

Nos. A08-1252 and A08-1700

State of Minnesota
 In Court of Appeals

Premier Bank, a Minnesota corporation,

Appellant,

vs.

Becker Development, LLC, Boone Family Investments, LLC,
 Steven L. Boone, Annette C. Boone, Nancy C. Buehler, Robert G. Buehler,
 Michael S. Uzelac, Pamela J. Noll, Deanna M. Lasser, Ann-Marie Rasmus,
 Daniel P. Boone, Bauerly Brothers, Inc., Kuechle Underground, Inc.,
 John Oliver & Associates, Inc., and John Does 1 through 5,

Respondents,

Pamela J. Noll,

Respondent,

vs.

Gordon Jensen and Jensen Anderson Sondrall, P.A.,

Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF LEGAL ISSUES

1. The district court has inherent power to grant summary judgment in favor of any party, which action should not be reversed on appeal absent genuine issues of material fact or an erroneous application of law.

The district court correctly determined that it had authority to grant summary judgment to either party in ruling on the motion for summary judgment by Premier Bank ("Premier").

Key Cases: *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993); *Leidall v. Grinnell Mutual Reinsurance Company*, 374 N.W.2d 532 (Minn. Ct. App. 1985).

2. On the facts and legal theories presented to the district court, the individual guarantors were entitled to summary judgment dismissing all claims based on the guaranties.

The district court correctly dismissed Premier's claims against the Guarantors based upon the plain language of the guaranty contract as asserted in the Guarantors' response to the bank's motion for summary judgment.

Key Cases: *Loving & Assoc., Inc. v. Carothers*, 619 N.W.2d 782, 786 (Minn. Ct. App. 2000), *rev. denied* (Minn. Feb. 13, 2001); *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346-47 (Minn. 2003); *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 312 (Minn. 2003).

3. By failing to raise the issues in the district court, Premier waived its right to seek reformation or to assert new contract claims on appeal.

The district court did not rule on reformation or the new contract claims because Premier failed to make those arguments before the district court.

Key Case: *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

4. Premier failed to present evidence to the district court to show that reformation is warranted.

The district court did not rule on reformation or the new contract claims because Premier failed to create any record below related to the parties' intent.

Key Cases: *Nichols v. Shelard Nat'l Bank*, 294 N.W.2d 730, 734 (Minn. 1980); *Manderfield v. Krovitz*, 539 N.W.2d 802, 805 (Minn. 1995); *rev. denied* (Jan. 26, 1996).

STATEMENT OF THE CASE

This case involves two appeals consolidated by this Court's October 7, 2008 Order. The first appeal, Appellate Court File No. A08-1252, was filed by Premier Bank on July 23, 2008 and seeks review of parts of a Judgment entered on May 30, 2008 ("Original Judgment") pursuant to a Statement of Undisputed Facts, Conclusions of Law, Order for Judgment and Partial Summary Judgment issued on that date by Judge Alan Pendleton, Judge of District Court, Tenth Judicial District. The Original Judgment determined issues raised in two civil actions before the district court: (1) an action involving claims by Premier and Kuechle Underground, Inc. ("Kuechle") against Boone Builders, Inc., district court file number 71-CV-07-960 (the "960 Action"), the appeal of which involves issues of priority between Premier's mortgage and Kuechle's mechanic's lien on which these Respondents take no position; and (2) an action arising out of a lawsuit commenced by Premier against these Respondents and others in district court file number 71-CV-07-1374 (the "1374 Action"), the appeal of which these Respondents address herein. The second appeal, Appellate Court File No. A08-1700, was filed on September 29, 2008. It arises out of an August 1, 2008 Judgment ("Supplemental Judgment") issued pursuant to a Supplemental Statement of Undisputed Facts, Conclusions of Law, Order for Judgment and Judgment dated July 28, 2008. The Supplemental Judgment relates only to issues raised in the 1374 Action.

The district court issued the Original Judgment in response to cross motions for summary judgment brought by Premier and Kuechle and the responses thereto. In the

1374 Action and its motion, Premier sought to foreclose a mortgage against two corporate entities, Becker Development, LLC (“Becker”) and Boone Family Investments, LLC, (“Boone Family Investments”), which mortgage secured a Note by Becker. Premier further sought to recover against all named individual Respondents based on their alleged guarantees of Becker’s Note. The district court denied Premier’s motion and granted summary judgment in favor of Respondents Steven L. Boone, Annette C. Boone, Michael S. Uzelac, Deanna M. Lasser, Ann-Marie Rasmus and Daniel P. Boone (collectively referred to by the district court as the “1374 Defendants/Guarantors”), dismissing with prejudice Premier’s claims against the 1374 Defendants/Guarantors based on its finding that the signed Guaranties guaranteed a Note executed by Boone Family Investments and not a Note signed by Becker. (See App. 261, 265, 269, 273, 277, 281, 285, 289, 293 and 320-323.) In the Original Judgment, the district court dismissed without prejudice Premier’s claims against Respondent Pamela J. Noll (“Noll”) and Respondents Nancy U.¹ and Robert G. Buehler (collectively, “the Buehlers”), ruling that Premier had failed to properly serve the Summons and Complaint on either Noll or the Buehlers and therefore they were not properly parties to the litigation at the time of Premier’s motion.

Thereafter, Premier properly served both Noll and the Buehlers with the Complaint, which was timely answered. Following motion by the Buehlers and Noll (*see*

¹ Ms. Buehler was incorrectly named in the case caption as Nancy C. Buehler. Her correct name is Nancy U. Buehler.

R-26-48)², the district court issued its Supplemental Judgment on August 1, 2008 dismissing Premier's claims against the Buehlers and Noll with prejudice on the same grounds as the Court had dismissed Premier's claims against the 1374 Defendants/Guarantors: the Guaranties pertained to a Note by Boone Family Investments and not a Note by Becker; Premier did not seek to enforce a Note by Boone Family Investments; and Noll and the Buehlers had not guaranteed and had no liability for a Note by Becker. Premier then filed a second appeal, this time from the Supplemental Order.

² All Respondents except Kuechle Underground, Inc., Bauerly Brothers, Inc., John Oliver & Associates, Inc., Gordon Jensen and Jensen Anderson Sondrall, P.A. have joined in filing Respondents' Joint Appendix. All citations from Respondents' Joint Appendix are denoted as R-____.

STATEMENT OF FACTS

Substantive Facts: The Loan Transaction

Respondent Steven L. Boone and his wife Annette C. Boone (“the Boones”) own a small home building company, Boone Builders, Inc. In 2000, the Boones were introduced to Gordon Jensen (“Jensen”), a real estate development attorney at Jensen Anderson Sondrall, P.A. (R-20 ; App. 319.) In 2004, the Boones became interested in developing 40 acres of property located in Becker, Minnesota (“the Property”). They hired attorney Jensen, who set up the corporate entities and drafted the transactional documents to allow them to proceed with the planned development. (App. 319.)

In September 2004, Jensen organized two limited liability companies: Boone Family Investments, which was formed solely to purchase and hold title to the Property; and Becker, formed to develop the residential housing project identified as the “River Bend Development.” (App. 89-90.) Steven Boone did not understand the legal and tax-related reasons for the various corporate formations but instead relied on Jensen’s legal advice and signed what he was told to sign. (App. 94.)

Boone Family Investments was made up of Steven Boone, his wife Annette Boone, and the couples’ six adult children. (App. 90.) Steven Boone was the only member with decision-making authority. (App. 90.) As silent members, the adult children, including Noll and Nancy Buehler, each invested \$10,000 in Boone Family Investments. (App. 9; 335.)

Jensen drafted all transactional documents with respect to the River Bend Development project. (App. 319.) Boone Family Investments purchased the Property on November 17, 2004. (App. 89.) On or about December 1, 2004, Jensen drafted and the two companies signed a Memorandum of Agreement whereby Becker obtained “certain rights to purchase” the River Bend Property. (App. 90.)

Steven Boone had obtained and intended to utilize a financing commitment from Construction Mortgage Investors Company (“CMIC”), a lending entity that had financed earlier projects for Boone Builders, which commitment included favorable terms and required no personal guaranties. (App. 319.) Jensen, who had represented Premier for years and was familiar with its business operations and expectations related to development loans, counseled Steven Boone to bring the project to Premier. (App. 320.) Relying solely on Jensen’s counsel, Steven Boone decided not to finance the project through CMIC and instead agreed to borrow money from Premier. (App. 319.) Unbeknownst to Steven Boone, Jensen had a continuing attorney/client relationship with Premier and was representing Premier with respect to the River Bend Development loan transaction. (App. 319.) Jensen did not divulge or explain his conflict of interest in simultaneously representing Premier and Becker or ever request or receive written waivers of the conflict of interest, inherent in his dual representation, related to the project. (App. 319.)

At some point prior to the loan closing, Jensen informed Steven Boone that Premier wanted the Boone family members to sign personal guaranties. Jensen

consistently and adamantly assured Steven Boone that Premier was requiring such as a mere “formality” and that he knew that Premier had never exercised its rights to recover under a personal guaranty in the past. (App. 320-321.)

Each of the individual Guaranties provides, in pertinent part, as follows:

This Guaranty, is made and entered into effective the 8th day of September, 2005, by (one for each individual guarantor) (hereinafter referred to as the Individual Guarantor”) to Premier Bank, a Minnesota corporation (hereinafter referred to as the “Lender”).

RECITALS:

A. Boone Family Investments, LLC, a Minnesota limited liability company (hereinafter referred to as the “DEBTOR”), (Emphasis Added.)

B. The Debtor and the Lender have agreed that the Lender will make an advance (“Loan”) to the Debtor in the principal amount of Three Million Two Hundred Thousand and 00/100 Dollars (\$3,200,000.00), which loan is evidenced by a loan note of even date herewith from the Debtor to the Lender (hereinafter referred to as the “Note”) to be disbursed pursuant to a Loan Agreement of even date

2. The Individual Guarantor hereby, unconditionally and absolutely, guarantees to Lender the due and prompt payment, and not just the collectability, of the principal and interest and late charges and all other indebtedness, if any, on the Note, when due, whether at maturity, pursuant to mandatory or optional prepayments, by acceleration or otherwise, all at the times and places and at the rates described in and otherwise according to the tenor of the Note.

3. The Individual Guarantor further hereby unconditionally and absolutely guarantees to Lender the due and prompt performance by the Debtor of all duties, agreements and obligations of the Debtor contained in the

Mortgage and the Loan Agreement, respectively, and the due and prompt payment of all costs incurred, including reasonable attorneys' fees, in enforcing the payment and performance of Debtor's obligations as provided in the Note, the Mortgage, and the Loan Agreement and its obligations under this Guaranty (the payment and performance of the items set forth in Paragraphs 2 and 3 of this Guaranty being hereinafter collectively referred to as the "Indebtedness Guaranteed").

(App. 261-295.)

The loan transaction was closed on September 8, 2005. Although the loan documents are all dated September 8, 2005, the documents were not signed in one location and not all documents were provided to each of the parties. (App. 335-337.)

Procedural Facts: Course of the Litigation

On October 1, 2007, Premier brought suit against all named parties in an action for breach of the loan-related agreements and to foreclose the mortgage. (R-01.) Premier sought to recover on the personal Guaranties executed by Noll, the Buehlers, and the 1374 Defendants/Guarantors (collectively, the "Individual Guarantors"). Ignorant of the actual terms of the Guaranties, which stated they were guaranties of a Loan Note executed by Boone Family Investments, Premier asserted that the Guaranties evidenced a promise by Respondents to pay the debts of Becker. (R-07; 11-12; 14-15.)

Premier effected service on Boone Family Investments, Becker, and the Boones, as such companies' principals, all of whom were represented by the same counsel of record, Lawrence Marofsky ("Marofsky"). Premier did not attempt to perfect service on Noll or the Buehlers. (R-22; 24; 49.) Premier, along with the parties who had been

served, conducted very brief discovery and on or about March 27, 2008 Premier noticed a motion for summary judgment, which was scheduled for hearing on April 25, 2008. (App. 143-170.) This motion was served on Marofsky but was not served on Noll or the Buehlers. (R-28; 41; 51; 72.) Prior to the hearing, Marofsky filed a response asserting that there was no factual or legal basis upon which to impose liability on the Individual Guarantors because the Guaranties Premier sought to enforce did not guarantee the Note of Becker. (App. 318-337.)

Noll first learned that she had been named as a party to the proceedings on April 15, 2008; the Buehlers learned of this fact on April 13, 2008. (R-22; 24; 49.) Noll and the Buehlers immediately retained counsel.

On April 24, 2008, Noll and the Buehlers filed separate motions to dismiss the Complaint against them on jurisdictional grounds for lack of service. (R-26; 39.) Because neither had been served in the litigation, neither answered. In their motion submissions, however, each identified substantive defenses to Premier's claims, including the malpractice of the third party defendants, Gordon Jensen and Jensen, Anderson & Sondrall, P.A., lack of an underlying breach of the subject loan, the legal insufficiency of the Guaranty and improper calculation of the amounts allegedly due on the Becker Note. (R-28; 41.)

Premier, through its counsel, although now aware that all parties had not been properly served or joined and thus not afforded the opportunity to present their defenses, nevertheless did not request or agree to a continuance or stay of the pending summary

judgment motion. Premier instead chose to proceed, asserting that there were no genuine issues of material fact in dispute that would prevent entry of judgment as a matter of law. At the April 25, 2008 hearing on Premier's motion for summary judgment and Noll and the Buehlers' motions to dismiss and to strike, Premier did not present the district court with either a written or oral motion for reformation of the Guaranties. (App. 24-25.) It did request and obtain the district court's permission to file a post-hearing reply memorandum.

On April 30, 2008, Premier filed its reply memorandum, disputing the arguments made by the Respondents that the Guaranties guaranteed a Note by Boone Family Investments, not a Note by Becker, and claiming a "mistake" in the named debtor which was the result of a "scrivener's error." (SA 361). Premier did not introduce evidence that a scrivener's error in fact had occurred, did not argue that this "scrivener's error" warranted reformation, did not move the district court for reformation, and did not withdraw its pending summary judgment motion to allow it further time to consider available options. Instead, Premier fully admitted it did not serve Noll or the Buehlers, claimed that it was nevertheless entitled to judgment against them, and asked the court to rule on the defenses by the Individual Guarantors that the Guaranties did not apply to the Note at issue. (SA 355-362.)

After the April 25, 2008 summary judgment hearing but before the district court issued its Original Judgment, Noll and the Buehlers accepted service in the 1374 Action. Noll served and filed an Answer to Premier's Complaint on May 23, 2008, wherein she

raised substantive defenses to her alleged liability under the Guaranty, including the fact that the Guaranty did not name Becker as the Debtor, brought a counterclaim against Premier relating to the underlying foreclosure action, and asserted a legal malpractice claim against Third Party Defendants Jensen and his law firm for their concurrent representation of all parties associated with the River Bend Development loan transaction (R-72.). The Buehlers served and filed a Joint Answer and Counterclaim on May 23, 2008, raising these substantive defenses to Premier's claims on the Note and on the Guaranties. (R-51.)

Following oral argument and receipt of Premier's post-argument submission, the district court issued the Original Judgment on May 30, 2008. (App. 5-49.) In the Original Judgment, the district court granted the motions of Noll and the Buehlers and dismissed these parties without prejudice on jurisdictional grounds. (App. 40.) With respect to the other individually named guarantors who had been served and were proper parties to the litigation, the district court denied Premier's motion for summary judgment and dismissed the claims arising out of the Guaranties, finding that the terms of the Guaranties bound these Respondents to pay a Note of Boone Family Investments, not a Note of Becker. (App. 37.)

On June 16, 2008, Premier filed a request for reconsideration under Rule 115.11, Minn. Gen. R. Prac. (R-90.) The grounds for this request were twofold: (1) because the Guaranty signed by Boone Family Investments guaranteed the debt of Becker, Boone Family Investments should be deemed liable under its Guaranty, and (2) because the

Individual Guarantors guaranteed the obligations of Boone Family Investments, they therefore guaranteed the debt of Becker. (R-90-91.) In the latter argument, Premier asserted for the first time a derivative liability theory. On June 17, 2008, the district court granted the request as to the former and denied it as to the latter, (R-96-97), and on July 17, 2008 issued an Order Granting Premier Bank's Motion for Reconsideration. (SA 363-365.)

On July 18, 2008, the parties again appeared before the district court, at a scheduled pretrial hearing. At that hearing, counsel for the Buehlers and Noll both pointed out to the district court that, after the summary judgment motions were argued in April but before the district court issued its decision at the end of May, Premier had made sufficient service of process on the Buehlers and Noll and each had filed timely Answers. (R-51; 72.) These Answers raised, amongst other issues, the fact that the Guaranties the Buehlers and Noll had signed were guaranties of a Note executed by Boone Family Investments, and Premier was seeking to enforce a Note executed by Becker. These were the same grounds upon which the district court had previously dismissed the claims against the 1374 Defendants/Guarantors. All parties agreed that should the Buehlers and Noll file a motion for summary judgment, the district court, consistent with its prior ruling, would grant summary judgment to the Buehlers and Noll on the merits. Thus, the parties and the district court agreed that the district court would consider such a motion without hearing if the Buehlers and Noll applied for such relief. That application was filed and served by the Buehlers and Noll on July 22, 2008. (R-120.) On July 28, 2008,

the district court ruled on the motion and issued its Supplemental Judgment on August 1, 2008, dismissing with prejudice all claims asserted by Premier against the Buehlers and Noll on the merits. (SA 365-368.)

On July 24, 2008, notwithstanding its July 23, 2008 appeal of the Original Judgment, Premier filed a motion to amend its Complaint to add claims for specific performance and indemnity. (R-127.) Premier did not include a request for reformation in its written motion or its proposed Amended Complaint, nor did it add that request at the oral argument on the motion. (R-130.) Lacking jurisdiction to consider the motion because of the pending appeal, the district court orally denied Premier's motion to amend its complaint on September 12, 2008.

ARGUMENT

I. THE DISTRICT COURT HAS INHERENT POWER TO GRANT SUMMARY JUDGMENT IN FAVOR OF ANY PARTY, WHICH ACTION SHOULD NOT BE REVERSED ON APPEAL ABSENT GENUINE ISSUES OF MATERIAL FACT OR AN ERRONEOUS APPLICATION OF LAW.

This Court is well aware of the standard of review applicable in the present case, which involves inquiry into whether “(1) there are any genuine issues of material fact; and (2) the district court’s application of the law was erroneous.” *McClure v. Davis Engineering, L.L.C.*, 716 N.W.2d, 354, 356 (Minn. Ct. App. 2006). The Court must find that no genuine issue of material fact exists “[w]here the record taken as a whole could not lead a rational trier of fact to find for [a specified] party.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). A genuine issue for trial must be established by substantial evidence, *DLH*, 566 N.W.2d at 69-70, that would be admissible at trial. *United States v. United States Gypsum Co.*, 340 U.S. 76 (1950). In determining whether a genuine issue of material fact exists, both the district court and this Court are required to look only to the evidence actually presented to the court below. *See Hasan v. McDonald’s Corp.*, 377 N.W.2d 472, 473 (Minn. Ct. App. 1985); *see also* Minn. R. Civ. App. P. 110.01. Where no material facts are in dispute, appellate review of a district court’s application of the law is *de novo*. *In re Collier*, 726 N.W.2d 799 (Minn. 2007).

Premier argues that because the Individual Guarantors had not “noticed and filed a motion to dismiss,” the district court committed reversible error by dismissing the claims against them “*sua sponte*.” (Premier’s Br. at 22.) This assertion is unsupported by the

case law or the applicable court rules. “A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that *either* party is entitled to a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (emphasis added); Rule 56.03, Minn. R. Civ. Pro. This rule gives a district court authority to enter judgment for either party, including a non-moving party, on the basis of the documents before the court when the motion is made. *Leidall v. Grinnell Mutual Reinsurance Company*, 374 N.W.2d 532, 535 (Minn. Ct. App. 1985); *Anderson v. Lappegaard*, 302 Minn. 266, 224 N.W.2d 504, 510 (Minn. 1974). As the party moving for summary judgment, Premier ran the risk that by establishing that no genuine issue of material fact existed, the law would favor the Individual Guarantors and that they would be entitled to judgment as a matter of law.

“A trial court may grant summary judgment *sua sponte* so long as it affords the adverse party an opportunity to oppose such an action.” *Doe v. Brainerd International Raceway, Inc.*, 514 N.W.2d 811, 822 (Minn. Ct. App. 1994). A reviewing court will not disturb the district court’s inherent power to grant summary judgment unless the objecting party can show prejudice from lack of notice, from procedural irregularities, or from the lack of a meaningful opportunity to oppose summary judgment. *Id.*; *Estate of Reidel v. Life Care Retirement Communities, Inc.*, 505 N.W.2d 78, 81 (Minn. Ct. App. 1993). Premier makes no such showing. Premier was the party that moved for summary judgment, and in so doing represented to the district court that no genuine issues of

material fact existed and that the case should be decided as a matter of law. Premier had ample notice and opportunity to oppose the arguments advanced by the Individual Guarantors in defense of Premier's request for summary judgment, and failed to do so. Instead, finding itself unhappy with the result in the district court Premier now seeks to argue that there existed below a triable issue of material fact rendering dismissal improper. It cannot shift its position on appeal in an effort to avoid the result it earned below. *See Gandrud v. Hansen*, 10 N.W.2d 372, 273 (Minn. 1943); *Gillen v. Commissioner of Taxation*, 232 N.W.2d 894, 898 (Minn. 1975). Accordingly, there is no basis upon which this Court should disturb the district court's dismissal of the Individual Guarantors upon the grounds identified.

II. ON THE FACTS AND LEGAL THEORIES PRESENTED TO THE DISTRICT COURT, THE INDIVIDUAL GUARANTORS WERE ENTITLED TO SUMMARY JUDGMENT DISMISSING ALL CLAIMS BASED ON THE GUARANTIES.

The Guaranties at issue are clear, unambiguous and available for this Court's scrutiny. They explicitly state that the signators promise to pay the debt evidenced in a promissory note executed by Boone Family Investments. There is no such debt, and there is no such Note. The Guaranties contain no reference to the debts of Becker or to Note(s) signed by Becker. As required by law, the district court correctly determined that the Individual Guarantors had no liability for Becker's debts by the strict terms of the Guaranties.

A. THE INDIVIDUAL GUARANTORS DID NOT GUARANTY BECKER'S DEBT.

A guaranty is “an independent contract between a guarantor and a creditor.” *Loving & Associates, Inc v. Carothers*, 619 N.W.2d 782, 786 (Minn. Ct. App. 2000), *rev. denied* (Minn. Feb.13, 2001). Interpretation of a guaranty contract, like any other contract, is subject to certain rules of construction. *See Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310-11 (Minn. 1989). The first step in interpreting any contract is to read the language of the contract itself, and if the language of the contract is clear and unambiguous the law requires that also to be the last step in contract interpretation. *See Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346-47 (Minn. 2003).

When interpreting the terms of a guaranty, the court must give unambiguous language its plain and ordinary meaning, *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310-11 (Minn. 1989). Summary judgment is appropriate when contract language is unambiguous, making the contract's affect a matter of law.³ *Green Tree Acceptance, Inc.*

³ The general rule is that where the intention of the parties may be gained wholly from the writing, construction of a contract is a question of law for the court. *Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 751 (Minn. 2000) (citing *Donnay v. Boulware*, 144 N.W.2d 711, 716 (Minn. 1966)). However, where the language of a contract is not clear and unambiguous, construction becomes a question of fact. *Id.*

If this Court determines that Premier has raised issues of fact, then summary judgment on any issue was premature. This Court has held that summary judgment may be premature when discovery has been minimal and where the information needed to survive summary judgment is in the moving party's sole possession. *U.S. Bank Nat'l Ass'n v. Angeion Corp.*, 615 N.W.2d 425, 433-34 (Minn. Ct. App. 2000), *rev. denied*, (Minn. Oct. 25, 2000). In this case, Noll and the Buehlers had not even been served on the date summary judgment was argued. [continued on next page]

v. Wheeler, 832 F.2d 116, 117 (8th Cir. 1987). Courts cannot consider evidence of intent to vary the plain meaning of a contract absent either ambiguity in the language of the contract or fraud. *See Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 312 (Minn. 2003). Likewise, the terms of a guarantor's obligations may not be enlarged beyond the fair and natural import of the guaranty's terms. *Schmidt v. McKenzie*, 215 Minn. 1, 9 N.W.2d 1 (1943); *American Tobacco Company v. Chalfen*, 260 Minn. 79, 108 N.W. 2d (1961).

In the present case, the language of the Guaranties is plain and unambiguous. The Individual Guarantors agreed to guarantee a loan from Premier to Boone Family Investments, not a loan from Premier to Becker. The recital paragraphs of each Guaranty identify the name of the debtor as Boone Family Investments, not Becker. Although Premier conveniently excludes this recital paragraph when describing the terms of the Guaranties it seeks to enforce, (*see Premier's Br. at 16*), recital paragraph A clearly identifies Boone Family Investments as the Debtor. (App. 269-276; 281-284.) Recital paragraph B identifies a loan from Premier to the Debtor, Boone Family Investments. There is no reference to Becker or any other debtor in the Guaranties. Premier did not

[Footnote 3 continued from previous page] As specified in Respondent Noll's Notice of Review filed in App. File No. A08-1252 and in Respondent Buehlers' Notice of Review filed in App. File No. A08-1700, numerous issues remain unresolved which could affect the obligations, if any, of the Respondents. (*See R-153; 155.*) These issues are moot if the trial court's dismissal of the Individual Guarantors is upheld. If it is not, however, and this Court reverses the grant of summary judgment on the Guaranties, it should vacate both appealed judgments and remand the entire case to allow the Individual Guarantors to litigate all contested issues in the case.

make a loan to Boone Family Investments and Boone Family Investments never executed a Note with Premier. The Note executed by Becker is not referenced in the Guaranties. There is no evidence in the district court record supporting Premier's argument that the Individual Guarantors agreed to guarantee anything other than a loan to Boone Family Investments. The only evidence of intent, attached to the 1374 Defendants/Guarantors' response to Premier's motion (App. 335-337), was that the Individual Guarantors only intended to guaranty a Note of Boone Family Investments, not of Becker.

Premier prepared the Guaranties. Premier relied on these documents in bringing this action and moving for summary judgment, asserting that the documents govern the transaction and that the Respondents are liable by the terms of the documents Premier drafted. After examining the plain and unambiguous language of Premier's documents, the district court correctly determined that the Individual Guarantors did not guarantee a debt of Becker. Giving this unambiguous contract language its plain and ordinary meaning, the district court properly found that the Individual Guarantors were entitled to judgment as a matter of law on Premier's claim for coverage of Becker's debt.

B. THERE IS NO LEGAL BASIS FOR ENLARGING THE TERMS OF THE GUARANTIES TO PROVIDE DERIVATIVE LIABILITY FOR BECKER'S NOTE.

Unable to recover under the plain language of the Guaranties and, as discussed below, choosing not to ask for reformation, Premier instead seeks to recover by now arguing a theory of recovery it did not raise below until after the hearing on its motion for summary judgment. Premier argues that because the Individual Guarantors guaranteed

the obligations of Boone Family Investments, and because Boone Family Investments guaranteed the loan made to Becker, it should follow that the Individual Guarantors effectively guaranteed the loan made to Becker. Such a claim is belied by the express terms of the Guaranties.

Paragraphs 2 and 3 of each individual Guaranty specifically define the indebtedness guaranteed. Paragraph 2 defines such as a Note from Boone Family Investments, not a Note from Becker. Paragraph 3, while addressing Boone Family Investments' obligations, if any, under the Loan Agreement and Mortgage, nowhere identifies Boone Family Investments' obligations under a guaranty as part of the "indebtedness guaranteed." Accordingly, all that was guaranteed by the Individual Guarantors was a *loan* made to Boone Family Investments, not a *guarantee* of Boone Family Investments to pay Becker's note.

Premier also renews its untimely argument⁴ that the Individual Guarantors should be held liable for Becker's debt pursuant to certain provisions of the Loan Agreement. Premier first cites to paragraph 4(i) of the Loan Agreement, which obligates Boone Family Investments, Becker and the Individual Guarantors to execute documents necessary for Premier "to perfect the assignment to Lender of security granted pursuant to this Loan Agreement." (*See* Premier's Br. at 15.) This argument has no merit. It is axiomatic that the "perfection" of a security interest, or the assignment of a security

⁴ Premier raised these claims after the entry of the Original Judgment as part of its motion to amend its complaint.

interest, is accomplished by filing and/or recording appropriate documentation to give notice to others of an interest in property pledged as collateral for a loan. In this transaction, this was accomplished by the execution and recording of the Mortgage and Assignment of Rents and Security Agreement and Fixture Financing Statement, (App. 216-233), and the execution of two Security Agreements, one by Becker and one by Boone Family Investments, which provided that the Debtor granted to Premier a security interest in, and assigned to Premier, certain property defined as collateral. (App. 234-243; 244-253.) The language of paragraph 4(i) has no application whatsoever to the Guaranties in that the Guaranties make no reference to the grant of a security interest, assignment of security, or the perfection of an assignment of security.

Next, Premier argues that pursuant to paragraph 11 of the Loan Agreement the Individual Guarantors agreed to indemnify Premier for breaches of warranties made thereunder, and that this constitutes evidence that the Individual Guarantors intended to guarantee Becker's Note. Again, this language does not support Premier's position. While it is true that the Individual Guarantors agreed to certain covenants, representations and warranties, the Court will note that none of the covenants, representations or warranties alleged by Premier to have been breached refer in any way to obligations under the Guaranties.

Faced with the plain and unambiguous language of its own documents, Premier seeks to enlarge Respondents' potential liability beyond the terms of the signed Guaranties. Premier cannot cite any legal authority in support of this argument because

the law provides just the opposite: guaranties are to be strictly enforced according to their terms. *See Milliken & Co. v. Eagle Packaging Co., Inc.*, 295 N.W.2d 377, 382, n. 3 (Minn. 1980); *Peoples State Bank of Plainview v. Muir*, 386 N.W.2d 321, 323 (Minn. Ct. App. 1986). In refusing to enlarge the obligations of a guarantor beyond the plain terms of an executed guaranty, the Minnesota Supreme Court has stated that a guarantor has the right to:

insist that he is bound to the extent, in manner, and under the circumstances pointed out in his obligation, and no further. Since a guarantor is ... bound by his agreement ... it is eminently just and proper that he should be a favorite of the law, and have a right to stand on the strict terms of his obligation. To charge him beyond its terms, or to permit it to be altered without his consent would be, not to enforce the contract made by him, but to make another for him.

Schmidt v. McKenzie, 215 Minn. 1, 9-10, 9 N.W.2d 1, 5 (1943) (internal citations omitted). *See also Bradshaw v. Barber*, 147 N.W. 650, 650 (Minn. 1914) (holding that the terms of a guaranty may not be enlarged beyond the fair and natural import of the guaranty's terms.) Accordingly, there is no basis to enlarge the terms of the Guaranties.

III. BY FAILING TO RAISE THE ISSUES IN THE DISTRICT COURT, PREMIER WAIVED ITS RIGHT TO SEEK REFORMATION OR TO ASSERT NEW CONTRACT CLAIMS ON APPEAL.

Premier raises issues on appeal that were never raised, heard, considered nor decided by the district court. While Premier contends that it asserted in the district court that the Guaranties “should be reformed under the theory of mutual mistake,” (Premier’s Br. at 7), and that the district court erred by “failing to reform” the Guaranties, (Premier’s

Br. at 14), the record is otherwise.⁵ Premier did not raise a reformation claim in the district court and made no record below to establish a “mutual mistake.” It also failed to timely raise any claims against the Individual Guarantors based upon the Loan Agreement. These claims are not asserted in the Complaint (R-01), Premier’s motion for summary judgment (App. 143), or its post hearing reply (App. 348). Having not raised either issue before the district court, Premier failed to preserve these issues for appeal.

The Minnesota Supreme Court has made clear that appellate courts do not pass judgment on new issues or theories. “A reviewing court must generally consider ‘only those issues that the record shows were *presented and considered* by the trial court in deciding the matter before it.’” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (citation omitted, emphasis added). Premier never presented to the district court a request to reform the Guaranties and failed to timely raise the newly alleged contract claims for the district court’s consideration. Had Premier determined that reformation was an appropriate remedy or that the contract claims were viable, it could have asserted such at numerous stages in the proceedings below.

In opposition to Premier’s summary judgment motion, the Individual Guarantors argued that the Guaranties were unenforceable because none of them guaranteed a Note of Becker. (App. 318.) The parties presented arguments on this issue at the April 25, 2008 summary judgment hearing, and Premier challenged this argument by including a

⁵ Premier does not challenge the legal basis for the district court’s dismissal of the Individual Guarantors, only that the district court erred by refusing to reform the Guaranties.

reference in its April 30th reply memorandum to a “scrivener’s error.”⁶ (SA 355.) As it examines the record, the Court will note that this cryptic reference was not accompanied by a request for action by the district court, and as such does not constitute a motion for reformation. *State v. Mudgett*, 728 N.W.2d 921, 922 (Minn. Ct. App. 2008) (finding that “an informal reference ... that is not accompanied by a specific application for relief, is not a motion.”) (citations omitted). If Premier had believed this alleged “scrivener’s error” was clear, consistent, unequivocal and convincing evidence of a mutual mistake warranting reformation, *see Manderfield v. Krovitz*, 539 N.W.2d 802, 805 (Minn. 1995), *rev. denied* (Jan. 25, 1996), it could have withdrawn its motion and sought leave to amend its Complaint to add a reformation count. Likewise, if it had deemed its alleged contract claims viable, it could have sought leave to add them to its Complaint and motion submissions. Instead, Premier chose to move ahead with its summary judgment motion, arguing that the Guaranties were enforceable as written.

After receiving the district court’s order dismissing the Individual Guarantors for the reasons briefed and argued, Premier had another opportunity to raise the issues of reformation and/or the contract claims for the district court’s consideration when it requested permission to file a motion to reconsider. (R-90.) The grounds for Premier’s

⁶ Even if Premier had raised these issues in its reply brief, it should not have been allowed to do so. *See* Minn. Gen. R. Prac. 115.03 (c) (stating that a reply memorandum is limited to new legal or factual matters raised by an opposing party’s response to a motion) (emphasis added); *see also McIntire v. State*, 458 N.W.2d 714, 717 n. 2 (Minn. Ct. App. 1990) (stating that issues not raised or argued in an initial brief “cannot be revived” in a reply brief).

filed request were only twofold: (1) because the Guaranty signed by Boone Family Investments guaranteed a Note of Becker, Premier was entitled to summary judgment against Boone Family Investments, and (2) because the Individual Guarantors guaranteed certain obligations of Boone Family Investments, under a derivative liability theory they had effectively guaranteed the Note signed by Becker. Despite the fact that it had clear knowledge of the specific terms of the Guaranties and their legal effect by that point in the proceedings, Premier's request for reconsideration contained no reference to or allegation of the existence of a mutual mistake, nor any request that the district court reform the Guaranties.⁷ Neither did it include any mention of claims based on the contractual terms of the Loan Agreement or the Mortgage.

Premier missed yet another opportunity to raise the issue of reformation when the parties convened before the district court for a scheduled pretrial hearing on July 18, 2008. During the discussions with the court, Premier again did not claim that a mutual mistake existed nor did it request that the district court reform the Guaranties. To the contrary, while discussing the posture of the case if appealed, counsel for Premier acknowledged the basis for the district court's Original Judgment, stating, "...as I understand the Court's reasoning behind the dismissal is that the personal Guaranties referred to Boone Family Investments as the debtor as opposed to Becker Development and because of that they didn't guarantee the debt." (R-107.) Counsel said nothing about

⁷ The district court granted Premier's request as to the Boone Family Investments' Guaranty without opposition from Respondents, and denied the request on the derivative liability claim against the Individual Guarantors.

the district court failing to reform the guarantees, nor did he make a request of the court to do so. Likewise, counsel made no mention of any Loan Agreement contract claims which the district court should have considered.

Even after filing its initial notice of appeal, Premier had one more opportunity to raise the issue of reformation with the district court when it moved to amend its Complaint on July 24, 2008. Because of the pending appeal the district court ruled that it lacked jurisdiction to consider the motion and denied the motion from the bench.⁸ Nevertheless, the Court will find it instructive to examine the proposed Amended Complaint to verify that even at that point in the proceedings Premier did not request reformation in the court below.⁹ (R-130.)

Since it failed to request this relief in the district court before the court ruled on the summary judgment motion, or even thereafter with respect to reformation, and correspondingly failed to create any record to support appellate review, Premier has waived any right to seek reformation or to raise its alleged contract claims based on the terms of the Loan Agreement, and cannot now raise these issues on appeal. Accordingly, this Court should affirm the district court's grant of summary judgment in favor of Respondents.

⁸ As of the date of the filing of this Brief, the district court had not yet reduced its oral Order to written form.

⁹ Premier did seek leave to add contract claims via its proposed Amended Complaint, which leave was denied given the district court's lack of jurisdiction resulting from Premier's earlier filed appeal of the Original Judgment. (R-127; 130.)

IV. PREMIER FAILED TO PRESENT EVIDENCE TO THE DISTRICT COURT TO SHOW THAT REFORMATION IS WARRANTED.

Premier argues that the district court should have reformed the individual Guaranties because “the evidentiary record clearly establishes that the Individual Guarantors agreed to guarantee the loan that Premier made to Becker Development.” (Premier’s Br. at 14.) However, a review of the record establishes that Premier not only failed to request reformation, but also made no record to establish grounds for a court to reform the Guaranties. Because Premier has failed to point to evidence in the record justifying a court’s reformation of the Guaranties, this Court should neither reform the Guaranties nor order the district court to do so.

A court may reform a written instrument only if: (1) there was a valid agreement between the parties expressing their real intentions; (2) the written instrument failed to express the real intentions of the parties, and (3) this failure was due to a mutual mistake of the parties or a unilateral mistake accompanied by fraud or inequitable conduct by the other party. *Nichols v. Shelard Nat’l Bank*, 294 N.W.2d 730, 734 (Minn. 1980); *Berg v. Carlstrom*, 347 N.W.2d 809, 812 (Minn. 1984).

The proponent of reformation must produce evidence of each of these elements which is “clear and consistent, unequivocal and convincing.” *Manderfield*, 539 N.W.2d at 805; *Kleis v. Johnson*, 354 N.W.2d 609, 612 (Minn. Ct. App. 1984). This standard is far stricter than a “preponderance of the evidence” standard. “In suits for reformation, the evidence must be of the clearest and most convincing nature; the burden of proof is

on the plaintiff to prove its case beyond a reasonable doubt.” 27 Williston on Contracts § 70:56. Premier has not met this burden in the evidence submitted to the district court.

In this case, the record is devoid of any evidence of a valid agreement between the parties expressing an intent to guarantee Becker’s obligations, a valid agreement between the parties expressing any intention but those expressed in the Guaranties, or a mutual mistake justifying reformation. Premier relies on the Loan Agreement and Recitals as “undisputed evidence that clearly and convincingly demonstrates that the district court should have reformed the Guaranties.” See Premier’s Br. at 14-20. While the Loan Agreement makes mention of Guaranties, nowhere does the Loan Agreement state what obligations are to be guaranteed. (App. 180.) As such, Premier’s proffered “evidence” is far from “clear and convincing.” In addition, Premier has put forth nothing — no affidavit and no testimony — to show an intent by either party different than is evidenced in the documents themselves. As such, there is no evidence in the record that would support a determination that there was a mutual mistake by the parties which would render reformation an appropriate remedy.

Premier also failed to produce a “scintilla of evidence,” *cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), that it made a unilateral mistake and that the Individual Guarantors engaged in fraud or inequitable conduct. A unilateral mistake by Premier is not alone grounds for reformation. *Nichols v. Shelard National Bank*, 294 N.W.2d 730, 734 (Minn. 1980) (“Absent ambiguity, fraud or misrepresentation, a mistake of one of the parties alone as to the subject matter of the contract is not a ground for reformation.”)

Premier has not even argued, and cannot show, that there was any fraud or misrepresentation on the part of the Individual Guarantors. Premier, not the Individual Guarantors, drafted the Guaranties. Therefore, Premier is not entitled to reformation of the Guaranties.

Premier failed to request reformation as a remedy in its Complaint or in its summary judgment motion and made no motion for or argument to support a motion for reformation of the contracts in its summary judgment pleadings. As noted above, an appellate court may not consider matters not produced and received in evidence at the district court. *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W. 2d 414, 421 (Minn. Ct. App. 2003) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988)). There is no such record in the present case. Respondents invite the Court to scour the entire record for even the mention of reformation, or a factual basis to conclude that there was a mutual mistake of fact or a unilateral mistake accompanied by fraud, including the district court's exhaustive 37 page Statement of Undisputed Facts and Conclusions of Law (App. 5-41), the district court's accompanying Memorandum (App. 43-49), and the district court's Supplemental Statement of Undisputed Facts and Conclusions of Law (SA 365-368.) It will not find any, and thus will confirm that the record cannot support Premier's belated attempt to convince this Court to reform the Guaranties in its favor. Accordingly, this Court should confirm that reformation is improper and uphold the district court's decision.

CONCLUSION

For the foregoing reasons and based on the authorities cited herein, Respondents Pamela J. Noll, Nancy U. Buehler and Robert G. Buehler request that this Court affirm the district court's grant of summary judgment in favor of the Individual Guarantors.

Dated: December 2, 2008

PARKER ROSEN, LLC

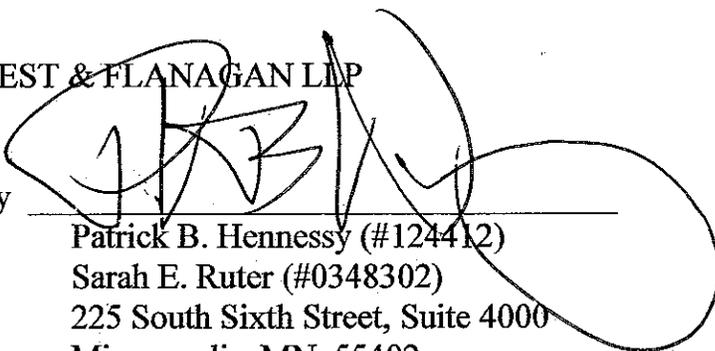
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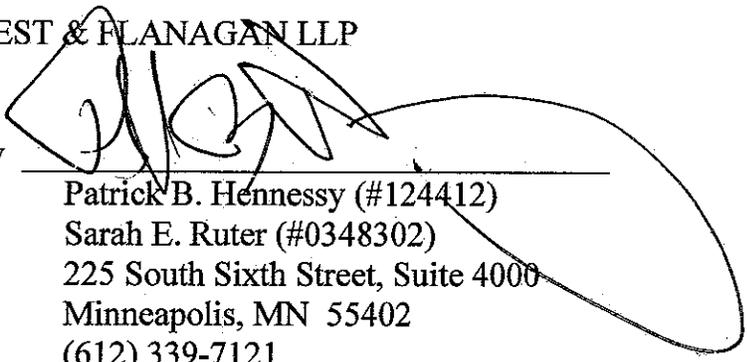
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CERTIFICATE OF BRIEF LENGTH

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subds. 1 and 3, for a Brief produced with a double-spaced proportional font. The length of this Brief is 669 lines (including footnotes) and 8,948 words (including footnotes). This Brief was prepared using Microsoft Word 2003.

Dated: December 8, 2008

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