written in the "title" line. *Id*. Roman testified Alsco was bringing materials to the Fatty's bar and he signed the Alsco Contract "because they were there with material." Tr. p. 41 LL 7-14. Roman testified that much of the hand-writing at the bottom of the Alsco Contract was not his and he could not say for certain who wrote in the words "partner/owner" underneath his signature. Tr. pp. 62 LL 12 – p. 63 LL 6. Roman did not read the Alsco Contract and explained the circumstances under which he likely signed it:

> Q. Do you remember signing this document?
>
> A. I do not remember signing this document.
>
> Q. Prior to the initiation of this lawsuit, had you ever read this document?
>
> A. I have never read this document.
>
> Q. How do you explain your signature being on the document if you never read it?
>
> A. Easy enough. During a typical day when I am inside the bar, this is during the day, so I can tell you this was signed during the day – the bar opened during the evening – so I was in there receiving deliveries and I receive several deliveries during the day. So all of the deliveries would be scheduled for certain days twice a week, which I would go in and receive those deliveries. My job was to show up, sign that we are receiving the delivery, and they would leave and I would receive the goods.
>
> . . .
>
> Q. So from your testimony, is it fair to say you never talked to anybody from Alsco about the services?

A. That is fair. I knew one person from Alsco.
Q. Who was that?

A. His name was Toby.

Q. And what was his role at Alsco?

A. To deliver linens.

Q. Did Toby have you signing this, to your recollection

A. It would be a logical guess, but I don't recollect.

Tr. pp. 55 LL 5 – p. 56 LL. 19.

Consistent with its business practices described above, Alsco admitted that, at the time Roman signed the Alsco Contract, Alsco did not who owned the Fatty's bar. Tr. p. 87 LL 22 – 25.

The Alsco Contract signed by Roman includes a Schedule of Materials Alsco was to deliver and service: 80 Bar White towels, 2 laundry bags, one bag stand, 18 mat slates (of different sizes), 8 fragrance cups, 16 fragrance cups, 4 gruerey mats, and 4 micro fiber mop heads. Tr. Exh. 1. Alsco confirmed that, under the terms of the contract, the Customer (Tons of Fun) could reduce or increase the quantities of the items on the Schedule at any time. Tr. Exh. 1.

The trial court concluded Roman signed the Alsco Contract not in an individual capacity, but as an undisclosed principal of Tons of Fun, LLC. R. p. 150-151.

3. <u>Appellant Fatty's Bar LLC & the Masonheimer's.</u>

Fatty's Bar, LLC ("Fatty's LLC") is an Idaho limited liability company owned and operated by Steve Masonheimer and his wife, Jennie Masonheimer. It was formed on January 4, 2013 with the Idaho Secretary of State. R. p. 141. It was undisputed that Zora had no ownership interest in Fatty's LLC.

Steve and Jennie Masonheimer also owned an Idaho limited liability company, The Drink, LLC, which previously operated a restaurant/bar located in Lake Harbor in Boise. R. p. 140.

4. <u>Shutdown of Tons of Fun and Fatty's bar.</u>

In December of 2012, Tons of Fun was experiencing financial difficulties and the liquor license it was using was being suspended for violations of liquor licensing laws. Tr. 22 LL 18-24. Tons of Fun was also unable to secure a renewal of its location lease at the Idaho street location. Tr. p. 33 LL 15-24. Zora searched for a financial investor but was unsuccessful. *Id.* Fatty's Bar and Tons of Fun was scheduled to shut down after New Year's Eve business on December 31, 2012. *Id.*

During the end of 2012, Zora was also working for the Masonheimer's restaurant at The Drink. Zora informed Steve Masonheimer of the financial difficulties and pending closure of Fatty's Bar and Tons of Fun. Steve Masonheimer testified he was not clear on who actually owned the old Fatty's or Tons of Fun, LLC, but that he had no desire to partner with Zora or be a financial backer for Zora. R. p. 140-141. The Masonheimer's decided, however, to look into the possibility of opening their own bar at that location given their experience in the industry. Tr. pp. 160 LL 22 – 163 L 3.

The Masonheimer's ultimately decided to open their own bar at the Idaho Street location. The Masonheimer's searched the Idaho Secretary of State's website and found that the "Fatty's" name had not been registered. *Id.* The Masonheimer's then formed Fatty's Bar, LLC in January of 2013 and registered the company with the Idaho Secretary of State. *Id.*

The Masonheimer's discovered the liquor license and other assets at the location on Idaho Street were not owned by Zora or Tons of Fun, but were instead owned by Colby Smith who had been leasing the assets to Tons of Fun. Colby Smith had previously operated a comedy club at

that location. Tr. pp. 163 L. 3 – p. 165 L. 23. Fatty's LLC applied for, and was approved to purchase, the liquor license from Smith for $135,000.00. *Id.* Fatty's LLC also executed an asset purchase agreement with Smith, pursuant to which Fatty's LLC purchased all other assets being used at the Idaho Street location for $40,000.00. *Id.* It is undisputed that when Tons of Fun shut down in December of 2012, Fatty's LLC did not purchase any assets from Zora or Tons of Fun, LLC. *Id.*

Fatty's LLC interviewed the prior employees of Tons of Fun and hired some, but not all of the employees. They agreed to hire Zora as a bar manager. They refused to hire any of the security guards because of the liquor license violations by Tons of Fun. Tr. p. 165 L 24 – p. 166 L 19. Fatty's LLC spent approximately $20,000 remodeling the interior of its new bar. *Id.* Fatty's LLC signed a five-year lease with the owner of the Idaho Street location. Tr. pp. 165 L 4 – 23. Approximately 30-45 days after Tons of Fun shut down the old Fatty's bar, Fatty's LLC opened up the remodeled restaurant/bar for business. *Id*.

Zora worked for Fatty's LLC as an employee for approximately six months, or until August 6, 2013, at which time he was fired for suspected embezzlement. At the time he was fired, Zora claimed ownership to some of the equipment being used at the Fatty's LLC location. Tr., p. 254, L. 15 – p. 254, L. 8. Jennie Masonheimer testified as follows:

> He claimed – had claimed to own some of the equipment that we believed we had already purchased, specifically the Fatty's sign, and we wanted to make sure that he felt that anything he could come back for, any other items, that everything was covered. So we paid him for basically the Fatty's sign, which is what he claimed to own.

Tr., p. 256, L. 19 – P. 257, L 11.

The Masonheimer's decided to pay off Zora for any equipment in which he claimed an interest. Tr. pp. 167-168. Zora and Steve Masonheimer signed a one paragraph agreement entitled

"Fatty's Bar LLC Agreement," dated August 6, 2013, which is eight months after Tons of Fun and the old Fatty's bar shut down. Tr. Exh. 8. The Agreement states:

> I Steve Masonheimer, as a member of Fatty's Bar LLC am purchasing the physical equipment located at 800 W. Idaho as listed below owned by Tons of Fun LLC/Justin Zora for $10,000. Two payments have already been made in the amount of $5,000. I will pay $2,500 on August 10, 2013 and the final payment of $2,500 on September 10, 2013. Justin Zora/Tons of Fun LLC must agree to stop all use of the name Fatty's Bar and/or claim any affiliation with Fatty's Bar as the name is legally owned and registered by Fatty's Bar LLC in the state of Idaho.

Id.

5. <u>Fatty's LLC's Dealings with Alsco.</u>

After Fatty's LLC opened for business the same Alsco driver delivered linens to its restaurant. The Masonheimer's were familiar with Alsco's services because Alsco had been providing linen services at The Drink. Tr. p. 171 L. 4-21. Fatty's LLC therefore accepted deliveries from Alsco and eventually set up a new account with Alsco. Jennie Masonheimer contacted Alsco and provided a new address for invoices and requested monthly invoices be sent to the address for payment. *Id.* Fatty's LLC continued to accept Alsco's linen services and paid for them until March of 2017. It was undisputed Fatty's LLC paid for all services received from Alsco.

Jennie Masonheimer did contact Alsco and informed them of new ownership and requested invoices be sent to a different address. Jennie Masonheimer also changed the billings so that Alsco billed Fatty's LLC monthly. Tr. p. 95 LL – p. 96 LL 3. Alsco admitted it knew there was a change in ownership and that the Fatty's bar owned by Tons of Fun had shut down for a period of time. Tr. p. 92 LL 7-25. Alsco, however, did not approach anyone at Fatty's LLC about signing one of

its Textile Services Agreements. *Id.* Tr. p., 171 LL 4-9. Likewise, Alsco did not even inform Fatty's LLC about the Alsco Contract signed by Roman. *Id.*

In early 2017, the current manager of Fatty's LLC, Ryan Andrews, was approached by the Alsco driver and told that the current contract had expired and the business needed to sign a new contract. Tr. p. 287, L. 3-20. At that same time Andrews did some research and determined Fatty's LLC could obtain linen services for a much lower cost from a different vendor and recommended a change to the Masonheimers. Tr. p. 287 LL 21-25 – p. 288 LL 1-10. Fatty's LLC then decided to switch linen service providers and informed the Alsco driver they were switching. *Id.*

Alsco soon informed the Masonheimers they were in breach of contract and could not cancel the contract. At Steve Masonheimer's request, Alsco forwarded to him a copy of the Alsco Contract signed by Roman in 2011. Tr. p. 173, LL 9-21. Despite the explanation that no one from Fatty's Bar, LLC, had ever signed this contract, Alsco promptly filed a lawsuit to recover liquidated damages. R. pp. 26-27. No evidence was presented to show that the Masonheimers were aware of the Alsco Contract when Fatty's LLC opened for business – or until they were made aware in March of 2017, when Fatty's Bar, LLC determined it no longer wanted the services of Alsco. Tr. p. 156 LL 15- P. 157 L. 1.

Alsco did present evidence that "The Drink" had an identical contract to the Alsco Contract signed by Roman in 2011. Tr. p. 45 LL 2 – p. 46 LL 3. The Drink contract was also signed by Clay Roman on August 1, 2012 while he was working for The Drink. Tr. Exh. 5. The word "owner" was also written under Roman's name on the Alsco Contract with The Drink. However, Roman testified he did not write the word "owner" on the The Drink Contract. Roman testified he was not aware he was signing a long-term contract with Alsco on behalf of the Drink, but instead thought that he was signing to accept linen services for the Drink. *Id.* It was undisputed

Roman was never an owner in the Drink and would not have had the authority as an employee to sign a long-term textile services agreement. Tr. p. 63 LL 9- p. 64 L. 10.

C. Course of Proceedings.

Alsco filed a Verified Complaint on May 2, 2017 naming Clay Roman, an individual d/b/a Fatty's; and Fatty's LLC as defendants. R. pp. 10-13. Alsco then filed an Amended Complaint on May 3, 2017 changing the name of the defendants to Clay Roman d/b/a Fatty's and Fatty's Bar, LLC. R. pp. 24-28. Defendant Fatty's Bar LLC filed a motion for summary judgment, which motion was denied by the district court. Aug. R. p. 001 – 015.

The case then proceeded to a court trial on April 10 and 11, 2018. Alsco presented testimony from four witnesses: Mike Ginnetti; Justin Zora, via deposition testimony; Defendant Clay Roman and Steve Masonheimer. Fatty's LLC made a motion for a directed verdict following the close of Alsco's case, which was denied. Tr. pp. 183-243.

On July 23, 2018, the trial court issued Findings of Fact and Conclusions of Law. R. pp. 138-156. The trial court reached the conclusion Fatty's Bar LLC was liable for breach of the Alsco Contract under the theory of successor liability. A Judgment was rendered against Fatty's LLC for liquidated damages in the amount of $23,206.46 on July 23, 2018.

The district court also concluded Clay Roman was liable to Alsco as an undisclosed principal of Tons of Fun, LLC. The district court issued a judgment against Clay Roman for the same amount, $23,206,46. R. p. 157. The district court found Roman and Fatty's LLC to be jointly and severally liable for this amount to Alsco. *Id.*

Fatty's LLC filed a motion for reconsideration on August 6, 2018. Aug. R. p. 12-14. This motion was denied by the district court on October 4, 2018. Aug. R. pp. 26-41. The district court awarded Alsco its costs of $1,513.37 and its fees of $26,766.00. *Id.*

II. ISSUES PRESENTED ON APPEAL

Fatty's LLC presents the following assignments of error on appeal:

1. Did the district court err in determining Fatty's Bar, LLC is a successor in interest to Tons of Fun, LLC?

2. Did the district court err in determining Fatty's Bar, LLC impliedly assumed the debts or liabilities of Tons of Fun, LLC?

3. Did the district court err in determining the automatic renewal provision in the contract between Tons of Fun, LLC and Alsco is not subject to the statue of frauds when applied to Fatty's Bar, LLC which did not sign the contract?

4. Did the district court err in finding Alsco had met its burden of proof to be awarded liquidated damages?

5. Did the district court err when it awarded costs and fees against Fatty's LLC?

6. Did the district court err when awarded costs and fee against Fatty's LLC in a disproportionate amount to the award against Roman, without any attempt by Alsco to segregate the fees between these two parties?

Fatty's LLC presents the following additional issue on appeal:

7. The Court Should Award Fatty's LLC its Costs and Fees on Appeal.

III. STANDARD OF REVIEW

This Court exercises free review over the district court's conclusions of law." *J.R. Simplot Co. v. Western Heritage Ins. Co.*, 132 Idaho 582, 584, 977 P.2d 196 (1999); *Opportunity, L.L.C. v. Ossewarde*, 136 Idaho 602, 605, 38 P.3d 1258, 1261 (2002). The standard of review of a non-jury trial court's findings of fact is set forth in Idaho Rule of Civil Procedure 52(a) which states:

> In all actions tried upon the facts without a jury ... the court shall find the facts specifically and state separately its conclusions of law thereon and direct the entry

> of the appropriate judgment. Findings of fact shall not be set aside unless clearly erroneous. In application of this principle regard shall be given to the special opportunity of the trial court to judge the credibility of those witnesses that appear before it.

Id. (quoting I.R.C.P. 52(a)). When determining whether a finding is clearly erroneous this Court does not weigh the evidence but inquires whether the findings of fact are supported by substantial and competent evidence. *Id.* Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact had been proven. *Id.*

IV. ARGUMENT

A. The District Court Erred When It Found Fatty's LLC is a Successor In Interest to Tons of Fun, LLC Because Alsco Failed to Plead a Successor Liability Claim.

The district court concluded Fatty's LLC is a successor in interest to Tons of Fun, LLC. R. 000144-000145. However, Alsco failed to plead a successor liability claim. Instead, Alsco plead that Fatty's LLC was a successor in interest to Clay Roman, d/b/a Fatty's, and that the succession happened sometime in 2013. R. 000025. In the First Amended Complaint filed May 3, 2017 Alsco plead as follows:

> 8. Upon information and belief, FATTY'S BAR, LLC became the successor to Clay Roman d/b/a Fatty's in 2013.

R. p. 24-27. The Amended Complaint *does not refer in any way* to Tons of Fun, LLC. *Id*.

Alsco did not amend or attempt to amend the Amended Complaint to include a breach of contract claim against Fatty's LLC as successor to Tons of Fun, LLC. Because Alsco had never plead that Fatty's LLC is a successor in interest to Tons of Fun, LLC, the Court erred in finding that Fatty's LLC was liable for the contractual obligation entered into by Tons of Fun, LLC. As this Court wrote in *Youngblood v. Higbee* , 145 Idaho 665, 182 P.3d 1199 (2008):

> While we will make every intendment to sustain a complaint that is defective, e.g., wrongly captioned or inartful, a complaint cannot be sustained if it fails to make a short and plain statement of a claim upon which relief may be granted. . . . We look at whether the complaint puts the adverse party on notice of the claims brought against it.

Id., 145 at 668, 182 P.3d at 1202, citing *Gibson v. Ada Cnty Sheriff's Dep't*, 139 Idaho 5, 9, 72 P.3d 845, 849 (2003).

In *Mortensen v. Stewart Title Guaranty Co*., 149 Idaho 437, 235 P.3d 387 (2010), the Court held that a claim for quasi-estoppel was improperly plead because the complaint did not contain the claim in the body of the complaint or prayer for relief. *Id.*, 149 Idaho at 444. This Court stated the claim was waived by the plaintiff even though the trial court had addressed the substance of the claim in a motion for summary judgment and motion for reconsideration:

> This Court has already expressly rejected the notion that an unpleaded claim can be preserved for appeal merely because the district court addressed the claim's merits. Pleading is necessary to put the opposing party on notice of the claims it is facing and thereby " insure that a just result is accomplished. . . . An unpleaded cause of action simply cannot be considered, whether on summary judgment or on appeal. . . . For example, in *Beco v. City of Idaho Falls*, 124 Idaho 859, 865 P.2d 950 (1993), this Court refused to consider the appellant's unpleaded breach-of-contract claim despite the fact that the district court ruled on the claim's merits.

Id.

As stated above, at no time during the pendency of this lawsuit did Alsco plead that Fatty's LLC was a successor in interest to Tons of Fun, LLC. Instead, Alsco consistently took the position Fatty's LLC became a successor to Clay Roman d/b/a Fatty's in 2013. R., 00025. Yet the district court made an express finding Fatty's Inc. was a successor in interest to Tons of Fun, LLC. R. pp. 9-10. The district court erred in doing so because Alsco waived this claim.

After the trial court's findings and conclusions were entered, Fatty's LLC promptly moved for reconsideration arguing the ruling could not stand because Alsco had never plead such a claim. Aug. R. pp. 12-20. Alsco filed a Memorandum filed in Opposition to the Motion for

Reconsideration, however, Alsco did not address its failure to plead the claim that Fatty's LLC was a successor to Tons of Fun. R. Aug. pp. 22-25. Nonetheless, the district court rejected Fatty's LLC's argument stating, "[a]s is often the case following discovery, Alsco later took the position that Fatty's Bar LLC became a successor in interest *to whatever entity* ran Fatty's prior to the formation of Fatty's LLC…" Aug. R. p. 31. The district court further stated "this argument was revealed in its opposition memorandum to Fatty's motion for summary judgment, its pre-trial brief, jury instructions and opening statement." Aug. R. p., 031 (emphasis added). The district court reasoned that Idaho is a notice pleading state and "Fatty's Bar LLC was put on notice by the pleadings that Alsco sought to hold it liable under the contract under a successor theory of liability, even if Alsco initially guessed wrong on the predecessor's identity." *Id.*

Yet Alsco's representative testified he discovered *prior to the time the lawsuit was filed* that Tons of Fun was the owner of the business called Fatty's when the Alsco Contract was signed. Tr. pp. 89 LL 12-20. In addition, a close review of the record shows Alsco consistently maintained Fatty's LLC was a successor to "Clay Roman d/b/a Fatty's." Alsco simply does not argue Fatty's LLC was a successor in interest to Tons of Fun, LLC, either in the Amended Complaint or in the documents referenced by the district court[1]. For example, in Alsco's pre-trial brief, the only reference to the predecessor corporation is contained in the fact section as: "Clay Roman executed a Contract, on behalf of a bar known as Fatty's, with Alsco, Inc. for the rental of textile supplies." R. 000059. Thus, at the time the pretrial brief was filed only weeks prior to trial, Alsco was still arguing Clay Roman was acting on behalf of a bar known as Fatty's

[1] Alsco's Memorandum in Opposition to Fatty's Motion for Summary Judgment states, "Fatty's Bar LLC was simply an entity change effected when Masonheimer became involved with the then owner/operator of the existing Fatty's bar." Aug. p., 007. Alsco further argues, "Rather, the undisputed facts show that Fatty's Bar, LLC was formed with the owner of the then existing Fatty's Bar which was owned and operated by Tons of Fun, LLC." Aug. p. 008. However, nowhere does Alsco state that Fatty's LLC became a successor in interest to Tons of Fun, LLC.

when he signed the Alsco Contract, and there is no mention of Tons of Fun, LLC.[2] Again, the district court abused its discretion and prejudiced Fatty's LLC's rights when it imposed a liability on Fatty's which was not supported by the evidence presented at trial.

Alsco carried the burden of proof at trial, and Alsco was required to name the correct predecessor corporation in its pleadings in order to sustain a successor liability claim. Alsco only stated a successor liability claim against Fatty's LLC as a successor to Clay Roman d/b/a Fatty's, or "the old Fatty's bar." Alsco never properly stated a successor liability claim involving Tons of Fun, LLC. The district court erred in holding otherwise.

Alsco therefore waived any claim that Fatty's LLC was liable for breach of contract as a successor in interest to Tons of Fun, LLC. The district court's finding and legal conclusion should therefore be set aside as an abuse of discretion.

B. The District Court Erred When It Found Fatty's LLC Is a Successor In Interest to Tons of Fun, LLC.

It is well settled law that the purchaser of a corporation's assets is not liable for the debts and obligations of the seller corporation. The purpose of the doctrine is to relieve the parties of any future liabilities which did not exist at the time of succession. Courts in other jurisdictions have recognized four exceptions to this general rule and found a successor corporation may be held liable when: (1) the buyer expressly or impliedly agrees to assume such liability; (2) the transaction amounts to a de facto consolidation or merger; (3) the buyer corporation is merely a continuation of the seller corporation; or (4) the transaction is entered into fraudulently for the purpose of escaping liability." See *Welco Indus., Inc. v. Applied Cos.*, 1993-Ohio-191, 67 Ohio St. 3d 344, 346-47, 617 N.E.2d 1129, 1132. See also, *In re Thorotrast Cases, 26 Phila.* 479, 488

[2] Because this was a bench trial, the jury instructions are immaterial.

(1994); *HRW Sys. v. Wash. Gas Light Co.*, 823 F. Supp. 318, 327 (D. Md. 1993); *Lopez v. Delta Int'l Mach. Corp.*, No. CIV 15-0193 JB/GBW, 2017 U.S. Dist. LEXIS 114656, at *99 (D.N.M. July 24, 2017)).

The primary purpose of the corporate successor liability doctrine is to prevent buying and selling corporations from fraudulently evading their current liabilities through a change in ownership. See *New York v. Nat'l Servs. Indus.*, 352 F.3d 682, 692 (2d Cir. 2003). The doctrine of successor liability has been eroded over time and is narrowly construed by most courts. George W. Kuney, The Taxonomy and Evaluation of Successor Liability (Revisited), *Transactions: The Tennessee Journal of Business Law*, Vol. 18 p. 740 (2017).

In order to sustain a claim for successor liability, Alsco carried the burden of proof to first show that Fatty's LLC was a successor in interest to Tons of Fun, LLC; and second to demonstrate the case falls into one of the four exceptions to the rule that a purchasing corporation is not liable for the selling corporation's debts in an asset purchase. Applying the undisputed facts to the relevant law, Alsco's successor liability claim fails as a matter of law. First, Alsco failed to prove Fatty's LLC is a successor corporation to Tons of Fun. Second, the implied assumption of debt claim fails because there was insufficient evidence that Fatty's LLC intended to assume any of Tons of Fun, LLC's debt.

1. The doctrine of successor liability is not applicable because Fatty's LLC is not a purchasing corporation of Tons of Fun, LLC.

The district court recognized that "[t]he well-settled general rule of successor liability is that where one company sells or otherwise transfers *all or substantially all of its assets* to another company, the latter is not liable for the debts and liabilities of the transferor." R., 000144 (emphasis added). The district court then erroneously concluded that Fatty's LLC purchased *all or substantially all* of the assets from Tons of Fun, LLC. However, there was no evidence to support this conclusion.

It was undisputed during trial that Fatty's LLC purchased all assets Fatty's from a third party not named in this suit – Colby Smith ("Smith"). R., 000141. Fatty's LLC executed an asset purchase agreement with Smith and paid him $130,000 for the liquor license and an additional $40,000 for what Steve Masonheimer considered to be all of the assets at the Idaho Street location. *Id.* Alsco presented no evidence to refute this asset purchase agreement between Smith and Fatty's LLC. The district court abused its discretion by ignoring uncontradicted evidence on the matter.

The "Fatty's Bar LLC Agreement" relied upon by Alsco and the trial court was executed eight months after Tons of Fun shut down its bar and Fatty's LLC opened for business. Tr. Exh. 8. The written agreement states that it was for purchase of the physical equipment designated in the agreement. But the agreement does not indicate in any manner that it was for the purchase of "all or substantially all" of the assets of Tons of Fun, LLC. Alsco did not present any evidence to show what Tons of Fun LLC owned as of August 2, 2013. Even Zora characterizes this agreement as a bill of sale for some equipment and not an asset purchase of Tons of Fun, LLC:

> Q. So I'll show you what has been marked as Exhibit 8, which was the last one in the stack I passed out. Do you recognize that document?
>
> A. Correct.

Q. Can you identify what that document is?

A. It's basically just a *bill of sale* for all the physical scenarios that, like I said, we had incurred over the years.

Tr., 27:8-15(emphasis added).

Zora further testified:

Q. If you look at the Exhibit 8, this is---Mr. Masonheimer, at this time was agreeing to purchase from you inventory?

A. Correct.

Q. Okay. And that was *inventory* that had been left at the bar known as Fatty's after it shut down at the end of December, 2012, and then it was left there when Ms. Masonheimer reopened it in about February of 2013, correct?

A. Well, it wasn't left there in the sense of abandonment.

Q. Oh, sure.

A. It was used in the sense of we're this new venture.

Q. It was left at the physical location?

A. Sure.

Tr., 34:13-24 (emphasis added).

Further, Jennie Masonheimer testified that the circumstances surrounding the execution of Exhibit 8 was essentially a payoff to get Zora to go away peacefully:

Q. Were you involved in the decision to essentially fire Mr. Zora from Fatty's?

A. Yes.

Q. What do you recall about that?

A. I handle all the books, reconcile the deposits and those kids of things, and several of the deposits were missing money, and when I approached Mr. Zora to discuss it, he said that it was from employee back shortages, and when I approached the employees about it, they were quite adamant that that was not the case. So after discussing with Steve, we hired a

> private investigator to come in, and after his research, he said that Justin had been taking money from the business, so we decided that we needed to part ways.
>
> . . .

Tr. p. 254 L 15 – p. 255 L 4.

Jennie Masonheimer then testified they paid Zora money at that time because he claimed ownership to the "Fatty's sign" and they wanted to make sure he could not come back against Fatty's LLC. Tr. p. 256 L 19 – p. 257 L 11.

Jennie Masonheimer's credibility and testimony was never called into question. The uncontradicted testimony of a credible witness must be accepted by the trier of fact unless the testimony is inherently improbable or impeached in some way. *State of Idaho v. Miller*, 131 Idaho 288, 295, 955 P.2d 603, 610 (Ct. App. 1997).

The district court therefore erroneously assumed, with no evidence presented, that Fatty's LLC purchased all or substantially all of the assets of Tons of Fun, LLC, and thereby erroneously concluded Fatty's LLC was a successor of Tons of Fun, LLC. R., 000144-000145. The court abused its discretion in the matter and thereby prejudiced Fatty's LLC's rights.

C. The District Court Erred When It Determined Fatty's LLC Impliedly Assumed the Contract with Alsco.

Assuming this Court finds that Fatty's LLC was a successor to Tons of Fun, LLC, it was an error for the trial court to hold that Fatty's LLC impliedly assumed liability for the Alsco Contract. R., 000145-000147. The district court concluded that Fatty's LLC was the successor of Tons of Fun, LLC under the "implied assumption" exception to successor liability. R. pp. 138-148. The district court did not find that Fatty's LLC was a successor to Tons of Fun under any other exception. *Id.* Fatty's will therefore confine its analysis on appeal mainly to the "implied assumption" exception.

An implied agreement of assumption is a creature of contract. *Thornton v. M7 Aero. LP*, 903 F. Supp. 2d 654, 664 (N.D. Ill. 2012). Under Idaho law, "[a]n assignee's assumption of an assignor's liabilities is never presumed, and the burden of proof is upon the party who asserts that there has been an assumption. *Murr v. Selag Corporation*, 113 Idaho 773, 7809, 747 P.2d 1302, 1309 (Ct. App. 1987). Alsco needed to present some evidence demonstrating an intent by Fatty's LLC to pay the debts of Tons of Fun, LLC. Factors demonstrating an intent to pay the debts of another person or entity include (1) admissions of liability by officers or other spokesmen of the buyer, as well as (2) the effect of the transfer upon creditors of the seller corporation. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 40 Misc.3d 643, 675 (New York, 2013). A fortuitous debt payment is not enough: "An agreement is not implied from the mere fact a new corporation has voluntarily paid some of the debts of the old corporation, without further manifestation of an intent to pay all of its debts." *Uni-Com Nw. v. Argus Pub. Co.*, 47 Wash. App. 787, 801, 737 P.2d 304, 311-12 (1987). In addition, the implied assumption theory, and the successor liability doctrine, generally, "do not focus on the conduct of the third-party bringing the successor liability claim." Instead, the focus "is on the relationship between asset buyer and [asset] seller and the [asset] buyer's post-acquisition conduct with respect to the assets." *Countrywide Home Loans*, 40 Misc3d at 677. Thus, an examination of the third-party claimant's alleged reliance on the acts of the asset buyer "is immaterial to this analysis." *Id.*

The district court concluded that Fatty's LLC had impliedly assumed liability for the Alsco Contract because Fatty's LLC continued for five years to accept and pay for weekly deliveries from Alsco. R., 000145. The district court also noted that Fatty's LLC had contacted Alsco to inform it of a change in ownership, billing address and payment method and amended its order. *Id.* at 000145-000146. However, the district court incorrectly focused on the actions and

relationship between the asset purchaser (Fatty's LLC) and the party with whom the asset seller (Tons of Fun, LLC) entered into a contract with (Alsco). In other words, the district court incorrectly focused on the actions and relationship between Fatty's LLC and Alsco. Instead, the district court should have focused on the relationship between Fatty's LLC and Tons of Fun, LLC. Alsco presented no evidence to show an implied agreement by Fatty's LLC to assume the debts of Tons of Fun, LLC. Fatty's LLC was a new entity with minimal connections to Tons of Fun. When asked during trial why it sued Fatty's and not Tons of Fun, Alsco's representative testified it was because Tons of Fun was "not the last one receiving services under the agreement." Tr. p. 98 LL 8-14.

Alsco presented no evidence that any representative of Fatty's LLC made any statements or demonstrated any conduct showing it would assume or be liable for the obligations under the Alsco Contract to Tons of Fun, LLC or Justin Zora. The actions of Fatty's LLC in accepting the linens delivered to it by Alsco and paying the invoices submitted by Alsco cannot meet the burden of proving Fatty's LLC agreed to assume a five-year contract with an auto-renewal clause. Further, there is a danger in imposing successor liability on purchasing corporations for the performance of automatic contract renewal clauses. Doing so goes beyond the prophylactic purpose of successor liability, which is to stop current debt or liability evasions, and encourages litigation over debts which did not exist at the time of the succession.

The case of *Zantel Marketing Agency v. Whitesell Corp.* 696 N.W.2d 735 (Mich.App. 2005) is on point in this regard. In that case, Stamptech and Zantel entered into an exclusive, ten-year marketing contract in 1996. In August of 1998, WOM (one of the defendants) purchased the assets of Stamptech through an Asset Sale Agreement, whereby it was agreed that WOM would purchase "substantially all of Stamptech's assets, including its name, receivables, equipment,

patents and business lease." *Id.* at 737. It was further expressly stated in the agreement that seller (Stamptech) would remain liable for all obligations and debts arising on or prior to the closing date, and that purchaser (WOM) would remain liable for all debts and obligations arising after the closing date. *Id.* at 738. After the closing, Zantel received oral assurances from WOM that their marketing agreement would remain unchanged. Further, Zantel continued marketing WOM and commission checks were made payable to Zantel and WOM continued to send correspondence using the prior company, Stamptech's, letterhead. *Id.* at 741. Eventually, the marketing contract between Zantel and defendant was prematurely terminated and Zantel sued for breach of contract, while the defendants argued there was no successor liability, express or implied. *Id.* at 739. The court rejected the successor liability claim holding there was no implied assumption of liability despite the actions of the parties. *Id.* at 741.

Applying the same reasoning here, the fact that Fatty's LLC continued to accept services from Alsco and paid for them is not a sufficient basis to conclude that Fatty's LLC impliedly assumed the contract liability Tons of Fun, LLC incurred. The district court abused its discretion by imposing successor liability on Fatty's LLC despite the lack of an implied agreement for debt assumption with Tons of Fun, LLC.

It is important to remember the underlying rationale for the successor liability doctrine, i.e., the payment of accrued "debts." The only Alsco debt which Fatty's LLC was capable of assuming at the time of its 2013 business formation was the balance of the 60-month Tons of Fun/Alsco Contract. At that time, Tons of Fun—the only party to the contract with Alsco—went out of business and had stopped making payments on its 60-month contract. Thus, Tons of Fun's remaining contract debt to Alsco was in default and only the balance of the unpaid installments could be passed on to Fatty's LLC as a successor. "A cause of action for breach of contract accrues

upon the breach even though no damage may occur until later." *Mason v. Tucker & Assocs.*, 125 Idaho 429, 436, 871 P.2d 846, 853 (Ct. App. 1994). In sum, this 60-month balance was the only debt which Tons of Fun was capable of passing to Fatty's LLC under the doctrine of successor liability.[3] The auto-renewal clause (and any alleged auto-renewed contract) was not a debt and could not be passed onto Fatty's LLC. Successor liability is not a means of imposing contract renewals on a successor.

This debt analysis is important on appeal because Alsco's money judgment against Fatty's LLC consists entirely of liquidated damages. The district court awarded Alsco $23,206,46 in liquidated damages because it found that Fatty's LLC was subject to the auto-renewal clause in the Tons of Fun/Alsco Contract, and that Fatty's had breached the renewed contract in 2017 when it stopped making payments to Alsco. This Court should find that Fatty's LLC did not assume a new five-year contract renewal under the Tons of Fun/Alsco Contract, even if Fatty's LLC had assumed the balance of the existing 60-month contract in the Alsco Contract. There is a significant difference between assuming the balance of a matured contract and assuming a new five-year future contract. Once Fatty's LLC had paid off the 60-month contract balance to Alsco in 2016, (assuming it was Fatty's LLC's liability), the parties continued an at-will association for continued services. Fatty's LLC could not "assume" a new five-year contract extension in 2013 because it was not a signatory to the Alsco Contract, and because doing so was impossible under the statute of frauds (to be discussed more in the next section). The district court therefore erred in finding that Fatty's LLC impliedly assumed a new five-year contract period with Alsco in 2013 and in awarding Alsco any liquidated damages under that renewed contract.

[3] This argument assumes, as did the district court, that Alsco could use Roman and Tons of Fun interchangeably for purposes of successor liability. Fatty's LLC uses the assumption for illustrative purposes only and does not admit to the correctness of the assumption.

Even if Fatty's LLC was a successor to Tons of Fun, LLC, Fatty's LLC could not be liable for more than the amount of assets it purchased from Tons of Fun. As this Court once explained: "The law seems to be well settled, that those who take over the business and assets of a dissolved corporation, take it subject to the debts and liabilities of the corporation, to the full extent of the value of the property taken over." *Radermacher v. Daniels*, 64 Idaho 376, 380, 133 P.2d 713, 715 (1943). The district court therefore erred in holding Fatty's LLC liable for liquidated damages to Alsco when that amount clearly exceeds the amount of assets which Fatty's received from Tons of Fun.

Fatty's LLC is aware that many appellate courts review successor liability claims for an abuse of discretion. See *Ind. Elec. Workers Pension Ben. Fund v. ManWeb Servs*., 884 F.3d 770 (7th Cir. 2018), and *Baker v. Delta Air Lines*, 6 F.3d 632 (9th Cir. 1993). Under these review standards, Fatty's LLC believes that the district court abused its discretion by imposing successor liability for the Tons of Fun contract. This error is subject to appellate review under a four-pronged abuse of discretion test: "When this Court reviews an alleged abuse of discretion by a trial court the sequence of inquiry requires consideration of four essentials. Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

The district court abused its discretion under the third prong of this test because it failed to apply correct legal standards in finding that Fatty's LLC was the successor to Tons of Fun, LLC. Also, the district court abused its discretion under the fourth prong of the test because it did not exercise a reasoned choice by finding that being a successor to Clay Roman, a non-owner of

Tons of Fun, LLC, was the same thing as being a successor to Tons of Fun, LLC as an entity. As a result, Fatty's LLC suffered prejudice to its substantial rights. See I.R.C.P. 61. Alsco did not present enough evidence at trial to support its successor liability theory, and the court erred in making a legal ruling which was not supported by the evidence. See *Browning v. Ringel*, 134 Idaho 6, 10, 995 P.2d 351, 355 (2000) (findings of fact in an action tried by the court must be supported by substantial and competent evidence). Fatty's had a right to entry of judgment based on the evidence at trial.

D. The District Court Erred When it Determined the Statute Of Frauds Was Inapplicable to the Alsco Contract.

If the terms of a contract are clear and unambiguous, the interpretation of their meaning and legal effect are questions of law. *Idaho v. Hosey*, 134 Idaho 883, 886, 11 P.3d 1101, 1104 (2000) (citations omitted). The meaning of an unambiguous contract must be determined from the plain meaning of the words. *Id.* Where, however, the contract is deemed to be ambiguous, "interpretation of the contract is a question of fact that focuses on the intent of the parties." *Id.* "Whether the facts establish a violation of the contract is a question of law over which this Court exercises free review." *Id*

Fatty's Bar, LLC asserts the successor liability claims by Alsco are barred by Idaho's Statute of Frauds. Idaho Code § 9-505(1)(2) requires the following type of contract to be in writing and subscribed (i.e., signed) by the party charged with performance of the contract: "a. a contract that by its terms is not to be performed within a year from its making." Because the Alsco Contract at issue is for a duration of consecutive five-year terms, it falls squarely within the statute of frauds. The statute of frauds applies even if successor liability is found to exist pursuant to the implied assumption exception, given that assumption is a contract theory. One of the stated purposes of Idaho's statute of frauds is to prevent creditors from trying to enforce unwritten, un-signed

promises to pay or answer for the debts of another person or entity.

The district court agreed that the Alsco Contract with Tons of Fun, LLC was for a five-year term and, as such, was required to be in writing and subscribed by the party charged or his agent. R., 000152. The district court erred, however, when it determined in this case that under the theory of successor liability imputed by implied assumption, an agreement falling within the statute of frauds need not be separately subscribed by the successor business to be enforceable. *Id.* The district court relied upon *Lehman Bros. Holdings Inc. v. Gateway Funding* for the proposition that when a contract satisfies the statue of frauds vis-à-vis the predecessor company, then it can be enforced against a successor in interest and does not pose a statute of frauds problem. 942 F.Supp.2d 516 (E.D. Pa. 2013), R., 000152. The *Lehman Bros.* opinion, however, expressly applies to those claims of successor liability based on the de facto merger doctrine. ("If the jury finds the existence of a *de facto* merger, then by definition Gateway assumes Arlington's written liabilities." *Id.* at 533). This opinion does not stand for the proposition that a successor "steps into the shoes" of a predecessor for *every* contract the predecessor signed when there is implied assumption and no de facto merger, or any common ownership.

Importantly, the district court found that there was no de facto merger between or mere continuation of Fatty's LLC and Tons of Fun, LLC. R. pp. 147-148. De facto merger is an entirely different exception to the successor liability doctrine than implied assumption. As acknowledged by the district court, the doctrine of de facto merger is an equitable doctrine that recognizes that successor liability may attach "where one corporation is absorbed by another, but without compliance with the statutory requirements for a merger." *United States v. Sterling Centrecorp Inc.*, 960 F.Supp.2d 1025, 1041 (E.D. Cal. 2013)(citations and quotes omitted). R., 000147. A de facto merger is characterized by: 1) a continuation of the enterprise of the seller corporation; 2) a continuity of shareholders; 3) the seller corporation ceasing its ordinary business operations and liquidating; and 4) the purchasing corporation assumes those obligations of the seller ordinarily

necessary for the uninterrupted continuation of normal business. *Sterling Centrecorp Inc.*, 960 F.Supp.2d at 1041-42.

Under these circumstances, it only makes sense that, as a matter of law, when there is a de facto merger (as there was in *Lehman Bros.*), express or implied assumption should occur and the statute of frauds is thereby bypassed. A de facto merger is essentially the same corporation existing in an alternative form and is most likely done with the intent to escape liability from creditors. Thus, it does not make sense, nor does *Lehman Bros.* stand for the proposition, that where there is an implied assumption, as a matter of law all liabilities are assumed despite the requirements of the statute of frauds.

Fatty's LLC is not liable to Alsco for liquidated damages for several other reasons:

First, Fatty's LLC is not liable to Alsco on the renewed Alsco Contract because it did not have a "meeting of the minds" with Alsco on the material terms of the contract. "The 'meeting of the minds' must occur on all material terms to the contract." *Barry v. Pac. W. Constr., Inc*., 140 Idaho 827, 831, 103 P.3d 440, 444 (2004). In Fatty's LLC's case, there is no evidence that Fatty's LLC was aware of, or accepted, the contract renewal clause. Silence on the matter is not sufficient, as Fatty's LLC did not negotiate or sign the original contract with the renewal clause. Idaho case law is clear: "Silence ordinarily does not establish acceptance without knowledge that silence is a mode of acceptance and the offeree intends to accept…A party cannot state an agreement on his own terms and unilaterally form a contract." *Figueroa v. Kit-San Co.,* 123 Idaho 149, 156-57, 845 P.2d 567, 570 (Ct. App. 1992). Alsco could not unilaterally impose the terms of the Alsco Contract onto Fatty's LLC without Fatty's LLC's express acceptance of all the material terms.

Second, the Alsco Contract was non-assignable because it was a personal services contract. The contract's primary purpose was to furnish lines and other cleaning services. "Generally, an executory contract for personal services cannot be specifically enforced." *Byrne v. Morley,* 78 Idaho 172, 176, 299 P.2d 758, 760 (1956). Moreover, personal service contracts fall naturally

within the Idaho Statute of Frauds: "The rule is firmly established by the great weight of authority that a contract for personal services which by its terms are to be rendered for a period in excess of one year is within the meaning of the statutory provision requiring contracts not to be performed within a year to be in writing." *Allen v. Moyle*, 84 Idaho 18, 23, 367 P.2d 579, 582 (1961).

Third, the Alsco Contract is not subject to a part-performance exception to the Idaho Statute of Frauds. Idaho case law is clear: "There is no literal foundation in I.C. § 9-505 for the oft-made assertion that part performance takes a contract outside the statute. Plainly it does not… The doctrine of part performance is best understood as a specific form of the more general principle of equitable estoppel." *Frantz v. Parke*, 111 Idaho 1005, 1009, 729 P.2d 1068, 1072 (Ct. App. 1986).

At trial, Alsco failed to show the elements of equitable estoppel and thus did not remove the parties' contract (and alleged contract renewal) from the Idaho Statute of Frauds:

> The essential elements of equitable estoppel…are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or con-structive, of the real facts. As related to the party claiming the estoppel, they are: (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in ques-tion; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Tew v. Manwaring, 94 Idaho 50, 53, 480 P.2d 896, 899 (1971). Fatty's LLC did not make any false representations to Alsco about the Alsco Contract, and Alsco had full knowledge that Fatty's LLC was receiving services without an express written acceptance or renewal of the Alsco Contract.

At the time of the alleged assumption of debt by Fatty's LLC (i.e., January 2013), the 60-month renewal contract did not yet exist. Alsco failed to present any evidence that the parties discussed the contract renewal provision after 2013, or that any new consideration was exchanged in connection with the alleged five-year renewal. Under these circumstances, this Court should

adopt the persuasive and sensible holdings in the Texas case *Farone v. Bag'n Baggage, Ltd.,* 165 S.W.3d 795 (Tex. App. 2005), wherein the court stated:

> The original contract could not be performed within one year. Any implied renewal of the contract, therefore, could not be performed within one year. The statute of frauds requires that those agreements are not enforceable unless the promise or agreement…is in writing and signed by the party to be charged with the promise or agreement or by someone who is lawfully authorized to sign for him. Here, there may have been implied agreements to continue the original contract; but, without a further writing during each period of extension of the original two-year agreement, any subsequent agreements are not enforceable.

Id., at p. 801. See also *Ripani v. Liberty Loan Corp*., 95 Cal. App. 3d 603, 609, 157 Cal. Rptr. 272, 276 (1979) (Renewal or extension of a lease in excess of one year is subject to the statute of frauds and therefore re-quires a writing.).

Moreover, the Supreme Court should adopt the persuasive findings in *People ex rel. Deneen v. Econ. Light & Power Co*., 241 Ill. 290, 89 N.E. 760 (1909), which finds that a multi-year contract constitutes a stand-alone contract, independent and severable from any renewals terms in the contract. *Id.*, at p. 354. The undisputed evidence at trial showed that the original contract between Alsco and Clay Roman were severable and that Fatty's did not have a meeting of the minds with Alsco as to contract renewals.

The appellate record shows that Alsco knew about the change in business from Tons of Fun, LLC and Fatty's LLC. Alsco stopped delivering during the interim transition period. The district court abused its discretion in finding that Alsco was excused from complying with the statute of frauds under these circumstances.

E. The District Court Erred in Concluding Alsco Met its Burden for an Award of Liquidated Damages.

As a general rule, "where the forfeiture or damage fixed by a contract is arbitrary and bears no reasonable relation to the anticipated damage, is exorbitant or unconscionable, it is regarded as a 'penalty, and the contractual provision therefor is void an unenforceable." *Melaleuca, Inc., v.*

Foeller, 155 Idaho 920, 927, 318 P.3d 910, 917 (2014) (quoting *Graves v. Cupric*, 75 Idaho 451, 456, 272 P.2d 1020, 1023 (1954)).

Alsco did not attempt to introduce any evidence regarding its actual damages. During cross examination, Alsco admitted that the value of the materials it purchased and used at Fatty's LLC bar totaled $2,000.00 and that Alsco had not invested anywhere close to $21,000 in actual product purchases for Fatty's Bar LLC. Tr. pp. 119 LL. 8 -12. When asked about lost profits, Alsco did not have any evidence that it incurred lost profits as a result of the early cancellation of the Alsco Agreement – only that it lost liquidated damages. Tr. p. 142 LL 1-25. Alsco failed to show that the liquidated damages of $21,000 bore any reasonable relationship to its actual damages. The district court therefore erred in awarding Alsco liquidated damages.

F. The District Court Erred in Awarding Cost and Attorney Fees to Alsco.

The district court erred in awarding attorney fees to Alsco on its successor liability claim. R. pp. 26-46. The district court awarded Alsco approximately $26,766.00 in fees and $1,513.37 in costs. *Id.* The district court based its fees award on the provisions of the Tons of Fun/Alsco Contract, as well as on Idaho Code § 12-120(3). Fatty's LLC believes that the district court should not have awarded any damages to Alsco under a successor liability claim, and so Alsco should not have been entitled to prevailing party fees under contract theory, or under Idaho Code § 12-120(3) and Rule 54. The Supreme Court should reverse the award of costs and fees to Alsco in its entirety.

Further, the district court apportioned fees between Defendants Roman and Fatty's LLC on a disproportionate bases without any support in the record. R. pp. 39-41. Fatty's LLC raised the issue of apportionment of fees between defendants in its Motion to Disallow Costs and Fees. Aug. R. p. 60. Despite this, Alsco's counsel did not submit any memorandum of fees that would demonstrate, in any way, how fees were incurred with respect to each defendant. Aug. R. pp. 48-55. Without any such testimony or assertions from counsel for Alsco, it was error for the district court to apportion fees in such a manner.

G. The District Court Should Award Fees to Fatty's LLC on Remand.

As set out above, Fatty's LLC believes that this Court should vacate the award of damages to Alsco on its successor liability claim. Alsco was not awarded damages on any other theory or claim. Thus, on remand, the district court should award Fatty's LLC its costs and fees as the prevailing party under Idaho Code § 12-120(3) and Rule 54. The commercial transactions between the parties forms the basis of Alsco's claims. The Court can award Fatty's LLC its fees under Section § 12-120(3) even if it finds that the alleged renewal contract with Alsco is not enforceable. See *Lawrence v. Jones*, 124 Idaho 748, 864 P.2d 194 (Ct. App. 1993). See also *Erickson v. Flynn*, 138 Idaho 430, 436, 64 P.3d 959, 965 (Ct. App. 2002) (attorney fees unquestionably are to be awarded under this subsection where the cause of action is for breach of a commercial contract; where the claim is contractual, fees must be awarded to the prevailing party even though, as here, liability under the contract was not established). Fatty's LLC presented arguments for costs and fees to the district court. The district court erred in ruling in favor of Alsco and in denying Fatty's' request for cots and fees. The Supreme Court should remand that issue for further proceedings and should direct the district court to allow Fatty's the opportunity to submit a Rule 54 memorandum of costs and fees on remand.

H. The Court Should Award Fatty's Its Costs and Fees on Appeal.

Fatty's LLC is entitled to costs and fees on appeal. See I.A.R. 35(a)(5) and I.A.R. 40, 41.

Idaho follows what is known as the "American Rule" for attorney fees, which rule holds that "no fee awards are available absent contractual or statutory authority." *Sopatyk v. Lemhi County,* 151 Idaho 809, 819, 264 P.3d 916, 926 (2011). In this case, Fatty's LLC is entitled to fees against Alsco on appeal under Idaho Code § 12-120(3) due to the underlying commercial transactions between the parties. See *Erickson v. Flynn*, cited above. The Court can award Fatty's LLC its fees even if it finds that the alleged renewal contract with Alsco is not enforceable. *Id.*

Fatty's LLC should be entitled to an award of fees under Idaho Code § 12-121 for any frivolous, unreasonable, or unfounded arguments by Alsco on appeal. See *Minich v. Gem State*

Developers, 99 Idaho 911, 591 P.2d 1078, 1979 (1979). See also *Berkshire Invs., LLC v. Taylor*, 153 Idaho 73, 87, 278 P.3d 943, 957 (2012). Should Fatty's LLC prevail on appeal, it seeks an award of costs consistent with I.A.R. 40.

IV. CONCLUSION

This Court should find that Alsco is not entitled to damages under a successor liability theory as a matter of law, and that the district court abused its discretion in awarding damages to Alsco as a successor to Tons of Fun, LLC. This Court should reverse the district court's damage awards to Alsco, and the award of costs and fees to Alsco and should find that Fatty's LLC is the prevailing party in the matter. This Court should also find that Fatty's LLC is entitled to fees under Idaho Code § 12-120(3) and should remand the issue of Fatty's LLC's costs and fees for further determination under Rule 54. Finally, this Court should award Fatty's LLC its costs and fees on appeal.

DATED: June 20, 2019.

PARÉ & COZAKOS, PLLC

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on June 20, 2019, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, to the following person(s):

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