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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

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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

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

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## ARGUMENT

### I. Franson's deposition transcript demonstrates that the statute of limitations expired before he served his third-party complaint.

[¶1] Franson's statute of limitations argument relies upon an incomplete recitation of his deposition transcript to conjure an issue of fact. Indeed, before the district court, Franson seemed to admit that his deposition testimony supported Hess's statute of limitations argument, and relied on a supposedly inconsistent interrogatory answer indicating he experienced a "loss of water pressure" in January 2009 to create a purported factual issue.[1] *See* Doc ID No. 83, ¶¶ 14-18. Franson's argument on appeal conveniently avoids the full context of his deposition testimony, because considering the full context leads a reasonable mind to 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. Hess. Supp. App. 18, Franson Depo. pp. 41:12-25, 42:1-14. Franson served Hess more than six years later, on December 26, 2014, approximately ten days after the statute of limitations expired. Hess Supp. App. 8.

[¶2] Hess stands by its initial briefing on this issue, which provides the Court a full recitation of the relevant deposition testimony. Hess respectfully requests the Court reject Franson's arguments (both old and new), which suggest he did not discover the damages to his water well until January 2009. Simply put, Franson is bound by his own

[1] Hess pointed out that this interrogatory response does not foreclose the possibility that Franson noticed decreasing water pressure in December 2008 before experiencing a total "loss" in January 2009. *See* Doc. ID. No. 87, ¶¶ 3-8. Moreover, Franson could not create an issue of fact by relying on an interrogatory answer explicitly contradicted by his own deposition testimony. *See* Doc. ID. No. 87, ¶¶ 9-12; *Canal Ins. Co. v. Kwik Kargo, Inc. Trucking*, Civil No. 08-439, 2009 WL 1086524 at *3 (D. Minn. April 21, 2009); *Stearns v. McGuire*, 154 F. App'x 70, 76 (10th Cir. 2005).

admission that he noticed a change in his water and attributed it to to the seismographic testing before Christmas 2008. Hess. Supp. App. 18, Franson Depo. pp. 41:12-25, 42:1-14.

## II. Franson's Rule 14 arguments are without merit and have not been raised before this appeal.

[¶3] Arguments not raised at the trial court and raised for the first time on appeal are not generally considered by this Court. *Guthmiller Farms, LLP v. Guthmiller*, 2013 ND 248, ¶ 17, 840 N.W.2d 636. This Court has made clear:

> The purpose of an appeal is to review the actions of the trial court, not to grant the appellant an opportunity to develop and expound upon new strategies or theories. The requirement that a party first present an issue to the trial court, as a precondition to raising it on appeal, gives that court a meaningful opportunity to make a correct decision, contributes valuable input to the process, and develops the record for effective review of the decision. It is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. Accordingly, issues or contentions not raised . . . in the district court cannot be raised for the first time on appeal.

*Working Capital No. 1, LLC v. Quality Auto Body, Inc.*, 2012 ND 115, ¶ 13, 817 N.W.2d 346 (citing *Paulson v. Paulson*, 2011 ND 159, ¶ 9, 801 N.W.2d 746). As outlined below, Franson makes several arguments in response to Hess's cross-appeal that were not raised before the trial court.

[¶4] Franson never truly addressed Rule 14's requirements and whether his third-party complaint met those requirements at the trial court level. Instead, Franson's briefing and oral argument focused on Rule 8's notice pleading requirements and how the alleged damage to his well should be paid for by Hess. Franson never argued Hess's liability was derivative of Agri-Industries' breach of contract claim. *See* Doc. ID. No. 83, ¶ 19-20, and Doc. ID No. 165, Summary Judgment Hearing Transcript p. 23:23-25; p. 24:1-22; p. 26:24-25; p. 27:1-9. As indicated in Hess's initial brief, the trial court gave similar

short shrift to Hess's Rule 14 arguments. For its part, Hess clearly briefed and argued the Rule 14 issues to the trial court, utilizing the same case law it has presented to this Court on appeal. *See* Doc. ID No. 76, ¶¶ 13-14 (citing *Selland v. Selland*, 519 N.W.2d 21 (N.D. 1994)); Doc. ID No. 165, Summary Judgment Hearing Transcript p. 12 (citing *Selland* and *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695 (8th Cir. 2003)). Franson may not now assert arguments that he failed to raise before the trial court. *See Guthmiller Farms*, 2013 ND 248 at ¶ 17.

[¶5] Also, regardless of the wavier, Franson's Rule 14 arguments fail on the merits. Franson's Rule 14 argument is twofold. First, he claims he "believed that Geokinetics . . . had agreed to pay Agri-Industries for its drilling of the new water well" so "[he] brought the third party complaint against Hess Corporation as they are the mineral developer responsible for the actions of Geokinetics." Brief of Cross-Appellee Francis Franson *at* ¶¶ 13 and 14. These allegations are absent from Franson's third-party complaint, and for that reason alone the third-party complaint fails to allege facts sufficient to comply with Rule 14. *See* Doc. ID No. 29. Moreover, the record before the Court lacks any evidence that Geokinetics had any authority, actual or ostensible, to bind Hess to a contract with Franson. Further, it is undisputed that Franson never spoke with anyone from Hess itself. Hess. Supp. App. 19, Franson Depo. p. 45:8-15.

[¶6] Second, Franson argues Hess could have moved to sever the third-party complaint under N.D.R.Civ.P. 14(a)(4). Though this may be true, this argument does not address Franson's Rule 14 pleading deficiencies. Further, it incorrectly presumes third-party complaints are never subject to a Rule 12(b)(6) motion based on Rule 14 pleading deficiencies. *See Mattes v. ABC Plastics, Inc.*, 323 F.3d 695 (8th Cir. 2003) (upholding

dismissal of third-party complaint under Rule 12(b)(6) because the claims could not be maintained under Rule 14). The opportunity to move to sever has no bearing on the Court's analysis here. Accordingly, the Court should reject this argument.

## CONCLUSION

[¶7] For the reasons set forth above, Hess respectfully requests, if the summary judgment ruling is not affirmed, that the district court be directed to dismiss 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 6th day of April, 2018.

*/s/ Paul J. Forster*

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

[¶8] This Brief contains 1,120 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: */s/ Paul J. Forster*
Paul J. Forster (#07398)

## CERTIFICATE OF SERVICE

[¶9] I hereby certify that a true and correct copy of the **REPLY BRIEF OF THIRD-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLANT HESS CORPORATION** was on the 6th day of April, 2018, served electronically on the following:

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