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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Agri Industries, Inc., Plaintiff and Appellee, v. Francis Franson, Defendant, Third-Party Plaintiff and Appellant, and Cross-Appellee v. Hess Corporation, Third-Party Defendant, Appellee and Cross-Appellant.	Supreme Court Nos. 20170319 and 20170412 Williams County District Court Case No. 53-2013-CV-01320

On Appeal from Order Granting Summary Judgment
dated June 23, 2017
Case No. 53-2013-CV-01320
County of Williams, Northwest Judicial District
The Honorable Benjamen J. Johnson, Presiding

BRIEF OF THIRD-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLANT HESS CORPORATION

Paul J. Forster (#07398)
Benjamin J. Sand (#07981)
CROWLEY FLECK PLLP
100 West Broadway Ave., Suite 250
P.O. Box 2798
Bismarck, North Dakota 58502-2798
Telephone: (701) 223-6585
Email: pforster@crowleyfleck.com
bsand@crowleyfleck.com
Attorneys for Third-Party Defendant,
Appellee and Cross-Appellant
Hess Corporation

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STATEMENT OF THE ISSUES

[¶1] Whether the completion of a "certified water quality and quantity test . . . within one year preceding the commencement of drilling operations" is an essential element of a claim under N.D.C.C. § 38-11.1-06?

[¶2] Whether Franson's claim against Hess is barred by the applicable statute of limitations?

[¶3] Whether Franson's third-party complaint fails to state a proper third-party claim under North Dakota Rules of Civil Procedure 8 and 14?

STATEMENT OF THE CASE

[¶4] The dispute before the Court is whether the District Court properly construed N.D.C.C. § 38-11.1-06 in its order granting judgment as a matter of law in Hess's favor on Franson's claim for damages under this statute. Franson's third-party complaint alleges that seismographic testing commissioned by Hess damaged his water well. The District Court found the plain language of N.D.C.C. § 38-11.1-06 requires a claimant to have conducted a "certified water quality or quantity test" within one year preceding the seismographic testing in order to seek recovery under the statute. The District Court granted Hess's motion for summary judgment because it was undisputed Franson never conducted such a test.

[¶5] Hess has also filed a cross-appeal from portions of the District Court's order granting summary judgment which rejected Hess's alternative arguments for dismissal. Franson's claims against Hess are barred under the applicable statute of limitations, based upon Franson's deposition testimony that he first believed his well had been damaged by the seismographic test over six years before he commenced this cause of action.

Moreover, Franson's third-party complaint fails to meet the pleading requirements of Rules 8 and 14 of the North Dakota Rules of Civil Procedure because it does not assert a legally cognizable third-party claim within the scope of Rule 14. The District Court rejected these arguments.

STATEMENT OF THE FACTS

[¶6] Francis Franson is a resident of Williams County, North Dakota, and owns real property at the following location:

Township 155 North, Range 95 West
Section 13: NE1/4

("Subject Property"). Hess Supp. App. 14, Franson Depo. pp. 14:17-25 – 15:1-15. In 2008, Hess engaged Geokinetics USA, Inc. ("Geokinetics") as an independent contractor to provide seismographic testing on an area that included the Subject Property. Hess Supp. App. 9, ¶ 3. On or about July 7, 2008, Geokinetics notified Franson of its intent to conduct geophysical operations on the Subject Property. Hess Supp. App. 16, Franson Depo. pp. 20-21; Hess Supp. App. 20. Geokinetics conducted seismographic testing on the Subject Property in mid-December of 2008. Hess Supp. App. 17, Franson Depo. pp. 38:22-25 – 39:1-3.

[¶7] The Subject Property housed a water well that was originally drilled in 1963. *See* Hess Supp. App. 14, Franson Depo. pp. 12:9-12, 15:16-20. Hess has denied that the seismographic testing damaged Franson's well, but nevertheless assumes Franson's testimony of damages to the well to be true for purposes of summary judgment. Undisputedly, Franson never conducted a water quality or water quantity test on this water well. Hess Supp. App. 15, Franson Depo. p. 18:18-24. Franson testified that

"within a day or two" after Geokinetics conducted the seismographic testing, he noticed the well had been damaged as a result of the seismographic testing. Hess Supp. App. 18, Franson Depo. p. 42:1-14. The colloquy below from the deposition clarifies that although Franson "didn't have much water" by January 2009, he had in fact noticed the quantity begin to decrease in mid-December 2008, just after the seismographic testing:

> Q: Well, let's put it this way: You said – we were talking about you noticing a – a change around the new year. Was that when the water actually finally stopped coming out at all, or was that when you started noticing a change?
>
> A: Well, I was getting just a little bit then, so I – I really noticed a change.
>
> Q: And it had been decreasing over the course of the last couple weeks before that?
>
> A: Yes.
>
> Q: So it had started – the – the water had started to – the water quantity had started to decrease before Christmas?
>
> A: Yeah. Right after the seismograph took place.
>
> Q: It started to decrease right after the seismographic test?
>
> A: Correct.
>
> Q: And at that point when it – when it started to decrease right after the seismographic test, did you believe at that point that the seismographic test had – had – had caused that change?
>
> A: Yes, I did.
>
> Q: Did you notice the quantity of water decreasing within a day or two after the seismographic test?
>
> A: Yes, I did. Mm-hmm (nodding affirmatively).
>
> Q: And within a day or two after the seismographic test, then, did – did you believe even at that point that the seismographic test had been responsible for that change?

A: Yes, I really did. Mm-hmm (nodding affirmatively).

Q: And, again, that would have been about ten days before Christmas?

A: Yes. Mm-hmm.

Hess Supp. App. 18, Franson Depo. pp. 40-42 (emphasis added).

[¶8] Over six years later, on December 26, 2014, Franson served his summons and third-party complaint on Hess. Hess Supp. App. 8; Franson App. 13.

A. Procedural Posture

[¶9] The underlying action against Franson is one for breach of contract stemming out of Franson's alleged failure to pay Agri Industries, Inc. ("Agri Industries") for the materials and services provided in the course of drilling him a new water well. Franson App. 7. This action was commenced on March 25, 2013. *Id*. As stated above, Hess was joined as a third-party defendant on December 26, 2014. The allegations in the third-party complaint are cursory, and generally allege Hess's "seismographic work" damaged Franson's well and water supply, causing "permanent and irreversible damage." Franson App. 13-14. Hess filed its answer on January 16, 2015, denying any and all liability for the damages alleged by Franson. Franson App. 15-16.

[¶10] On March 13, 2017, Hess filed its "Motion for Dismissal or Summary Judgment" under Rules 12(c) and 56 of the North Dakota Rules of Civil Procedure. Doc. ID No. 75-76. In its motion, Hess argued (1) Franson's claim was barred under the applicable statute of limitations; (2) Franson's third-party complaint fails to state a claim upon which relief can be granted; and (3) Hess cannot be held liable for the torts of its independent contractor, Geokinetics. Doc. ID No. 76, ¶ 1. Franson filed a response in

opposition to the motion on April 17, 2017, where, for the first time, Franson indicated his claim is one for compensation under chap. 38-11.1, N.D.C.C. – North Dakota's Oil and Gas Production Damage Compensation Act. Doc. ID No. 83, ¶ 19. Hess filed its reply in support of its motion on April 24, 2017. Doc. ID No. 87. Hess's reply brief was its first opportunity to address Franson's claim as one contemplated under chap. 38-11.1, N.D.C.C., and it did so by indicating that Franson's purported statutory claim fails not only because he failed to plead it but also because he had not conducted a "certified water quality and quantity" test on the well at issue, as required by N.D.C.C. § 38-11.1-06. Hess did not waive its other arguments in support of dismissal or summary judgment.

[¶11] The District Court held a hearing on Hess's motion on June 12, 2017. Doc. ID. No. 90. The District Court granted Summary Judgment in Hess's favor on June 23, 2017. Franson App. 18-24. Franson moved for reconsideration on June 29, 2017, and Hess responded in opposition to the motion on July 6, 2017. Doc. ID. Nos. 100 and 107. A hearing on the motion for reconsideration was held July 7, 2017, where the District Court orally denied the motion. Doc. ID. No. 106; Hess Supp. App. 39.

[¶12] The underlying action ultimately went to trial and Franson was found liable to Agri Industries in the principal amount of $77,924.85. Hess Supp. App. 36-37 (Judgment); Hess Supp. App. 38-39 (Amended Judgment).

STANDARD OF REVIEW

A. Summary Judgment Standard

[¶13] The standard of review for a district court's grant of summary judgment is well established:

> Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Hallin v. Inland Oil & Gas Corporation, 2017 ND 254, ¶ 6, 903 N.W.2d 61 (citing *THR Minerals, LLC v. Robinson*, 2017 ND 78, ¶ 6, 892 N.W.2d 193).

B. Statutory Construction is reviewed de novo

[¶14] Interpretation of a statute is a question of law fully reviewable on appeal. *See James Valley Grain, LLC v. David*, 2011 ND 160, ¶ 6, 802 N.W.2d 158. In interpreting a statute, the Court first looks to the "language of the statute itself [] giving it its plain, ordinary, and commonly understood meaning." *Grey Bear v. N.D. Dept. Of Human Servs.*, 2002 ND 139, ¶ 7, 651 N.W.2d 611. Where the plain language of a statute is clear and unambiguous, the legislative intent is presumed clear. *Id.* "A statute's language must be interpreted in context, and this Court attempts to give meaning and effect to every word, phrase, and sentence." *Holbach v. City of Minot*, 2012 ND 117, ¶ 14, 817 N.W.2d 340. "Statutes are construed as a whole and are harmonized to give meaning to related provisions." *James Valley Grain*, at ¶ 6. When there is an irreconcilable conflict between two statutory provisions, a particular provision prevails over a general provision. *See* N.D.C.C. § 1-02-07. The District Court's decision granting summary judgment in

favor of Hess based on its interpretation of N.D.C.C. § 38-11.1-06 is therefore reviewed de novo.

C. The statute of limitations becomes a question of law reviewed de novo if the evidence is such that reasonable minds could draw but one conclusion.

[¶15] The discovery rule, which determines when a claim accrues for purposes of computing limitations, applies to a claim under N.D.C.C. § 38-11.1-06 ("For purposes of this section, the claim for relief is deemed to have accrued at the time it is discovered or might have been discovered in the exercise of reasonable diligence."). "The discovery rule postpones a claim's accrual until the plaintiff knew, or with the exercise of reasonable diligence should have known, of the wrongful act and its resulting injury." *Snortland v. State*, 2000 ND 162, ¶ 11, 615 N.W.2d 574. "An objective standard is used for the knowledge requirement of the discovery rule, which focuses upon whether the plaintiff is aware of facts that would place a reasonable person on notice a potential claim exists, without regard to the plaintiff's subjective beliefs." *Id.* Statute of limitations defenses may present issues of fact if there is conflicting evidence about the time of notice, but "if uncontroverted facts exist that demonstrate the time when a reasonable person would have been placed on notice, a court may resolve the question as a matter of law." *Id.* The issue becomes a question of law, reviewed de novo, when "the evidence is such that reasonable minds could draw but one conclusion." *Id.*

D. A motion to dismiss under North Dakota Rule of Civil Procedure 12 is reviewed de novo.

[¶16] Under Rule 12 of the North Dakota Rules of Civil Procedure, the defense of failure to state a claim upon which relief may be granted may be raised on a Rule 12(c)

motion, and such motions must be made after pleadings are closed but early enough not to delay trial. N.D.R.Civ.P. 12(c), 12(h)(2). Rule 8 of the North Dakota Rules of Civil Procedure requires a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for the relief sought. N.D.R.Civ.P. 8(a). A motion to dismiss may be utilized to test "the legal sufficiency of the statement of the claim presented in the complaint." *Limberg v. Sanford Medical Center Fargo*, 2016 ND 140, ¶ 7, 881 N.W.2d 658.

[¶17] A third-party complaint must allege a legally sufficient claim under Rule 14 of the North Dakota Rules of Civil Procedure. Under Rule 14(a) of the North Dakota Rules of Civil Procedure, "a defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of a claim against it." *See also Selland v. Selland*, 519 N.W.2d 21, 22 (N.D. 1994). Rule 14(a) does not "allow the defendant to assert a separate and independent claim even though the claim arises out of the same general set of facts as the main claim." *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 698 (8th Cir. 2003).[1] A district court's order on a motion to dismiss for failure to state a claim is reviewed de novo. *See Nandan, LLP v. City of Fargo*, 2015 ND 37, ¶ 11, 858 N.W.2d 892; *Brandvold v. Lewis and Clark Public School Dist. No. 161*, 2011 ND 185, ¶ 6, 803 N.W.2d 827.

[1] "Although not binding, federal court interpretations of a corresponding federal rule of civil procedure are highly persuasive in construing our rule." *Choice Financial Group v. Schellpfeffer*, 2006 ND 87, ¶ 12, 712 N.W.2d 855.

ARGUMENT

I. The District Court correctly construed N.D.C.C. § 38-11.1-06 as requiring a certified water quality and quantity test within one year preceding drilling operations.

[¶18] N.D.C.C. § 38-11.1-06 provides to "any person who owns an interest in real property within one-half mile [804.67 meters] of where geophysical or seismograph activities are or have been conducted" a cause of action if their "domestic, livestock, or irrigation water supply . . . has been disrupted or diminished in quality or quantity by the drilling operations." N.D.C.C. § 38-11.1-06. The statute defines "drilling operations" to include "oil and gas geophysical and seismograph exploration activities." N.D.C.C. § 38-11.1-03(3) The pertinent portion of that section is quoted below:

> **38-11.1-06. Protection of surface and ground water – Other responsibilities of mineral developer.**
>
> If the domestic, livestock, or irrigation water supply of any person who owns an interest in real property within one-half mile [804.67 meters] of where geophysical or seismograph activities are or have been conducted or within one mile [1.61 kilometers] of an oil or gas well site has been disrupted, or diminished in quality or quantity by the drilling operations **and a certified water quality and quantity test has been performed by the person who owns an interest in real property within one year preceding the commencement of drilling operations**, the person who owns an interest in real property is entitled to recover the cost of making such repairs, alterations, or construction that will ensure the delivery to the surface owner of that quality and quantity of water available to the surface owner prior to the commencement of drilling operations.

N.D.C.C. § 38-11.1-06 (emphasis added). The District Court correctly construed N.D.C.C. § 38-11.1-06 when it held "the completion of the 'certified water quality or quantity test' is an essential element under N.D.C.C. 38-11.1-06, which Franson would have the burden of proving at trial in order for judgment in his favor." Franson App. 24, ¶ 11. This requirement is clear and unambiguous under the plain language of the statute.

[¶19] Franson contends that the certified water testing requirement is negated by language in the same statutory section describing how to establish "prima facie evidence of injury":

> Prima facie evidence of injury under this section may be established by a showing that the mineral developer's drilling operations penetrated or disrupted an aquifer in such a manner as to cause a diminution in water quality or quantity within the distance limits imposed by this section.

N.D.C.C. § 38-11.1-06. Franson contends this prima facie evidence clause eliminates the necessity of a certified water test in the event that a water well has stopped producing completely as a result of drilling operations. To the contrary, this provision simply establishes the evidence for a prima facie showing of damages ("injury"); it does not negate the requirement that an owner must have tested the water supply as a precondition to establishing liability. Franson's interpretation enjoys no support from the plain text of the statute, as the essential elements of a claim under N.D.C.C. § 38-11.1-06 do not vary based upon the extent of the damages alleged. Such an interpretation fails to abide by the rules of construction laid out in the North Dakota Century Code and handed down by this Court, because it fails to give any meaning or effect to the statute's water testing requirement.

[¶20] Franson's interpretation creates conflict in a statute where none need exist. *See Grossman v. Lerud*, 2014 ND 235, ¶ 7, 857 N.W.2d 92 ("Statutes should be harmonized to avoid conflicts."). As this Court has noted, "the term 'prima facie evidence' is ambiguous at best." *Wasem v. Laskowski*, 274 N.W.2d 219, 223 (N.D. 1979) (citations omitted). This Court provided a definition of the term in 1950 when it defined "prima facie evidence" to mean "sufficient evidence upon which a party would be entitled to recover, providing his opponent produced no further testimony." *Schnoor v. Meinecke*,

77 N.D. 96, 40 N.W.2d 803, 808 (N.D. 1950). The Court has also noted that "A prima facie evidence rule is nothing more or less than a rule of evidence, and it is not a rule of substantive law; it has reference and applies only to the mode or manner by and through which facts essential to a judgment or conviction might be established." *Medical Arts Bldg. Ltd. v. Eralp*, 290 N.W.2d 241, 245 (N.D. 1980). Thus, nothing in this Court's precedent suggests that a rule defining what constitutes prima facie evidence of injury may negate an element of liability.

[¶21] Here, the prima facie evidence clause at issue merely states an evidentiary basis upon which a claimant under N.D.C.C. § 38-11.1-06 may show injury. For example, the prima facie evidence clause may limit the expert testimony required to show causation of an injury, but it does not negate or contradict the testing requirement contained in the same section. Even if there were irreconcilable conflict between the two provisions, the certified water test requirement would prevail under the "particular controls general" rule of statutory construction. *See* N.D.C.C. §1-02-07 (When there is an irreconcilable conflict between two provisions in the same statute, the particular provision prevails over a general one). Simply put, the Court cannot ignore the plain language of N.D.C.C. § 38-11.1-06, which requires the completion of a "certified water quality and quantity test . . . within one year preceding the commencement of drilling operations" by any surface owner pursuing a claim under the statute.

[¶22] In sum, N.D.C.C. § 38-11.1-06 establishes specific elements that a claimant must establish at trial in order to receive compensation for damages to their "domestic, livestock, or irrigation water supply." In addition to owning interests in real property situated nearby seismograph activities, a claimant under N.D.C.C. § 38-11.1-06 must

have conducted "a certified water quality and quantity test" within one year preceding the operations that are alleged to have damaged the water supply. The undisputed record before the Court reveals Franson has never conducted such a test, and therefore cannot meet the specific requirements of the statute. The District Court thereby appropriately dismissed Franson's claim as a matter of law and should be affirmed accordingly.

II. The statute of limitations has run.

[¶23] An action brought under N.D.C.C. § 38-11.1-06 "must be brought within six years of the time the action has accrued," and "the claim for relief is deemed to have accrued at the time it is discovered or might have been discovered in the exercise of reasonable diligence." This statute incorporates the "discovery rule," under which the Court utilizes an objective standard for the knowledge requirement and focuses upon whether the plaintiff was aware of facts that would put a reasonable person on notice that a potential claim exists. *See Wells v. First American Bank West*, 1999 ND 170, ¶ 10, 598 N.W.2d 834.

[¶24] "Statutes of limitation are designed to prevent plaintiffs from sleeping on their legal rights and bringing stale claims to the detriment of defendants." *Dunford v. Tryhus*, 2009 ND 2012, ¶ 6, 776 N.W.2d 539. "Thus, statutes of limitation are designed to prevent the plaintiff's enforcement of stale claims when, through the lapse of time, evidence regarding the claim has become difficult to procure or even lost entirely." *Langowski v. Altendorf*, 2012 ND 34, ¶ 8, 812 N.W.2d 427. Hess has at all times disputed its liability to Franson for the alleged damages to his water well, and Franson's

untimely commencement of the underlying cause of action bars him from pursuing this stale claim.

[¶25] Franson indicated he became aware of the alleged damage to his water well and believed that the seismographic test was responsible for the quantity of water decreasing "within a day or two after the seismographic test" – around ten days *before* Christmas 2008. Hess Supp. App. 17-18, Franson Depo. pp. 39-42. Franson's quantity of water then continually diminished over the course of two weeks. Hess Supp. App. 18, Franson Depo. pp. 40-41. Therefore, the statute of limitations began to run on or within a day or two of December 15, 2008. This timeline required Franson to commence an action on or within a day or two of December 15, 2014. All that is required to commence an action in North Dakota is the service of a summons of a defendant. N.D.R.Civ.P. 3. Franson delivered his summons to a process server and served Hess with the summons in this action on December 26, 2014, around ten days after the applicable statute of limitations expired. Hess Supp. App. 8.

[¶26] The District Court concluded "Franson had actual knowledge of the injury when he noticed the sudden change after Christmas in 2008" and therefore complied with the applicable statute of limitations. Franson App. 21, ¶ 7. The District Court came to this conclusion despite recognizing Franson testified in the deposition "that he noticed a change soon after the geological testing." *Id.* This conclusion by the District Court inappropriately disregards Franson's testimony that his quantity of water "became less, less, and less" over a period of about two weeks, beginning about ten days before Christmas 2008. Hess Supp. App. 18, Franson Depo. pp. 40:19-24, 42:6-14. When considering the full context of Franson's deposition testimony, reasonable minds can

draw but one conclusion: that Franson became aware of the alleged damage to the water well and believed that the seismographic test was responsible for the quantity of water decreasing "within a day or two after the seismographic test" – around ten days *before* Christmas 2008. In other words, he was on notice of his claim at that time, even if the extent of damages appeared to increase as time went on.

[¶27] Accordingly, Franson's claim against Hess is barred by the statute of limitations, as a matter of law.

III. Franson's Third-Party Complaint fails to state a claim under North Dakota Rules of Civil Procedure 8 and 14.

[¶28] Franson's third-party complaint should be dismissed for a failure to state a legally sufficient claim under Rule 14 of the North Dakota Rules of Civil Procedure. The District Court's order rejecting Hess's argument in this regard only analyzed Franson's claim under the pleading standards of N.D.R.Civ.P. 8, without regard to the requirements of Rule 14. Hess maintains that Franson's third-party complaint fails to meet the Rule 8 pleading requirements, as it fails to set out the essential elements of any recognized claim under North Dakota law. It only became apparent that Franson was seeking compensation under North Dakota's Oil and Gas Production Damage Compensation Act when Franson filed his response to Hess's "Motion for Dismissal or Summary Judgment." *See* Doc. ID. No. 83.

[¶29] Moreover, Franson's third-party complaint fails to meet the requirements of North Dakota Rule of Civil Procedure 14(a) in both form and substance. North Dakota Rule of Civil Procedure 14(a) states "A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the

claim against it." Such a claim must "aris[e] out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff." N.D.R.Civ.P. 14(a)(3). The crucial characteristic of a Rule 14 claim is that the defendant is attempting to transfer to the third-party defendant the liability asserted against defendant by the original plaintiff. *See* Charles Alan Wright, Arthur R. Miller, et. al. Fed. Practice & Procedure Civ., § 1446 (3d ed. Jan. 2017). "Rule 14(a) does not allow the defendant to assert a separate and independent claim even though the claim arises out of the same general set of facts as the main claim." *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 698 (8th Cir. 2003). In short, something more than mere transactional relatedness is required.

[¶30] A third-party claim may be asserted under Rule 14(a) only when the third party's liability is in some way dependent on the outcome of the main claim and is secondary or derivative thereto. *See Danks v. Holland*, 246 N.W.2d 86, 89 (N.D. 1976). The secondary or derivative liability notion is central and thus impleader has been successfully utilized when the basis of the third-party claim is a theory such as indemnity, subrogation, contribution, or express or implied warranty. *See* Wright & Miller, Fed. Practice & Procedure Civ. § 1446 (3d ed. Jan. 2017); *See also Danks*, at p. 90 ("Third-Party complaints, under Rule 14, are generally brought under theories of indemnity or contribution.").

[¶31] Franson's third-party claim against Hess is separate and distinct from whatever contractual liability has been alleged and proven at trial against Franson by Agri Industries. Hess has at all times asserted it did not damage Franson's original water well. Franson's contractual liability to Agri Industries for the construction of a new water well does not prove Hess damaged the original water well and owes him compensation under

N.D.C.C. § 38-11.1-06. Hess's liability to Franson is therefore not contingent or dependent on Agri Industries' contractual claim against Franson – rather, it is an independent claim that depends on Franson meeting each and every element of a claim under N.D.C.C. § 38-11.1-06. Agri Industries' complaint and Franson's third-party complaint allege separate and independent causes of action where the liability of the relevant parties require distinct inquiries and totally separate sets of facts. To treat the claim against Hess as a derivative liability within the meaning of Rule 14 would stretch the language of the rule beyond its breaking point and would effectively remove all limits on the scope of third party claims.

[¶32] The case of *U.S. v. Bailey*, 516 F. Supp. 2d 998 (D. Minn. 2007) is instructive. In *Bailey*, the United States ordered Bailey to restore a tract of land he had constructed a road upon because the road violated the Clean Water Act. *Id.* at 1003. Bailey had constructed the road with the permission and guidance of Lake of the Woods County, despite several requests from the EPA to refrain from doing so until and unless the appropriate permit could be issued. *Id.* at 1002-1003. A permit was never granted and the United States commenced an action to enforce restoration of the property, and Bailey impleaded Lake of the Woods County under Rule 14. *Id.* at 1019. Bailey's third-party complaint against Lake of the Woods County was ultimately dismissed because Bailey failed to identify a "cognizable legal theory under which he has a right of indemnity or contribution against the County." *Id.* at 1020. There was no such cognizable legal theory because no provision in the Clean Water Act nor any contract with Lake of the Woods County provided such a right. *Id*.

[¶33] Similarly, there is no contractual agreement or provision in N.D.C.C. § 38-11.1-06 which provides Franson a right of indemnity or contribution. The court in *Bailey* stated that he "must be able to claim – based on an insurance contract or statutory indemnification provision or something else – that, if he is held liable to the United States, then the County should be held liable to *him*." *Bailey*, 516 F. Supp. 2d at 1020 (emphasis in original). Bailey could not do so, therefore his third-party complaint was dismissed. Franson's third-party complaint suffers the same deficiency. Franson cannot claim – based on an insurance contract or the very terms of chap. 38-11.1, N.D.C.C. – that, if he is held liable to Agri Industries, then Hess should be held liable to him. This is so because Franson's allegations against Hess comprise a separate and independent cause of action from Agri Industries' claims against him.

[¶34] These deficiencies manifest themselves most clearly in Franson's inability to frame his third-party complaint within the scope of Rule 14(a). *See State v. N.D. ex rel. N.D. Workmen's Compensation Bureau v. Pryzbylski*, 98 F. Supp. 21, 22 (D. Minn. 1951) (dismissing third-party complaint for clear pleading deficiencies under Rule 14(a)). Notably absent from Franson's third-party complaint is any coherent legal theory under which Hess could be liable for Franson's contractual obligations to Agri Industries. There is no claim for contribution. There is no claim for indemnity. These allegations are not present in Franson's third-party complaint because they would be baseless and do not enjoy any support from the record before the Court or the governing case law.

[¶35] In sum, Franson's third-party complaint fails to meet the pleading standards of Rule 8, and is legally insufficient under Rule 14. These pleading deficiencies provide yet another independent reason why the third-party complaint must be dismissed.

CONCLUSION

[¶36] For the reasons set forth above, Hess respectfully requests the Court affirm summary judgment in favor of Hess and against Franson because his claim fails as a matter of law under N.D.C.C. § 38-11.1-06. In the alternative, Hess requests that the court direct dismissal of the third-party complaint because Franson's claims are barred by the statute of limitations and because the third-party complaint fails to state a proper third-party claim under Rules 8 and 14 of the North Dakota Rules of Civil Procedure.

DATED this 21st day of February, 2018.

Paul J. Forster

Paul J. Forster (#07398)
Benjamin J. Sand (#07981)
Crowley Fleck PLLP
100 West Broadway Ave., Suite 250
P.O. Box 2798
Bismarck, North Dakota 58502-2798
Telephone: (701) 223-6585
Email: pforster@crowleyfleck.com
bsand@crowleyfleck.com
Attorneys for Third-Party Defendant,
Appellee and Cross-Appellant
Hess Corporation

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

[¶37] This Brief contains 5,136 words, excluding the parts of the brief exempted by N.D.R.App.P. 32(a)(8)(A). I certify that this Brief complies with the typeface requirements of N.D.R.App.P. 32 and the type style requirements of that rule, because it has been prepared in a proportionally-spaced typeface using a Microsoft Word, Times New Roman, 12 point font.

By: *Paul J. Forster*
Paul J. Forster (#07398)

CERTIFICATE OF SERVICE

[¶38] I hereby certify that true and correct copies of the **BRIEF OF THIRD-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLANT HESS CORPORATION** and **SUPPLEMENTAL APPENDIX OF THIRD-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLANT HESS CORPORATION** were on the 21st day of February, 2018, served electronically on the following:

Scott A. Hager
shager@pagelweikum.com
Attorneys for Defendant, Third-Party Plaintiff and Appellant Francis Franson

Jack Patrick Dwyer
jack@ndwaterlaw.com
Lynn M. Mesteth
lynn@ndwaterlaw.com
Attorneys for Plaintiff and Appellee Agri Industries, Inc.

By: *Paul J. Forster*
Paul J. Forster (#07398)