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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

James Vault & Precast Co., Donna Bline, Melvin Zent, Thomas Kuntz, Dave Olheiser and Jerry Kram, Plaintiffs
v.
B&B Hot Oil Service, Inc., Steve Forster, Daniel Krebs and Debra D. Krebs, Defendants

Supreme Court
Case No: 20180317

Steve Forster, Daniel Krebs and Debra D. Krebs, Crossclaim Plaintiffs and Appellants
v.
B&B Hot Oil Service, Inc, Crossclaim Defendant and Appellee, and
St. Paul Surplus Lines Insurance Company, Crossclaim Defendant

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B&B Hot Oil Service, Inc., Counter-Crossclaim Plaintiff and Appellee
v.
Steve Forster, Daniel Krebs and Debra D. Krebs, Counter-Crossclaim Defendants and Appellants

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Steve Forster, Daniel Krebs, and Debra D. Krebs, Plaintiffs
v.
St. Paul Surplus Lines Insurance Company, Defendant

Steve Forster, Daniel Krebs, and Debra D. Krebs, Crossclaim Plaintiffs and Appellants
v.
JB's Welding, Crossclaim Defendant and Appellee

St. Paul Surplus Lines Insurance Company, Third-Party Plaintiff
v.
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 NO. 45-10-C-00809

REPLY BRIEF OF APPELLANTS STEVE FORSTER, DANIEL KREBS AND DEBRA D. KREBS

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LAW AND ARGUMENT

I. The District Court Erred in Concluding Forster Was a Party to the Lease

[¶1] B&B's argument Forster is bound by admissions made in pleadings is based upon a mischaracterization of Forster's actual pleadings in this action. The *Second Amended Complaint* (App.182) constitutes Forster and Krebs' pleading in this action, which replaces any and all prior pleadings. As explained in detail in paragraphs 25 to 28 of Forster/Krebs' principal brief, Forster/Krebs clearly alleged the Lease was entered into only between B&B and Krebs. Further allegations that B&B has breached contractual obligations owed Forster under paragraph 9 of the Lease are not inconsistent with that allegation. Pursuant to paragraph 9 of the Lease, B&B contractually agreed with Krebs to also name Forster as an additional insured. Forster, as an intended beneficiary of this provision, has the right to seek enforcement of that contractual obligation owed by B&B.

[¶2] The district court's determination Forster was a party to the Lease and bound by its terms, including specifically the waiver of claims provision in paragraph 10, was in error and the dismissal of Forster's claims against B&B should be reversed on this basis alone.

II. The District Court Erred in Concluding All Claims Against B&B Were Waived Pursuant To Paragraph 10 of the Lease

[¶3] B&B's assertion *Viacom International v. Midtown Realty Co*., 193 A.D.2d 45 (N.Y. App. Div. 1993) and *St. Paul Fire & Mar. Ins. Co. v. Protection Mut. Ins. Co*., 644 F.Supp. 38 (S.D.N.Y. 1986) are distinguishable from the present case based upon different language in the waiver of subrogation provisions therein misses the crucial point. In both *Viacom* and *St. Paul*, the courts interpreted the leases as a whole in determining the waiver of subrogation provisions only applied to tort claims, and not to

breach of contract claims. While it is true paragraph 10 of the Lease in this case does not expressly assert the waiver of subrogation provision only applies to tort claims, the Lease as a whole evidences such an intention. As discussed at paragraphs 29 through 36 of Forster/Krebs' principal brief, paragraphs 7, 9, 12 and 13 of the Lease evidence such an intent.

[¶4] Pursuant to paragraph 7 (Repairs provision) B&B agreed, in relevant part, "at its cost, to take good care of the premises and equipment therein … [and] to repair and maintain the premises in a manner that the premises will be returned to the Owner at the termination of this lease in the same condition as when they took possession of the premises, usual wear the only exception." (underline added.) Paragraph 7 does not limit its application to cases of partial destruction only. The only exception to the repair requirement is for "usual wear." If this provision was intended to be limited to instances of partial destruction of the leased premises, it would have said so. Both the *Viacom* and *St. Paul* cases involved repair provisions in commercial leases expressly limited to instances of partial destruction of the leased premises, and yet, the courts in both of those cases considered the repair provisions in concluding the separate waiver of subrogation provisions did not apply to claims of breach of the lease itself, including the repair provisions. B&B's argument its repair obligation under paragraph 7 was conditioned upon an alleged implied covenant the leased premises still exist at the termination of the lease is contrary to the express terms of paragraph 7 which only limit its application for "usual wear".

[¶5] B&B's argument it did not violate paragraph 12 of the Lease on the basis "propane" does not fall within the definition of "petroleum" under 40 C.F.R. § 98.6, is

misleading and irrelevant. The term "petroleum" under paragraph 12 is not tied to the definition located at 40 C.F.R. § 98.6, or any other identified definition. That regulation is not mentioned anywhere in the Lease. As "petroleum" is not tied to any specific definition, the commonly understood meaning of the word "petroleum" applies. B&B admits propane is a liquefied petroleum gas. B&B also admits the term "Hazardous Substances" excludes petroleum, and therefore, paragraph 12(A) does not apply. B&B specifically agreed to indemnify and save the Owner harmless from and against any and all liabilities, damages and remediation costs arising from the release of any contaminant, pollutant, or petroleum in, on or under the premises. The explosion was the proximate result of petroleum (or more generically pollutant/contaminant) which leaked from the knockoff B&B stored within the leased premises.

[¶6] Forster/Krebs's assertion paragraph 10 of the Lease is unenforceable under N.D.C.C. § 9-08-02 is not foreclosed by *Hillerson v. Bismarck Pub. Sch.*, 2013 ND 193, ¶ 14, 840 N.W.2d 65, as alleged by B&B. *Hillerson* only addressed the "willful injury" element of N.D.C.C. § 9-08-02, and did not address the "violation of law, whether willful or negligent" element thereof. As discussed, Forster/Krebs allege B&B's storage of the propane trucks in the Building violated applicable law. (App.197 ¶XV; App.373 pp.89-90 (Robert Whitemore testifying NFPA 58 was adopted into Title 49 of Code of Federal Regulations pertaining to transportation of hazardous materials).)

[¶7] B&B's interpretation of the meaning of "manufacturer" under N.D.C.C. § 28-01.3-01(02) as requiring an actual sale of the unreasonably defective product in all cases defies common sense, particularly where the product at issue is utilized in a commercial context. Where a person or entity manufactures a product with the intent of

utilizing the product directly themselves for commercial purposes, query the logic of depriving injured users or innocent bystanders of a strict liability remedy. Such an interpretation would lead to absurd results. For example, what if Ford Motor Company, instead of selling one of its vehicles, simply allowed its employees to use the vehicle for company business. If any such employee (user) or innocent bystander were later injured as a result of an unreasonably dangerous condition in the vehicle, would such injured persons be deprived of a remedy under strict products liability?

III. The District Court Erred In Concluding Acuity Consented To Waiver of Its Subrogation Rights, And In Determining B&B Is An Implied Co-Insured Under the Acuity Policy

[¶8] B&B concedes the implied co-insured rule has no application with respect to Forster/Krebs personal property losses and uninsured losses. With respect to real property losses, this Court's analysis in *Uren v. Dakota Dust-Tex, Inc*., 2002 ND 81, 643 N.W.2d 678 demonstrates a lease, taken as a whole, should be considered in interpreting whether it expresses an intent the tenant not be covered under the landlord's property insurance policy. In *Uren*, the Court noted the terms of the lease, including the specific wording of the Repairs provision therein, expressly absolved the tenant of any liability for repair to the extent such repairs were covered under the landlord's property insurance policy. *Uren* at ¶ 12. In the present case, the Repairs clause is exactly the opposite, requiring B&B to pay for all repairs necessary to effectuate a return of the property to the Owner, usual wear being the only exception. The lease in *Uren* also did not involve an Environmental Compliance provision similar to paragraph 12 in the Lease, which contains its own independent hold harmless/indemnification provision. Paragraphs 7, 9, 12 and 13 of the Lease evidence a clear intention for the tenant to bear responsibility for

the damage at issue in this case, and therefore, the implied co-insured rule has no application.

[¶9] Forster/Krebs arguments on the issue of Acuity's alleged consent to waiver of its subrogation interests are provided at paragraphs 43-48 of Forster/Krebs' principal brief. Contrary to the law from other jurisdictions cited by B&B, this Court has held "[a] waiver of the right to subrogation must be by an act of the subrogee; it cannot be contracted away by the conduct or agreement of third parties." *St. Paul Fire & Marine Ins. Co. v. Amerada Hess Corp*. 275 N.W.2d 304, 308 (N.D. 1979). Even assuming, arguendo, Acuity consented to the waiver of its subrogation rights pursuant to paragraph J(1), which is denied, the waiver provisions of paragraph 10 of the lease were only ever agreed to by Krebs as Forster was not a party to the Lease. There is no evidence to establish Forster knowingly and intentionally waived Acuity's subrogation claims relative to sums paid by Acuity to Forster.

IV. The District Court Erred in Concluding the Indemnification Clause in Paragraph 9 of the Lease Did Not Apply to Forster's and Kreb's Property Damage Claims

[¶10] B&B's reliance upon *Hoff v. Krebs*, 2009 ND 48, ¶ 10, 763 N.W.2d 520 for the proposition the hold harmless and indemnification language of paragraph 9 of the Lease was only intended to apply to third party claims, is misplaced. The hold harmless provision in *Hoff* was expressly limited to "claims, demand or suits of third parties". No such limiting language appears in paragraph 9 of the Lease. In addition, as discussed above, the language of the indemnification provision in paragraph 9 of the Lease is different that the provision at issue in *Uren*, and the provisions of paragraph 7, 12 and 13

of the Lease evidencing an intention the tenant be responsible for the specific damages at issue, were not present in *Uren*.

V. The District Court Erred In Denying Leave To Amend Pleadings To Expressly Allege Breaches of Other Lease Provisions by B&B, And To Allege Claims For Which Joint Liability Between B&B and JB's Could Be Found By The Jury

[¶11] The district court abused its discretion by denying Forster/Krebs' request to amend pleadings to allege joint conduct claims against B&B on the alleged basis the requested amendments would have been futile based upon the waiver of claims provision in paragraph 10 of the Lease, despite permitting amendment to include claims of concerted action and joint venture as against JB's only. As discussed, the district court's interpretation of paragraph 10, and the Lease as a whole, was in error. At the very least, the district court erred in applying paragraph 10 to Forster, who was not even a party to the Lease.

[¶12] In addition, as discussed in paragraphs 57-62 of Forster/Krebs' principal brief, Forster/Krebs sought leave to expressly allege concerted action by B&B's and JB's, and their adoption and ratification of each other's work in jointly designing, assembling and manufacturing the knockoff, conduct which would subject B&B and JB's to joint and several liability. Forster/Krebs' pleadings already allege facts from which joint liability could be found by a jury on such claims. (A182-A194.) In any event, under North Dakota's notice pleading standard, Forster/Krebs were not required to plead every element of their legal theories for recovery – the pleadings placed the defendants on notice of the nature of Forster/Krebs' claims. *See Jablonsky v. Klemm*, 377 N.W.2d 560, 565 (N.D. 1985) (Under North Dakota's "liberal pleading rules, the plaintiffs were not required to allege every element of their claim …."; "pleadings that indicate generally the

type of claim that is involved satisfy the spirit of Rule 8(a)" …." (citations omitted"); N.D.R.Civ.P. 8(d) ("Each allegation must be simple, concise, and direct. No technical form is required"); N.D.R.Civ.P. 8(e) ("Pleadings must be construed so as to do justice.").

CONCLUSION

[¶13] For the foregoing reasons, Forster/Krebs request the challenged decisions of the district court be reversed and this matter be remanded to the district court for further proceedings consistent with this Court's decision.

[¶14] Dated this 12th day of December, 2018.

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CERTIFICATE OF COMPLIANCE

[¶15] The undersigned, as attorneys for the Appellants in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 1,889 words.

[¶16] Dated this 12th day of December, 2018.

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[¶17] I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANTS STEVE FORSTER, DANIEL KREBS AND DEBRA D. KREBS** was on the 12th day of December, 2018, emailed to the following:

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