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STATE OF NORTH DAKOTA

SUPREME COURT
OF THE
STATE OF NORTH DAKOTA

James Vault & Precast Co., Donna Bline, Melvin Zent, Thomas Kuntz, Dave Olheiser and Jerry Kram, Plaintiffs, vs. B & B Hot Oil Service, Inc., Steve Forster, Daniel Krebs and Debra D. Krebs, Defendants. and Steve Forster, Daniel Krebs, and Debra D. Krebs, Crossclaim Plaintiffs, vs. B & B Hot Oil Service, Inc., Crossclaim Defendant. and B & B Hot Oil Service, Inc., Counter-Crossclaim Plaintiff, vs. Steve Forster, Daniel Krebs and Debra D. Krebs, Counter-Crossclaim Defendants and Steve Forster, Daniel Krebs, and Debra D.	Supreme Court Case No. 20170130

Krebs,	)
	)
Plaintiffs,	)
vs.	)
	)
St. Paul Surplus Lines Insurance Company,	)
	)
Defendant,	)
	)
and	)
	)
Steve Forster, Daniel Krebs, and Debra D. Krebs,	)
	)
Crossclaim Plaintiffs,	)
vs.	)
	)
JB's Welding,	)
	)
Crossclaim Defendant,	)
	)
and	)
	)
St. Paul Surplus Lines Insurance Company,	)
	)
Third-Party Plaintiff,	)
	)
vs.	)
	)
Acuity, a Mutual Insurance Company,	)
	)
Third-Party Defendant.	)

APPEAL FROM MULTIPLE FINAL ORDERS AND DECISIONS IN THE DISTRICT COURT, SOUTHWEST JUDICIAL DISTRICT, STARK COUNTY, NORTH DAKOTA
THE HONORABLE DANN GREENWOOD
CIVIL CASE NO. 45-10-C-00809

BRIEF OF APPELLEE B & B HOT OIL SERVICE, INC.

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STATEMENT OF THE ISSUES

[1] Whether the district court properly granted summary judgment to B & B Hot Oil Service, Inc. (hereafter, "B & B") on the crossclaims of Appellants Steve Forster, Daniel Krebs, and Debra Krebs (collectively, "Forster/Krebs"), when it determined that Forster/Krebs waived all claims against B & B for damages to Forster/Krebs' property, and that the B & B's duty to indemnify Forster/Krebs extended only to the claims of third-parties.

[2] Whether the district court properly dismissed the subrogation claims of Acuity, A Mutual Insurance Company (hereafter, "Acuity"), when it determined that Acuity consented to a pre-loss waiver of claims by Forster/Krebs and that B & B was an implied co-insured of Acuity.

[3] Whether the district court properly denied Forster/Krebs' motion to amend their pleadings to assert additional allegations of breach of contract against B & B when it determined that the requested amendments were futile based on the contractual waiver of claims and its prior ruling dismissing all of Forster/Krebs' claims against B & B.

[4] Whether the district court properly denied Forster/Krebs' request to amend their pleadings to clarify claims of concerted action and joint venture when it determined those claims were futile based on the waiver provision of the lease agreement between Forster/Krebs and B & B and its prior decisions dismissing Forster/Krebs' strict products liability claim against B & B.

STATEMENT OF CASE AND RELEVANT PROCEDURAL HISTORY

[5] This is an appeal of multiple orders entered by the district court dismissing Forster/Krebs' and Acuity's claims against B & B and JB's Welding related to a fire and subsequent explosion that occurred on January 15, 2010 (the "Incident"). The Incident occurred at a building owned by Forster/Krebs (the "Building"). (App. 26, ¶ II). At the time of the Incident, B & B occupied the west half of the Building pursuant to a "Lease Agreement" dated October 1, 2009 (the "Lease") (App. 37-41).

[6] James Vault Precast Co., Donna Bline, Melvin Zent, Thomas Kuntz, Dave Olheiser, and Jerry Cline (the "James Vault Plaintiffs") commenced this lawsuit on October 5, 2010, naming B & B and Forster/Krebs as defendants. (App. 24). Forster/Krebs' brought crossclaims against B & B for breach of contract, negligence, *res ipsa loquitor,* and strict products liability, seeking to recover the amounts paid by Acuity and uninsured losses. Ultimately, B & B and its insurers resolved all of the claims of the James Vault Plaintiffs, with no contribution from Forster/Krebs or Acuity. The district court entered its order dismissing the James Vault Plaintiffs' claims on June 7, 2011. (Doc. 21).

[7] On August 30, 2013, B & B moved for summary judgment on all of Forster/Krebs' and Acuity's claims against them. (Doc. 128). On October 3, 2013, Forster/Krebs made a cross-motion for partial summary judgment, asking the district court to rule in Forster/Krebs' favor on eighteen issues, including finding that B & B breached Paragraphs 7, 12 and 13 of the Lease (Doc. 164, ¶¶ 2, 4, 7).

[8] On December 20, 2013, the district court issued its Memorandum Decision granting B & B's motion for summary judgment and denying Forster/Krebs' cross-motion. (App. 102-126).

[9] On January 15, 2014, Forster/Krebs sought leave to serve an amended crossclaim on B & B to add additional claims for breach of various provisions of the Lease not previously pled by Forster/Krebs, including breaches of Paragraphs 7, 12 and 13 (Doc. 333). B & B resisted on the basis that the district court's Memorandum Decision and Order (App. 102-126; 127-130) rendered the proposed amendment futile. (Doc. 358).

[10] On January 27, 2014, Forster/Krebs and Acuity moved for reconsideration of the Memorandum Decision (App. 102-126) and Order (App. 127-130)(Doc. 361).

[11] On April 23, 2014, while their motion for leave to served amended crossclaim (Doc. 333) and motion for reconsideration (Doc. 361) were still pending, Forster/Krebs filed a "Motion for Judicial Determination of Claims, Or In The Alternative, Motion for Leave of Court to Serve Second Amended Complaint and Request for Reconsideration." (Doc. 400). Forster/Krebs asked the district court to determine that the existing Amended Complaint (App. 61-72) asserted claims against B & B and JB's Welding for concerted action and joint venture (Doc. 401). Alternatively, Forster/Krebs sought leave to amend to "clarify claims of concerted action and joint venture", and to reconsider the district court's prior decisions dismissing all of Forster/Krebs' claims against B & B to the extent they dismissed Forster/Krebs' strict products liability claims against B & B. (Doc. 401).

[12] On May 16, 2014, the district court entered its Memorandum Decision on Motion for Reconsideration, denying Forster/Krebs' motion for reconsideration of the December 20, 2013 Memorandum Decision and December 30, 2013 Order. (App. 137-141). However, the district court vacated that portion of its prior Order (App. 127-130) granting summary judgment to B & B on Acuity's subrogation claims because Acuity was not a party to the lawsuit at the time the Order was entered. (App. 140, ¶ 8). On May 29, 2014, the district court entered an amended Order

partially granting B & B's motion for summary judgment on the claims of Forster/Krebs, leaving only the subrogation claims of Acuity pending. (App. 142-145).

[13] On June 6, 2014, B & B moved for summary judgment on the subrogation claims of Acuity and on Forster/Krebs' claims for attorneys' fees related to the defense of the claims of the James Vault Plaintiffs. (Doc. 506).

[14] On July 14, 2014, the district court issued its decision on Forster/Krebs' Motion for Judicial Determination of Claims, Or In The Alternative, Motion for Leave of Court to Serve Second Amended Complaint and Request for Reconsideration. (App. 155-180). Therein, the district court denied all relief sought by Forster/Krebs. On July 14, 2014, the district court also entered its order denying Forster/Krebs' motion for leave to serve an amended crossclaim on B & B. (App. 150-154). On July 21, 2014, the district court entered its Order on Steve Forster, Daniel Krebs, and Debra d. Krebs' Motion for Judicial Determination of Claims, Or In The Alternative, Motion for Leave of Court to Serve Second Amended Complaint and Request for Reconsideration, wherein it denied all relief sought by Forster/Krebs. (App. 195-198).

[15] On September 26, 2014, the district court issued is Memorandum Decision on Motion of B & B Hot Oil Service, Inc. For Summary Judgment (Subrogation), wherein it granted B & B summary judgment on Acuity's subrogation claims and Forster/Krebs' claims for attorneys' fees (App. 215-228). On October 7, 2014, the district court entered its Order dismissing Acuity's subrogation claims and Forster/Krebs' claims for attorneys' fees. (App. 229-231).

STATEMENT OF RELEVANT FACTS

[16] For the purposes of this appeal, B & B sets forth the following facts:

[17] The Building was owned by Steve Forster, Daniel Krebs, and Debra Krebs. (App. 26, ¶ II).

[18] Paragraph 9 of the Lease reads, in its entirety:

> "9. Liability for Loss. The Owner shall not be liable for any injury or damages to any property of the Renter or persons on or about the premises and the Renter shall hold the Owner harmless from any claims or damages thereto. Further, the Owner shall not be liable for any injury, either to persons or property sustained by the Renter or by other persons, including, but not limited to guests of the Renter due to the leased premises, or any part thereof. The Renter shall indemnify and save harmless the Owner from any and all liabilities, costs, and expenses arising from injury to persons or property in or about the premises from any manner or thing growing out of Renter's use, occupancy, management or control thereof and the Renter agrees that Renter shall obtain a general public liability insurance policy with the Owner as a named insured. Such insurance at times is to be in an amount of not less than $1,000,000.00 per injury to or death of any one person, $1,000,000.00 for injuries to or death of persons in one accident, and $400,000.00 for damages to property. The Renter agrees to have its insurance carrier(s) furnish Owner certificate(s) verifying insurance coverages in accordance with the above requirements. Such verification must be on the certificate forms as furnished by Renter or its representative. The acceptance of a certificate with less than the required amounts shall not be deemed a waiver of these requirements. The Renter agrees to have its insurance carrier(s) provide Thirty (30) days written notice to Owner should the Renter's insurance policy be canceled for any reason before the certificate's expiration date. The insurance certificate should list Daniel J. Krebs and Stephen A. Forster as the named insured." (App. 38-39)

[19] Paragraph 10 of the Lease reads, in its entirety:

> "10. Waiver of Subrogation. Anything in this lease to the contrary notwithstanding, Owner and Renter each hereby waives any and all rights of recovery, claim, action or cause of action against the other, its agents, officers, directors, partners, shareholders or employees, for any loss or damage that may occur to the leased premises, or any improvements thereto, or said building of which the leased premises are a part or any improvements thereto, or any property of such party therein, by reason of fire, the elements, or any other cause which could be insured against under the terms of standard fire and extended coverage insurance policies, regardless of cause or origin, including negligence of the other party thereto, it agents, officers or employees, and covenants that no insurer shall hold any right of subrogation against such other party." (App. 39)

[20] Steve Forster, Marlene Forster, Daniel Krebs, and Debra D. Krebs were named insured

parties under Acuity Bis-Pak Commercial Policy F-96220-0 ("Acuity Policy"), which provided both first-party property damage and third-party liability coverage for the Building, said policy being effective July 9, 2009 to July 9, 2010. (Doc. 134).

LAW AND ARGUMENT

I. The district court properly dismissed Forster/Krebs' claims against B & B based on the unambiguous language of the Lease.

[21] Paragraph 10 of the Lease waives all claims between Forster/Krebs and B & B. Further, Paragraph 9 of the Lease, which requires B & B to indemnify Forster/Krebs for the claims of third-parties, does not require B & B to compensate Forster/Krebs for their own losses, including any uninsured losses. Moreover, the district court correctly determined that Steve Forster was a party to the Lease.

A. Steve Forster was a party to the Lease.

[22] Forster/Krebs allege that "Forster also leased his interest in the premised to B&B, just not pursuant to the written lease." Appellants' Brief, ¶ 26. However, Blane Fugere of B & B testified that, prior to signing the Lease, he had never talked to Steve Forster, and that he and Steve Forster never entered into any lease agreement. (*Transcript of Deposition of Blane Fugere*, 101:25-102:5, Doc. # 599). Despite this testimony, Steve Forster now argues that he had a lease with B & B, just not the Lease at issue. This position finds no support in the record. The only evidence of any lease agreement between B & B and any owner of the Building is the Lease.

[23] The district court correctly determined that Steve Forster was a party to the Lease. Steve Forster admitted that he leased the space in the building to B & B. (App. 26, ¶ 2). Steve Forster brought a claim against B & B for breach of Paragraph 9 of the Lease. (App. 25, ¶¶ XXII through XXV). Steve Forster brought a motion for summary judgment against B & B asking the district court to determine that B & B breached Paragraphs 7, 12, and 13 of the Lease. (Doc. 163, ¶¶ 2, 4,

7). Steve Forster moved, twice, to amend his crossclaims against B & B to add causes of action for breaches of Paragraphs 7, 12 and 13 of the Lease. (Doc. 333; Doc. 400). Parties are bound by their pleadings, and admissions made in pleadings are binding on a party, unless a party amends their pleadings or other issues are litigated by consent. See Soby Const., Inc. v. Skjonsby Truck Line, Inc., 275 N.W.2d 336, 340-41 (N.D. 1979), overr'ld on other grounds by Shark v. Thompson, 373 N.W.2d 859, 867 (N.D. 1985); 71 C.J.S. *Pleading*, §§ 89, 92; 29A AM. JUR. 2D Evidence, § 787. Steve Forster never amended his pleadings to assert that he leased his ownership interests in the Building to B & B under a different lease. Thus, he is bound by his multiple admissions that he is a party to the Lease, and his conduct in pursuing claims against B & B for breach of the Lease. The district court's determination that Steve Forster was party to the Lease was proper, and should be affirmed.

B. Paragraph 10 of the Lease waived all Forster/Krebs' claims against B & B.

[24] As the clear and unambiguous language of Paragraph 10 states, Forster/Krebs waived all claims against B&B for any loss to the "premises" (west side of building), the building of which the leased premises were a part, or any property of such party therein. (App. 39). Paragraph 10 disregards the cause or origin of the loss. (App. 39). It also does not limit the waiver to damages arising from tort. Rather, it states that "*any and all rights of recovery, claim, action or cause of action*" are waived. (App. 39)(emphasis added). This broad waiver encompasses all claims, including breach of contract claims.

[25] Forster/Krebs argue that Paragraph 10 only applies to damages resulting from tort, and not breach of the contract. Appellants' Brief, ¶ 30. In support of this argument, they cite two cases: Viacom Intl. v. Midtown Realty Co., 193 A.D.2d 45, 51-53 (N.Y. App. Div. 1993), and St. Paul

Fire & Mar. Ins. Co. v. Protection Mut. Ins. Co., 644 F.Supp. 38, 40 (S.D.N.Y. 1986). These cases are not binding authority, and, to the extent they are persuasive, are distinguishable.

[26] The lease at issue in Viacom was materially different from the Lease. The "waiver of subrogation" provision stated "[n]othing herein shall relieve the Tenant from liability that may exist as a result of damage for fire or casualty", and "[n]otwithstanding the foregoing, each party shall look first to any insurance in its favor before making any claim against the other party for recovery of loss or damage resulting from fire." Viacom, 193 A.D.2d at 51. The court reasoned that, when viewing these two sentences together, it was evident that while the landlord waived claims arising under law, the contractual obligation of the tenant to be liable for fire was not waived. Id. at 52.

[27] The language before the court in Viacom is distinguishable from the language of the Lease. The lease in Viacom contained a provision expressly holding the tenant liable for any damage caused by fire or casualty. The Lease contains no such language. Rather, Forster/Krebs expressly waived all claims against B & B for loss related to fire, the elements, or any other cause that could be insured against. Thus, instead of holding the tenant liable for fire damage, as was the case in Viacom, the Lease exonerates B & B from liability for fire damage.

[28] The St. Paul Fire & Marine case is also distinguishable. That case dealt with the same lease provisions involved in Viacom. However, that case addressed the conflict between a lease provision obligating the landlord to pay for all damage caused by fire or other casualty, and the waiver of subrogation provision. St. Paul Fire & Marine, 644 F.Supp. at 39. The court held that the "waiver of subrogation" clause of the lease did not apply to the present situation, as the landlord was contractually obligated to repair the fire damage. Id. at 40. Thus, the landlord's insurer could not seek subrogation against the tenant when the landlord contractually assumed liability. Id.

[29] The Lease contains no provision rendering B & B contractually responsible for fire or casualty damage. Paragraph 10 waived all "rights of recovery, claim, action, or cause of action . . . for any loss or damage that may occur to the leased premises . . . by reason of fire, the elements, or any other cause which could be insured against under the terms of standard fire and extended coverage insurance policies. . . ." It is not limited to tort claims causing loss or damage to the Building. Further, there is no provision in the Lease holding either B&B or Forster/Krebs liable for fire or casualty loss, as was the case in Viacom and St. Paul Fire & Marine. Those cases interpreted contract language that does not exist in the Lease. Thus, those cases are distinguishable, as correctly determined by the district court. (App. 118, ¶¶ 35-39).

[30] Forster/Krebs argue that other provisions of the Lease evidence the parties' intent that B & B would be responsible for damages from explosion proximately caused by B & B's tenancy. Appellant's Brief, ¶ 31. They cite to Paragraphs 7, 9, 12, 13 of the Lease to support this argument. However, as set forth below, Forster/Krebs are incorrect, and the district court correctly determined that the Lease did not render B & B responsible for damages to the Building.

[31] Paragraph 7 of the Lease, the "Repairs" provision, does not shift responsibility for fire or explosion loss to B & B. It only requires B & B to repair the premises, and to return the premises to Forster/Krebs in the same condition as when B & B took premises. While never addressed by this Court, courts in other jurisdictions have held that "repairs" provisions in leases are not promises to rebuild in the event the building is destroyed. Travelers Ins. Co. et. al. v. Linn, 510 S.E.2d 139, 143 (Ga. Ct. App. 1999). "If the words 'to repair' or 'to keep in repair generally' the building or property rented, are qualified by further words 'to return in the same condition' (or words to that effect), and if the building or property is destroyed by fire, it is of course impossible to return the same building or property . . . the covenant is subject to an implied covenant that the

building exist at the expiration of the lease, and that if the building or property is destroyed by fire the lessee is not liable under contract for the return of the property or its value." Id. (citing Williams v. Bernath, 6 S.E.2d 184 (1939)). Here, the Building was destroyed. Pursuant to Paragraph 10, Forster/Krebs waived all claims against B & B, regardless of cause or origin, for destruction of the Building or its contents, that could be insured under standard fire and extended coverage policies. The Lease is clear that the risk of fire and casualty loss to the building, and Forster/Krebs' property therein, fell squarely on Forster/Krebs. Had the parties' intended otherwise, Forster/Krebs would not have waived all claims for loss or damage to the Building caused by "fire, the elements, or any other cause which could be insured against under the terms of standard and extended coverage insurance policies, regardless of cause or origin, *including the negligence of the other party thereto*." The plain language of the Lease, and in particular, Paragraphs 7 and 10, indicate that Paragraph 7 does not apply in the event the Building is destroyed.

[32] In J.R. Simplot Co. v. Rycair, Inc., 67 P.3d 36 (Id. 2003), a commercial landlord sued a tenant for damages related to a fire in the leased building. The landlord alleged that the contractual provision requiring the tenant to return the premises in equal or better condition obligated the tenant to pay to rebuild the building following destruction. Id. at 42-43. The Idaho Supreme Court disagreed. In addressing the contractual duty to return the premises in good condition, the Idaho Supreme Court held that the "general rule" is that "normal wear and tear lease requirements do not include fire damage to the property." Id. at 43. "The plain meaning of maintain or repair is not synonymous with rebuild." Id.

[33] When reviewing the Lease in its entirety, it is evident that the parties did not intend for Paragraph 7 to include an obligation on the part of B & B to reconstruct the building in the event

of destruction. Paragraph 10 contains a waiver of all claims, including for B & B's own negligence or breach of contract, for loss or damage to the Building or its contents resulting from a cause that could be insured against under fire and extended coverage policies. To read Paragraph 7 to include an obligation on the part of B & B to reconstruct the building would require Paragraph 10 to be disregarded. When the Lease is read as a whole, it is clear that the parties intended for the risk of loss due to fire or other casualty to remain with Forster/Krebs. They waived all claims against B & B for this category of loss, even if caused by B & B's negligence or breach of contract.

[34] Forster/Krebs argue that the language of Paragraph 9, which requires B & B to "indemnify and save harmless the Owner", obligates B & B to compensate Forster/Krebs for their own loss. Forster/Krebs misunderstand the meaning of "indemnity."

[35] Forster/Krebs focus on the following language from Paragraph 9:

> The Renter shall *indemnify and save harmless* the Owner from any and all liabilities, costs and expenses *arising from injury to persons or property in or about the premises* from any manner or thing growing out of Renter's use, occupancy, management or control thereof. . . . (App. 38)(emphasis added).

"Indemnity" is defined in North Dakota as "a contract by which one engages to save another from a legal consequence of the conduct of one of the parties or of some other person." N.D.C.C. § 22-02-01. "Indemnification is a remedy which allows a party to recover reimbursement from another for the discharge of a liability which, as between them, should have been discharged by the other." Specialized Contracting, Inc. v. St. Paul Fire & Marine Ins. Co., 2012 ND 259, ¶ 14, 825 N.W.2d 872 (citing Olander Contracting Co. v. Gail Wachter Inv., 2002 ND 65, ¶ 15, 643 N.W.2d 29). As the definition of "indemnification" dictates, the remedy is to recover reimbursement for discharging liabilities. This is consistent with this Court's view that the terms "indemnify" and "save harmless" apply to the claims of third-parties. Hoff v. Krebs, 2009 ND 48, ¶ 10, 763 N.W.2d 520 (citing Uren v. Dakota Dust-Tex, Inc., 2002 ND 81, ¶ 8, 643 N.W.2d 678); Olander, 2002 ND

65, ¶ 15 (holding that contractual obligation to "indemnify and save [City] of Bismarck harmless" applied to claims of third-parties). Forster/Krebs' argument that Paragraph 9 requires B & B to "indemnify" Forster/Krebs for their own loss is directly contrary to North Dakota law. The obligation of B&B to "indemnify and save harmless" Forster/Krebs from "any and all liabilities, costs, and expenses arising from injury to persons or property" is unambiguous, and evinces an intent that B & B protect Forster/Krebs from liability for third-party claims, not their own property damage.

[36] Forster/Krebs allege Paragraph 12 holds B & B contractually responsible for damages to the Building. Paragraph 12(A) contains an obligation not to cause or permit any "Hazardous Substance", as defined at 42 U.S.C.A. § 9601(14), to "be used, stored, or generated on the premises, except for "Hazardous Substances" of types and quantities customarily used or found in automobile service stations." (App. 39). Paragraph 12(B) states that B & B shall not cause or permit the release (as defined in 42 U.S.C.A. § 9601(22)) of any "Hazardous Substance", contaminant, pollutant, or petroleum. (App. 39). Paragraph 12(C) states, in pertinent part:

> "Renter shall **indemnify and save harmless** Owner from and against any and all liabilities, damages, suits, penalties, judgments and environmental cleanup, removal, response, assessment, or remediation costs arising from the contamination of the premises or Release of any Hazardous substance, pollutant, contaminant, or petroleum in, on or under the premises. . . ." (App. 40)(emphasis added).

While Forster/Krebs are correct that propane is a liquefied petroleum gas, they are incorrect that the Lease precluded B & B from using it at the Building. "Petroleum" is excluded from the definition of "Hazardous Substance" in 42 U.S.C. § 9601(14). Petroleum is also specifically excluded from the definition of "pollutant and contaminant." 42 U.S.C. § 9601 (33). Thus, propane is not a Hazardous Substance, pollutant, or contaminant under 42 U.S.C. § 9601, nor is it "petroleum." "Petroleum" is not defined at 42 U.S.C. § 9601. But, "petroleum" is defined

elsewhere as "oil removed from the earth and the oil derived from tar sands and shale." 40 C.F.R. § 98.6. Thus, propane is not "petroleum", contrary to Forster/Krebs' assertion.

[37] Paragraph 12(A) prohibited the storage of "Hazardous Substances", except "types and quantities customarily used or found in automobile service stations." Common sense shows that propane is stored and used at almost every automobile service station. Thus, even if propane were a "Hazardous Substance", which it is not, B & B did not breach Paragraph 12(A) of the Lease by storing its hot oil trucks inside the Building. Further, B&B did not violate Paragraph 12(B), as it did not allow the release of any Hazardous Substance, pollutant, contaminant, or petroleum, as propane is none of the foregoing. However, even had a release of a Hazardous Substance, pollutant, contaminant or petroleum occurred, which it did not, B & B would not be liable for Forster/Krebs' own loss under the indemnity provisions of 12(C)

[38] Paragraph 12(C) is a standard environmental indemnity clause. The terms "indemnify" and "save harmless" obligate B & B to indemnify and save harmless Forster/Krebs "from and against" liability related to the claims of third-parties or government agencies. See N.D.C.C. § 22-02-01; see also Specialized Contracting, Inc., 2012 ND 259, ¶ 14. Even if it is assumed a release occurred, Paragraph 12(C) does not render B & B liable for Forster/Krebs' own property loss. It requires B & B to indemnify Forster/Krebs from third-party and government claims. If there were any authority for the position that the terms "indemnify" and "save harmless" meant that B & B was required to compensate Forster/Krebs for their own loss, Forster/Krebs would have cited to it. No such authority has been provided, because none exists. The overwhelming weight of authority is directly contradictory to Forster/Krebs' position.

[39] Forster/Krebs argue that Paragraph 13, which requires B & B to comply with all "laws, regulations, and orders of government authorities", was breached when B & B stored its trucks

inside, allegedly in contradiction of the owner's manual for the truck manufactured by Energy Fabrication. Appellants' Brief, ¶ 36. According to Forster/Krebs, National Fire Protection Association ("NFPA") guidelines require B & B to follow the manufacturer's guidelines regarding the use and storage of equipment. Id.

[40] Forster/Krebs do not cite to the specific provision of any applicable law, regulation, or government order adopting the NFPA code B & B allegedly violated. However, assuming that Forster/Krebs' allegations were true (which they are not), Paragraph 13 does not contain any language obligating B & B to pay for loss to the building caused by fire or explosion. These claims were all waived in Paragraph 10. Paragraph 13 simply states that B & B will comply with laws, regulations and orders of government. It does not evince the intent that B & B would compensate Forster/Krebs for their own loss or rebuild the Building.

[41] Forster/Krebs argue further that the waiver provisions of Paragraph 10 are unenforceable to the extent "it purports to exempt" B & B from responsibility for its own violation of law. Appellant's Brief, ¶ 39. In support, Forster/Krebs cite to N.D.C.C. § 9-08-02, which states that any contract exempting one party from responsibility for that person's "own fraud or willful injury to the person or property of another, or violation of law . . . is against public policy." Forster/Krebs' argument is foreclosed by this Court's decision in Hillerson v. Bismarck Pub. Sch., 2013 ND 193, ¶14, 840 N.W.2d 65. In Hillerson, this Court held that "[o]ur previous case law addressing pre-injury releases of liability support a general rule requiring specific pleading of intentional or willful conduct if a plaintiff is arguing the waiver violates N.D.C.C. § 9-08-02." Id. (citing Reed v. Univ. of North Dakota, 1999 ND 25, ¶ 22 n.4, 589 N.W.2d 880, and Kondrad v. Bismarck Park Dist., 2003 ND 4, ¶ 8 n.1, 655 N.W.2d 411). Here, Forster/Krebs' pleadings do not contain a specific allegation of intentional or willful conduct on the part of B & B. Rather, Forster/Krebs' claims are

for breach of contract, negligence, *res ipsa loquitor,* and strict products liability. Accordingly, the waiver provision of Paragraph 10 does not violate N.D.C.C. § 9-08-02, and is enforceable to waive all of Forster/Krebs' claims against B & B.

[42] Forster/Krebs also argue that Paragraph 10 is void as a matter of public policy under N.D.C.C. § 9-08-01, as it operates to waive Forster/Krebs' strict products liability claim. Appellant's Brief, ¶ 40. This Court has held that, in order for N.D.C.C. § 9-08-01 to render a contractual provision void, the provision of the contract itself must be "inherently illegal." Huber v. Farmers Union Service Ass'n, 2010 ND 151, ¶ 12, 787 N.W.2d 268. Such is not the case here, as the Lease was not an illegal contract, nor are waivers of liability "inherently illegal" contract provisions. See, e.g.. Hillerson, 2013 ND 193, ¶ 11.

[43] This Court has never addressed whether language similar to that found in Paragraph 10 violates public policy when it operates to release a strict products liability claim. As the district court correctly determined, this Court has upheld contractual provisions exonerating one party to an otherwise lawful contract from liability where there is "clear and unambiguous language evidencing an intent to extinguish liability." (App. 162, ¶ 2); See Hillerson, 2013 ND 193, ¶ 11. Moreover, the case law cited by Forster/Krebs in support of their argument that contractual waivers of strict products liability claims are void dealt with claims for bodily injury, and were brought by consumers and users against the distributors and manufacturers of the allegedly defective products. Wheelock v. Sport Kites, Inc., 839 F.Supp. 730, 737 (D.HI. 1993), superseded by statute H.R.S. § 663-1.54, as recognized in King v. CJM Country Stables, 315 F.Supp.2d 1061, 1067 (9th Cir. 2004); Westlye v. Look Sports, Inc., 17 Cal.App.4th 1714, 1747, 22 Cal.Rptr.2nd 781 (Cal.App. 1993). Conversely, Forster/Krebs' claims are for property damage. In support of its finding that Paragraph 10 was not void as a matter of public policy as it relates to property damage claims, the

district court cited to Chicago Steel Rule and Die Fabricators Co. v. ADT Sec. Systems, Inc., 327 Ill.App.3d 642, 649-50, 763 N.E.2d 839 (Ill.App. 1st Dist., 2002). In Chicago Steel, the Appellate Court of Illinois held that "[w]e do not believe that enforcement of exculpatory provisions barring commercial parties to the contract with equal bargaining power from bringing strict liability claims for damage to other property would conflict with a public policy concern. . . . As the supreme court has noted, this policy concern is not implicated when commercial entities with equal bargaining power enter into a contract which clearly allocates risk." Id. (citing Trans States Airlines v. Pratt & Whitney Can., 177 Ill.2d 21, 39, 682 N.E.2d 45 (Ill. 1997)). Here, Forster/Krebs were commercial landlords, and B & B was a commercial tenant. There is no evidence in the record of unequal bargaining power. Paragraph 10 clearly allocates risk of damage to the Building and its contents to Forster/Krebs. Thus, the district court correctly determined that Paragraph 10 was not against public policy when operating to waive Forster/Krebs' strict products liability claim for property damage.

[44] More importantly, B & B is not a "manufacturer" under North Dakota's Products Liability Act (the "Act"), which applies to all "product liability actions" against a "manufacturer or seller" of a product, regardless of legal theory. N.D.C.C. § 28-01.3-01(02). "Manufacturer" is defined as: "a person or entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product *prior to the sale of the product to a user or consumer.* . . ." N.D.C.C. § 28-01.3-01(1)(emphasis added). Further, under N.D.C.C. § 28-01.3-06, "no product may be considered to have a defect or be in a defective condition, *unless at the time the product was sold by the manufacturer*. . . there was a defect or defective condition in the product which made the product unreasonably dangerous to the user or consumer." (emphasis added). As indicated, merely designing, assembling, fabricating, or constructing a product is not enough: it

must be done in connection with and "prior to the sale of the product to a user or consumer." B&B did not sell the hot oil truck to anybody. Rather, B & B was the "user or consumer" of the hot oil truck. The hot oil truck was used in B & B's business. If B & B is a "manufacturer" under the Act, then every parent who builds a treehouse for their kids, or every person who restores classic cars for their own enjoyment, would be a "manufacturer" subject to strict products liability. This is clearly not the intent of the Act, as it imposes liability for damage caused by defective products on manufacturers who sell their products, not on persons who build products for their own use. Bouchard v. Johnson, 555 N.W.2d 81, 83 (N.D. 1996)("[i]n interpreting a statute, we first determine the legislature's intent by looking to the statutory language.") Had the legislature intended for the Act to apply to persons who build things for their own use, the definition of "manufacturer" would not have included the condition that the product be sold. N.D.C.C. § 28-01.3-01(2). To interpret the Act otherwise would yield an absurd result. Bouchard, 555 N.W.2d at 93. Thus, even if the Court determines that the waiver provision of the Lease cannot operate to waive a strict products liability action, Forster/Krebs' claims for such were properly dismissed, as they cannot maintain a strict products liability action against B & B, who is not a manufacturer under the Act.

[45] Forster/Krebs further allege that Paragraph 10 is a "general release" that does not extend to unknown claims at the time of execution pursuant to N.D.C.C. § 9-13-02. Appellants' Brief, ¶ 41. As the district court correctly determined, N.D.C.C. § 9-13-02 applies to releases entered into after a claim has accrued, and limits the release to known claims. Parties are free to allocate risk and exculpate the other from liability prior to the accrual of a claim, just as B & B and Forster/Krebs did in this instance. Moreover, if Forster/Krebs' position were adopted, no

exculpatory clause would be enforceable, and this Court has held that these clauses are enforceable in a lawful contract. Hillerson, 2013 ND 193, ¶ 11.

II. The district court correctly determined that Acuity's subrogation claims are barred by Paragraph 10 of the Lease and the implied co-insured rule.

[46] The basic principles of subrogation are well-settled in North Dakota and other jurisdictions. An insurer's right of subrogation depends upon the validity of the insured's claims. Burgener v. Bushaw, 545 N.W.2d 163, 167 (N.D. 1996); See also Bakowski v. Mountain States Steel, Inc., 2002 UT 62, ¶ 23, 52 P.3d 1179; Trinity Universal Ins. Co. v. Bill Cox Const., Inc., 75 S.W.3d 6, 10 (Tx. Ct. App. 2001). Further, a subrogating insurer does not acquire any more rights against the defendant than the insured has. Farmers Ins. Exch. V. Arlt, 61 N.W.2d 429, 434 (N.D. 1953). When the insured has waived claims through a pre-loss agreement, the conduct of the insured waives the subrogation rights of the insurer, even if the insurer did not consent to the waiver. Bakowski, 2002 UT 62, ¶ 23 (citing 16 *Couch on Insurance* 3d § 224:76 (2014).

[47] In Bakowski, a commercial lease contained a "waiver of subrogation" provision wherein the landlord and tenant waived all rights of recovery against the other "for loss of or damage to such waiving party or its property or the property of others under its control where such loss or damage is insured against under any insurance policy in force at the time of such loss or damage." Bakowski, 2002 UT 62, ¶ 26. The waiver of subrogation also contained a requirement that the landlord and tenant each notify their respective insurers of the waiver of subrogation and obtain endorsements recognizing the waiver. Id. The landlord argued that waiver was ineffective against the insurer because it failed to notify the insurer of the agreement and obtain the necessary waiver. Id. at ¶ 27. The Supreme Court of Utah disagreed, finding that the first sentence of the waiver provision, where the parties waived their rights of recovery against each other for loss covered

under any insurance policy, independently effectuated a waiver of the subrogation rights of the landlord's insurers. Id. The court's holding is instructive:

> "Because a subrogee insurer can succeed only to the rights of its insured and because all defenses available to a third party against the insured can be used against the subrogee insurer, it necessarily follows that in this case Mountain States' [landlord] insurers are also precluded from pursuing a subrogation action in Mountain States' name to recover for damages against Voest-Alpine [tenant] that were paid by Mountain States' insurers. It is therefore irrelevant that the first sentence does not mention that the waiver applies to insurers also."

Id. at ¶ 28. Thus, even though the landlord failed to obtain the necessary waiver and to put the insurer on notice, the waiver of subrogation was effective against the insurer.

[48] Similar to the "waiver of subrogation" in Bakowski, Paragraph 10 contains a broad waiver of claims, and also includes a "covenant" that no insurer shall hold a right of subrogation against the parties to the Lease. Similar to the landlord in Bakowski, Forster/Krebs failed to ensure that no insurer held a right of subrogation against B&B, thereby breaching the contractual covenant. However, this failure does not negate the waiver of claims in Paragraph 10, which has the effect of waiving Acuity's subrogation rights, regardless of whether Acuity was notified of the provision or consented to it. The district court determined that Paragraph 10 waived all of Forster/Krebs claims against B&B. (App. 120, ¶ 39). Accordingly, this pre-loss waiver also waived Acuity's subrogation claims, as those claims are limited to the claims of Forster/Krebs. Burgener, 545 N.W.2d at 167; Bakowski, 52 P.2d at 1187; 16 *Couch on Insurance* 3d § 224.76 (2014) ("[s]uch pre-loss waivers fully comport with many policies which explicitly specify that the insured shall do nothing 'after the loss' to prejudice the insurer's subrogation rights"). Based on general subrogation principles and the pre-loss waiver of claims by its insureds, Acuity has no subrogation rights, and the district court properly dismissed Acuity's claims.

B. The Acuity Policy authorizes pre-loss waivers of claims.

[49] Under the "Common Policy Conditions" portion of the Acuity Policy, there is a section entitled "Transfer of Rights of Recovery Against Others to Us." (App. 78-79). It states, in relevant part:

> "1. Applicable to Property coverage:
>
> > If any person or organization to or from whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you [Forster/Krebs] may waive your rights against another party in writing:
> >
> > a. Prior to a loss to your Covered Property.

The first sentence indicates that Acuity only acquired the rights of Forster/Krebs. The second sentence prohibits Forster/Krebs from doing anything after loss to impair Acuity's rights. The third sentence specifically authorizes Forster/Krebs to waive claims pre-loss, which consequently waives Acuity's subrogation rights. This interpretation is consistent with the plain language of paragraph J(1) and general subrogation principles. See Burgener, 545 N.W.2d at 167; 16 Couch on Insurance 3d § 224:76 (2014); 44 Am.Jur.2d *Insurance* § 1795.

[50] A Texas appellate court has addressed the effect of paragraph J.1 on an insurer's subrogation rights. In Trinity Universal Ins. Co. v. Bill Cox Const., Inc., 75 S.W.3d 6, 10 (Tx. Ct. App. 2000), the Texas Court of Appeals addressed the effect of a "Transfer of Rights of Recovery Against Others to Us" clause in a property insurance policy. The language of that provision was identical to the language of J.1 of the Acuity Policy. Trinity, 75 S.W.3d at 10. In reviewing the "Transfer of Rights of Recovery Against Others to Us" clause, the court found that it only prohibited post-loss waivers of Trinity's rights. Id. Thus, Trinity was barred from subrogating against the third-party due to the valid pre-loss waiver executed by its insured. Id. at 14.

[51] Acuity argues that it is not barred from subrogation based on the North Dakota Supreme Court's holding in St. Paul Fire & Marine Ins. Co. v. Amerada Hess Corp., 275 N.W.2d 304 (N.D. 1979). The agreement at issue in that case, a well service contract, had an express warranty provision. Amerada, 275 N.W.2d at 306. The agreement also had a "waiver of negligence" provision, which this Court interpreted to waive all claims for negligence. Id. at 307. This Court found that the subrogee insurer was not barred from seeking recovery under the breach of the warranty provision, as the contractual waiver was limited to negligence. Id. Importantly, in reaching this conclusion, this Court did not address the language of the relevant insurance policy.

[52] The facts of Amerada are distinguishable from this case. Unlike in Amerada, Acuity expressly authorized its insured, Forster/Krebs, to waive its rights prior to loss. (App. 78). There was no such insurance provision in Amerada. This fact materially distinguishes this case from Amerada. Further, Paragraph 10 is not limited to claims for negligence, as was the case of the waiver in Amerada. Accordingly, the district court did not err when it held that Acuity consented to the pre-loss waiver of claims found in Paragraph 10.

c. Acuity's subrogation claim is barred by the anti-subrogation rule.

[53] In addition to determining that Acuity's subrogation rights were barred by Paragraph 10, a provision authorized in the Acuity Policy, the district court correctly determined that B & B was an implied co-insured of Acuity with respect to the damages to the Building (App. 114-117, ¶¶ 25-32; App. 223, ¶ 20)

[54] First adopted in Community Credit Union of New Rockford v. Homelvig, 487 N.W.2d 602 (N.D. 1992), the implied co-insured rule holds that, absent an express agreement to the contrary, a tenant is an implied co-insured under the landlord's property policy, which bars the insurer from seeking subrogation from the tenant. Homelvig, 487 N.W.2d at 603. This rule was later applied

in the case of Uren v. Dakota Dust-Tex, Inc., 2002 ND 81, 643 N.W.2d 678. Due to the language of the Lease being nearly identical to the contract language before the Court in Uren, the Court's analysis and holding there is particularly instructive.

[55] In Uren, Paul Uren ("Uren", leased a building to a commercial laundry, Dakota Dust-Tex, Inc. ("Dakota"). 2002 ND 81, ¶ 2. After a fire damaged the building, Uren's property insurance carrier, Heritage Mutual Insurance Company, sought subrogation against Dakota in the name of Uren. Id. at ¶ 4. Uren also sought to recover uninsured losses from Dakota. Id. Dakota moved for summary judgment, arguing it was an implied co-insured under the policy issued to Uren. Id. The district court agreed, and awarded summary judgment to Dakota. Id. Uren appealed.

[56] On appeal, Uren argued that Dakota was not an implied co-insured because a provision in the parties' lease agreement was an "express agreement" to the contrary. Id. at ¶ 5. This "agreement", apparently found in the "Hold Harmless" and "Liability Insurance" clauses of Uren and Dakota's lease, read, in pertinent part:

> " HOLD HARMLESS
>
> The [Dakota] agrees to indemnify and save [Uren] harmless against any and all claims, damages, costs, and expenses, including reasonable attorneys' fees arising out of or connected with the conduct or management of the business conducted by the Lessee on the demised premises . . .
> …….
>
> LIABILITY INSURANCE
>
> The Lessee [Dakota] agrees to take out public liability insurance covering the demised premises. Said policy or policies shall be for an amount of at least Five Hundred Thousand Dollars ($500,000.00), for death or injury to one or more persons, plus Twenty-Five Thousand Dollars ($25,000.00) property damage, which said policy or policies of insurance shall name the Lessor [Uren] as additional insureds thereunder. Lessee further agrees to maintain the same at Lessee's sole cost and expense in full force and effect, during the entire term of this lease or any renewal thereof. . ." Id. at ¶ 7.

Uren argued that the "Hold Harmless" provision made Dakota responsible for all damages to the building, and that the "Liability Insurance" provision required Dakota to procure property casualty insurance covering damage to the building. Id.

[57] This Court roundly rejected both of Uren's arguments, which are the same arguments Acuity advances in this appeal. First, this Court found that these provisions did not express a "clear, unambiguous" intent to make Dakota liable for damages to the building or an intent that Dakota not be considered a co-insured under Uren's property policy. Id. at ¶ 8. When elaborating, the Court stated that the first provision, a standard "Hold Harmless" clause, has been held to be "a promise to protect and defend an indemnitee from all *claims of third parties*." Id. (citing, e.g., Bridston v. Dover Corp., 352 N.W.2d 194, 197 (N.D. 1984)(emphasis in original)). The Court held this provision was "not a clear, express agreement that Dakota would not be considered a co-insured under Uren's property insurance." Uren, 643 N.W.2d at 680.

[58] The Court further held that Uren misinterpreted the provision requiring Dakota to procure liability insurance. Id. at ¶ 9. Uren argued that the purpose of the insurance clause was to require Dakota to purchase insurance to protect the building, claiming the fact Uren was to be added as an "additional insured" was proof that the policy was to provide "direct coverage to Uren for property damages sustained by Uren." Id. The Court aptly noted that the insurance clause did not require Dakota to purchase *property insurance* on the subject building, but rather *liability* insurance. Id.n at ¶ 10. "Naming Uren as an additional insured under a liability policy would not provide protection for Uren's building, but would only protect Uren from liability claims of third parties." Id. The Court concluded that the lease contained no "express agreement" indicating Dakota would not be an implied co-insured under Uren's property policy, thereby barring the subrogation claim. Id. at ¶ 13.

[59] The arguments advanced by Uren are eerily similar to those advanced by Acuity, and the language of the agreement at issue in Uren and the Lease are indistinguishable. When combined, the "Hold Harmless" and "Liability Insurance" clauses of the lease in Uren are nearly identical to the language of Paragraph 9 of the Lease. Paragraph 9 required B&B to "indemnify and save harmless [Forster/Krebs] from any and all liabilities, costs, and expenses arising from injury to persons or property in or about the premises from any manner or thing growing out of [B&B's] use, occupancy, management or control thereof." (App. 38). In analyzing similar language in Uren, the Court held it was a "standard hold harmless clause", relating only to claims of third parties. Uren, 2002 ND 81, ¶ 8. With respect to the obligation to procure insurance, Paragraph 9 required B&B to "obtain a general public liability insurance policy with the [Forster/Krebs] as a named insured. . . ." (App. 38). B & B was not required to procure property insurance, only liability insurance, just as Dakota was in Uren. As the district court correctly determined, the Lease does not contain an "express agreement" that B & B would be liable for property damage, and its determination that B & B is an implied co-insured of Acuity was not in error.

[60] Forster/Krebs argue that the implied co-insured rule does not apply to the loss to their personal property, as B & B did not lease any of Forster/Krebs' personal property. Appellants' Brief, ¶ 50. Forster/Krebs argue further that the implied co-insured doctrine does not apply to the extent of uninsured losses. Appellants' Brief, ¶ 51. Forster/Krebs misinterpret the district court's decision on these issues. The district court did not dismiss Forster/Krebs' claims for damages to personal property based on the implied co-insured rule. Rather, it dismissed those claims based on Paragraph 10. (App. 117, ¶¶ 32, 39). Similarly, the district court did not dismiss the claims for uninsured losses based on the implied co-insured doctrine. Rather, it dismissed them based on the language of Paragraph 10. (App. 117, ¶¶ 32-39).

III. The district court properly concluded that Paragraph 9 does not apply to Forster/Krebs' property damage claims.

[61] Forster/Krebs allege that the district court erred in holding that the indemnification provisions of Paragraph 9 only applied to third-party claims, and not to Forster/Krebs property damage claims. Appellants' Brief, ¶ 52. Forster/Krebs misunderstand the meaning of the word "indemnity", and this Court's prior holdings interpreting indemnity provisions.

[62] As correctly determined by the district court, Paragraph 9 is a standard "hold harmless" clause. (App. 112-114, ¶¶ 20-23). When interpreting similar provisions, this Court has held that a "hold harmless" provision is a "promise to protect and defend the indemnitee from all claims of *third parties*." Hoff v. Krebs, 2009 ND 48, ¶ 10, 763 N.W.2d 520 (citing Uren v. Dakota Dust-Tex, Inc., 2002 ND 81, ¶ 8, 643 N.W.2d 678) (emphasis in original). The district court, consistent with this Court's prior decisions, correctly determined that Paragraph 9 does not require B & B to compensate Forster/Krebs for their own loss, and this determination was not in error.

IV. The district court did not err when it determined that Forster/Krebs only pled breach of Paragraph 9 and denied the request to amend the pleadings.

[63] North Dakota Rule of Civil Procedure 15(a)(2) governs amendments after responsive pleadings are served. It is within the discretion of the trial court to permit or deny an amendment to a pleading. See Greenwood v. American Family Ins. Co., 398 N.W.2d 108, 111 (N.D. 1996). This discretion is wide. Darby v. Swenson, Inc., 2009 ND 103, ¶ 11, 767 N.W.2d 147. The court's decision to allow an amendment will not be disturbed on appeal absent an abuse of discretion. Greenwood, 398 N.W.2d at 111. A trial court does not abuse its discretion when denying a proposed amendment that would be futile. See, e.g., First Interstate Bank of Fargo, N.A. v. Rebarchek, 511 N.W.2d 235, 243 (N.D. 1994), and Thimjon Farms Partnership v. First Int'l Bank & Trust, 2013 ND 60, ¶ 28, 837 N.W.2d 327. The Court has explained that when leave to amend

is not sought until after "a summary judgment motion has been docketed, the proposed amendment must be . . . solidly grounded in the record." George v. Veeder, 2012 ND 186, ¶ 7, 820 N.W.2d 731 (citing Johnson v. Hovland, 2011 ND 64, ¶ 9, 795 N.W.2d 294). In reviewing decisions of other courts, the Court recognized that "an amendment is futile for the purposes of determining whether leave to amend should be granted, if the added claim would not survive a motion for summary judgment." Johnson, 2011 ND 64, ¶ 9.

[64] Forster/Krebs' first motion to amend their pleadings presented a unique scenario. Pursuant to their Cross-Motion for Partial Summary Judgment, Forster/Krebs asked the district court to find, as a matter of law, that B & B breached Paragraph 7, 12 and 13 of the Lease. Forster/Krebs Brief in Opposition to B&B Hot Oil Service, Inc.'s Motion for Summary Judgment and in Support of Forster/Krebs' Cross-Motion for Partial Summary Judgment (Doc. 165, ¶ 3). In its Memorandum Decision denying Forster/Krebs' motion for summary judgment, which was issued before Forster/Krebs' motion to amend, the district court noted that Forster/Krebs' claims against B & B did not include claims for breach of Paragraph 7 or 12 of the Lease, and that Forster/Krebs had not moved to amend. (App. 106 ¶ 6). However, the district court found that even if it agreed with Forster/Krebs that their pleadings did include breach of contract claims based on Paragraphs 7 and 12, such would "not alter the Court's conclusion or decision on the pending motions for summary judgment." (App. 107, ¶ 7). When discussing Paragraph 10 of the Lease, the district court properly ruled Forster/Krebs released any claims against B & B for loss of property arising from the fire and explosion. (App. 117, ¶ 32). Further, when addressing Forster/Krebs' argument that Paragraph 10 only applied to claims in tort, not in contract, the district court stated:

> "[39] It is the Court's interpretation of [Paragraph 10] that Forster/Krebs waived *any claims against B&B for damage to the building (or contents thereof owned by Forster/Krebs) caused by fire regardless of whether the "cause of origin" was B&B's negligence or was any conduct B&B which would otherwise constitute a breach of*

contract. For instance, the language "by reason of fire" isn't followed by language to the effect, "except when fire is caused by conduct which is a breach of this lease."

(App. 120, ¶ 39)(emphasis added).

[65] Based on this Court's holding in Johnson, the motion to amend was properly denied. The standard for futility of amendments is whether the new claims would survive summary judgment. Prior to moving to amend, Forster/Krebs moved for summary judgment on the claims they sought to add via amendment, and lost. Based on the district's court's decision denying Forster/Krebs' motion for summary judgment, the motion to amend was futile. (App. 153, ¶ 8). Thus, the district court did not abuse its discretion in denying the proposed amendment as futile.

V. The district court did not err in denying Forster/Krebs' Motion For Leave To Amend their pleadings to assert concerted and joint venture claims against B & B.

[66] While their first motion to amend the pleadings against B & B was pending, Forster/Krebs filed their "Motion for Judicial Determination, Or in the Alternative, For Leave of Court to Serve Second Amended Complaint, and Request for Reconsideration" (Doc. 400). Forster/Krebs asked the Court to determine that their existing pleadings alleged claims against B & B and JB's Welding for concerted action and joint venture and that B & B was on "notice" of such claims. (Doc. 400, ¶ 1). In the alternative, Forster/Krebs asked the district court for leave to amend their existing pleadings to "clarify claims of concerted action and joint venture" against B & B and JB's Welding. (Doc. 400, ¶ 1). The district court properly denied the request for leave to assert concerted action and joint venture claims against B & B. (App. 155-180).

[67] According to Forster/Krebs, B&B and JB's Welding were on notice of the joint nature of their conduct being asserted and the intention to hold them jointly liable for their conduct in relation to the design, manufacture and assembly of the "knock-off" truck, and no amendment was

necessary. Appellants Brief, ¶ 61. A resolution of this issue requires an analysis of North Dakota's "notice" pleading standard, adopted at N.D.R.Civ.P. 8(a).

[68] Rule 8(a), N.D.R.Civ.P., requires that a claim for relief, "whether an original claim, a counterclaim, a crossclaim, or a third-party claim", must contain the following:

> "(1) a short and plain statement of the claim showing that the pleader is entitled to relief; and
>
> (2) a demand for the relief sought, which may include relief in the alternative or different types of relief.

The purpose of North Dakota's "liberalized" pleading requirement is to "place the defendant on notice as to the general nature of a plaintiff's claim. . . In determining the sufficiency of a pleading, we will look to the substance of the claim alleged." Tibert v Minto Grain, LLC, 2004 ND 133, ¶18, 682 N.W.2d 294 (citing Daley v. American Family Mutual Ins. Co., 355 N.W.2d 812, 815 (N.D. 1984)).

[69] In order to analyze whether the Amended Complaint (App. 61-72), the final pleading against B & B, was sufficient to put B & B on notice of a claim for "concerted action" and "joint venture", the Court must analyze the substance of the claims alleged. Minto Grain, 2004 ND 133, ¶18. Setting aside the fact that Forster/Krebs did not seek or obtain leave to amend their claims against B&B when bringing the Amended Complaint against JB's Welding, it still fails to sufficiently plead claims for "concerted action" or "joint venture" even under the most liberal application of the "notice pleading" standard.

[70] With respect to the allegation of "concerted action", Forster/Krebs failed to plead there was an agreement to commit a wrongful act, which would invoke the exception allowing for joint liability under N.D.C.C. § 32-03.2-02. Forster/Krebs did not allege a "common plan to commit a tortious act, the participants knew of the plan and its purpose, and the participants took substantial

affirmative steps to encourage the achievement of this result." Tibert v. Nodak Mutual Ins. Co., 2012 ND 81, ¶22, 816 N.W.2d 31 (citing Ward v. Bullis, 2008 ND 80, ¶ 31, 748 N.W.2d 397). This Court has "expressly refused" to construe "in concert" under N.D.C.C. § 32-03.2-02 to include "concurrent negligence." Tibert, 2012 ND 81, ¶ 22. Here, Forster/Krebs' pleadings allege only concurrent negligence, not a common plan by B & B and JB's Welding to commit a tortious act. (App. 61-72, ¶¶ IV, XX, XXX). As this allegation is insufficient under N.D.C.C. §32-03.2-02 and the case law regarding "concerted actions" to impose joint liability, it is also insufficient under N.D.R.Civ.P. 8(a) to put B & B on notice that Forster/Krebs were alleging concerted action for which joint and several liability could be imposed.

[71] Forster/Krebs also allege that the Amended Complaint put B&B on notice of a claim for joint venture. However, the Amended Complaint, even if liberally construed, does not plead a single fact supporting a claim for joint venture. In North Dakota, "[f]or a business enterprise to constitute a joint venture, the following four elements must be present: (1) contribution by the parties of money, property, time, or skill in some common undertaking, but the contributions need not be equal or of the same nature; (2) a proprietary interest and right of mutual control over the engaged property; (3) an express or implied agreement for the sharing of profits, and usually, but not necessarily, of losses; and (4) an express or implied contract showing a joint venture was formed." Come Big or Stay Home, LLC v. EOG Resources, 2012 ND 91, ¶17, 816 N.W.2 80 (citing Sandvick v. LaCrosse, 2008 ND 77, ¶ 11, 747 N.W.2d 519).

[72] Forster/Krebs failed to plead any facts supporting a claim for joint venture. They did not allege that B&B and JB's Welding each contributed money, property, time, or skill to a common business enterprise. They did not allege that JB's Welding had a proprietary interest and right of mutual control over the "knockoff" truck. They have not alleged that B&B and JB's Welding had

an agreement to share in the profits and/or losses associated with the operation of the "knockoff" truck. They have not alleged the presence of any express or implied contract showing a joint venture was formed. Rather, they simply allege that because B&B hired JB's Welding to help build a truck for B&B's own use, then the parties entered into a joint venture. This is not a joint venture under North Dakota law. The Amended Complaint is wholly insufficient to put B&B or JB's Welding on notice of a claim for "joint venture" because Forster/Krebs did not plead any facts that would support this claim.

[73] Forster/Krebs requested, in the alternative, that if the district court determined the Amended Complaint did not adequately allege "concerted action and joint venture", that it grant leave to allow Forster/Krebs to again amend their pleadings to adequately allege such claims. The deadline for filing motions to amend pleadings was November 1, 2013. (Doc. 124). This was Forster/Krebs second motion to amend their claims against B&B made after the deadline in the Scheduling Order. Further, it was the second motion to amend made after the Memorandum Decision dismissing all of Forster/Krebs claims against B&B was issued. Moreover, similar to Forster/Krebs' first motion to amend to add claims against B & B for breach of additional provisions of the Lease (Doc. 333), an amendment adding claims for "concerted action" and "joint venture" was futile, and was properly denied by the district court.

[74] In denying Forster/Krebs' motion for leave to amend its pleadings to allege concerted action and joint venture claims against B & B arising from the manufacture of the "knockoff" truck, the district court noted that it had already dismissed Forster/Krebs' strict products liability claims against B & B. (App. 159, ¶ 13). In determining whether the proposed amendment would be futile, the district court properly focused on whether Forster/Krebs' claim for strict products liability could be contractually waived. (App. 161, ¶ 16). The district court determined that no

provision of North Dakota law rendered Paragraph 10 void as a matter of public policy when operating to waive claims of property damage. (App. 165, ¶¶ 27-30). Ultimately, the district court found that the proposed amendment against B & B would be futile based on the waiver of Paragraph 10, as it would not (and did not) survive a motion for summary judgment. (App. 165, ¶ 26). This decision was not an abuse of discretion, and should not be disturbed on appeal.

CONCLUSION

[75] For the reasons set forth herein, B & B request that the Court affirm all of the district court's decisions and orders presented in this appeal.

Dated this 15th day November, 2017.

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CERTIFICATE OF COMPLIANCE

[76] The undersigned, as attorney for B & B Hot Oil Service, Inc., one of the Appellees in this matter, and as author of this Appellee's Brief, hereby certifies, in compliance with Rule 32(a) of the North Dakota Rules of Civil Procedure, that this Appellee's Brief was prepared with proportional type face and the total number of words in this Appellee's Brief, excluding words in the Table of Contents, Table of Authorities, signature blocks, Certificate of Service, and this Certificate of Compliance, totals 10,357.

Dated this 15th day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **BRIEF OF APPELLEE B & B HOT OIL SERVICE, INC.** to be delivered via email, on the 15th day of November 2017, to the following persons:

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