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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jacob Greer, d/b/a Greer Farm, Appellant, vs. Global Industries, Inc., Nebraska Engineering Co., a Division of Global Industries, Inc., Advanced Ag Construction Incorporation, Appellees.	Supreme Court No.: 20170453 Barnes Co. Case No.: 02-2014-CV-00220

BRIEF OF APPELLEE

APPEAL FROM THE DISTRICT COURT'S MEMORANDUM OPINION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT DATED AUGUST 31, 2017 (DOC. ID #103)
ORDER FOR SUMMARY JUDGMENT ON CLAIMS ALLEGED AGAINST GLOBAL INDUSTRIES, INC., NEBRASKA ENGINEERING CO. DATED SEPTEMBER 18, 2017 (Doc. ID #106) AND JUDGMENT ENTERED OCTOBER 2, 2017 (Doc ID #113)
BARNES COUNTY DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
THE HONORABLE TROY LEFEVRE

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I. STATEMENT OF THE ISSUES

[1] Whether the District Court erred in granting Summary Judgment dismissing Plaintiff's claims against Global Industries, Inc., and Nebraska Engineering Co. ("NECO"), an unincorporated division of Global.

[2] Whether the District Court erred in granting Plaintiff's Motion for certification under N.D.R. Civ.P. 54(b).

II. STATEMENT OF THE CASE

[3] Global Industries, Inc., and Nebraska Engineering Co. ("NECO"), an unincorporated division of Global (jointly referred to as "Global"), is an agricultural equipment manufacturing company.

[4] Plaintiff Jacob Greer entered into a contract to purchase a grain dryer from Advanced Ag Construction Incorporated ("Advanced Ag"). (See Complaint, Doc. ID#1). Greer admits that he "entered into a Project Contract dated December 5, 2011 with Advanced Ag, calling for the purchase of one (1) NECO model D24360 continuous-flow grain dryer, and related items ("Dryer") and Greer signed the original Project Contract on that day." (Doc. ID# 1 at ¶8). Advanced Ag was operated by Chad Peda.

[5] The contract for the dryer was solely between Advanced Ag and Greer. (Doc. ID#4) Peda signed the contract only on behalf of Advanced Ag. (Doc. ID#5). Global is not a signatory to that agreement nor is Global identified as a party to the agreement. (See Doc. ID## 4 and 5).

[6] The purchase price of the dryer was $237,075. (Doc. ID#4). The price in the contract states that it is a special price offered by Advanced Ag and not the manufacturer's [Global's] list price. (Doc. ID#4). In addition to selling the dryer,

Advanced Ag and Greer also agreed to Advanced Ag receiving additional payments for "Construction Start" and "Startup & Completion." (Doc. ID## 4 and 5).

[7] On December 30, 2011, Greer paid the $237,075.00 amount via check made out to Advanced Ag. (Doc. ID#6). Advanced Ag did not pay any of the $237,075.00 to Global to manufacture the dryer. Greer never paid Global any money related to the manufacture or purchase of the dryer Advanced Ag sold to Greer.

[8] On September 8, 2014, Greer filed his Complaint. (Doc. ID# 1). His Complaint against Advanced Ag alleges breach of contract (for not supplying the dryer) and conversion (for taking the $237,075.00). (Doc. ID#1). Greer admits he entered into the contract with Advanced Ag for the purchase of the dryer. (See Doc. ID#1 at ¶¶8-13). Greer does not allege that he entered into a contract with Global. Rather, Greer alleges two claims against Global, both of which are dependent on Greer proving that Advanced Ag was Global's agent.

[9] Specifically, Greer alleges that Advanced Ag was Global's agent and, therefore, Global is liable for Advanced Ag's breach of contract and conversion. (Doc. ID#1 at ¶¶ 14-16).[1]

[10] Advanced Ag never responded to Greer's Complaint.

[11] On October 28, 2016, Global moved for summary judgment asserting there was no principal-agency relationship between Global and Advanced Ag such that Advanced Ag had authority to bind Global to Advanced Ag's contract with Greer. (Doc. ID# 65). Greer opposed the motion. (Doc. ID# 80). A hearing was held on April 6, 2017. On August 31, 2017, the District Court issued its Memorandum Opinion Granting

[1] Greer's complaint does not allege any other claim against Global, such as a claim for negligence.

Global's Motion for Summary Judgment. (Appellant's Appendix "App." At pp 16-20). The District Court held that Advanced Ag did not have authority, actual or ostensible, to bind Global to Advanced Ag's contract with Greer. Id. On September 18, 2017, the District Court ordered Summary Judgment in accordance with its August 31, 2017 memorandum opinion. (App. at 21-22). On October 1, 2017, Summary Judgment was entered. (App. at 23). The Summary Judgment dismissed Greer's claims against Global with prejudice on the merits. Id.

[12] Because the District Court's order for Summary Judgment dismissed all of the claims against Global, Global's cross-claim for contribution and/or indemnity against Advanced Ag became moot. Thus, as a result of the Summary Judgment in favor of Global, the only claims that remained were those of Greer against Advanced Ag.

[13] On October 3, 2017, Greer sought certification under N.D.R.Civ. P. 54(b), so he could appeal the Summary Judgment dismissal of his claims against Global. (Doc. ID #115). Greer's motion also sought a continuance of the trial scheduled for October 30, 2017. (Doc. ID #115).

[14] On October 17, 2017, Global responded to Greer's motion. (Doc. ID#118). Global did not object to Greer's request for a continuance of the trial on his claims against Advanced Ag. Id. Global's concern, however, was Greer's request for a finding by the District Court that *res judicata* or collateral estoppel could apply to any default judgment Greer obtained against Advanced Ag. Id. Such a conclusion would be wrong. Thus, Global advised that it did not object to Rule 54(b) certification as long as there was no court determination that, absent the certification, a default judgment against Advanced Ag could be imputed against Global. Id. at ¶¶5-14.

[15] On November 6, 2017, the District Court entered its Order Granting Plaintiff's Motion for Rule 54(b) Certification, explaining that in so doing the court did not make "any finding as to whether the doctrines of *res judicata* or collateral estoppel apply to bar relitigating the issue of damages as argued by Plaintiff . . ." (App. at 24-25, at ¶2).

[16] On December 21, 2017, Greer filed his notice of appeal. (App. at 26-27).

III. STATEMENT OF FACTS

[17] Greer entered into a contract with Advanced Ag on December 5, 2011 calling for the purchase of one (1) NECO model D24360 continuous-flow grain dryer, and related items ("dryer"). (Complaint, App. pg. 7 at ¶8). Greer claims he signed the written purchase contract with Advanced Ag on December 5, 2011. Id.

[18] The NECO Model D24360 continuous-flow grain dryer identified in the purchase contract with Advanced Ag is a dryer that is manufactured by Global.

[19] Global is not a party to the purchase contract and is not identified as a party to the purchase contract. (See Doc. ID## 4 and 5).

[20] On December 30, 2011, Greer paid Advanced Ag $237,075.00 for the purchase of a dryer. (Doc. ID #1 at ¶12; See also Doc. ID #71). The payment check was made payable to Advanced Ag. Id.

[21] Prior to December 30, 2011, when Greer paid Advanced Ag for the dryer, there were no communications between Global and Greer regarding Advanced Ag or Chad Peda, the owner/operator of Advanced Ag. Greer did not learn about Advanced Ag through Global. (Greer Depo., Doc. ID #68 at 123:3–123:6).

[22] On, or about December 12, 2011, Greer contacted Global and spoke with Mike Schram, a Global customer service representative, to inquire whether Greer could become a dealer for Global. (See Greer Depo., Doc. ID#68 at 119:13-119:20). Schram informed Greer that he could not be a dealer for Global products. Id.

[23] Also, on or about December 12, 2011, Schram told Greer that he could not purchase a dryer directly from Global. (Doc. ID#68, Greer Depo., at 117:22-120:1). Schram explained that a dryer could only be purchased through a dealer. Id. at 117:22-118:4. Greer was referred to a dealer in Page, N.D. called Triple E, another non-exclusive dealer of Global products. (Id. at 118:21-118:24. See also Schram Depo., Doc. ID #88 at 14:11-14). Greer was not referred to Advanced Ag. (Doc. ID# 68 at 118:21-118:24). Greer learned of Advanced Ag from his brother-in-law, not Global. Id. at 123:3–123:6.

[24] It is undisputed that Global never mentioned Advanced Ag to Greer prior to December 30, 2011. (See Doc. ID #68 at 115:17-25; Doc. ID #88 at 14:11-14).

[25] Advanced Ag was a non-exclusive dealer of products manufactured by Global. (Doc. ID # 70 at No. 15). Advanced Ag was one of many companies from whom Greer could purchase a Global dryer. (Greer Depo. Doc. ID #68 105:14-24). Advanced Ag sold many different types of grain handling equipment for many different manufacturers, including non-Global manufacturers, such as Scarco, Micada, Westfield, Schlagel, Warrior and others. (Doc. ID # 72 at 2).

[26] The owner and representatives of Advanced Ag were never employed by Global. (Doc. ID # 80, at ¶ 32). There has never been any written agreement between Global and Advanced Ag. (Doc. ID #86 at 39:4-11).

[27] Advanced Ag entered into its contract with Greer solely on its own behalf. (Doc. ID# 4 and 5). Global is not referenced as being a party to the agreement and is not shown on the signature blocks. Id.

[28] Greer admits that no individuals from Global were involved with or signed any documents pertaining to the sale of the dryer from Advanced Ag to Greer. (Greer Depo., Doc. ID #68 at 79:2-79:6). Greer admits that Chad Peda, the person who operated Advanced Ag, signed the dryer contract "to bind Advanced Ag." (Doc. ID #1 at ¶¶ 4 and 11).

[29] Advanced Ag never paid Global any amounts to manufacture the dryer, including any part of the $237,075.00 check Greer paid to Advanced Ag. (Doc. ID #69 at No. 18, 19). Greer never paid Global any money related to the purchase of this dryer. (Doc. ID #68 at 148:6-25). The check from Greer to Advanced Ag in the amount of $237,075.00 was deposited in Advanced Ag's bank account. (Doc ID #71).

[30] The dryer was only part of the grain handling system that Greer was purchasing from Advanced Ag. Greer was also purchasing Sukup grain bins and Hunter grain handling equipment, including a conveyor, grain handling legs and tower, none of which are manufactured by Global. (Doc. ID #73, Bates No. Greer 000034, 000044 and 000045; Doc. ID #74).

IV. STANDARD OF REVIEW

A. SUMMARY JUDGMENT.

[31] Whether the district court properly granted summary judgment is a question of law which the Court reviews de novo. Wenco v. EOG Resources, Inc., 2012 ND 219, ¶ 8, 822 N.W.2d 701. Summary judgment is a procedural device for the prompt

resolution of a controversy without a trial if there are no genuine issues of material fact or if the issues to be resolved are questions of law. Farmers Union Oil Co. v. Smetana, 2009 ND 74 ¶ 8, 764 N.W.2d 665; Wheeler v. Gardner, 2006 ND 24, ¶ 8, 708 N.W.2d 908; Jacob v. Nodak Mut. Ins. Co., 2005 ND 56, ¶ 11, 693 N.W.2d 604. A "court may examine pleadings, depositions, admissions, affidavits, and interrogatories to determine whether summary judgment is appropriate." Good Bird v. Twin Buttes School District, 2007 ND 103, ¶ 5, 733 N.W.2d 601 (quoting Azure v. Belcourt Pub. School Dist., 2004 ND 128, ¶ 8, 681 N.W.2d 816).

[32] The movant has the initial burden of showing there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Good Bird, 2007 ND 103, ¶ 5, 733 N.W.2d 601 (citing Grandbois & Grandbois, Inc. v. City of Watford City, 2004 ND 162, ¶ 17, 685 N.W.2d 129). The burden then shifts to the party resisting summary judgment. Id. The resisting party "may not simply rely upon pleadings or upon unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact, and must, if appropriate, draw the court's attention to relevant evidence in the record raising an issue of material fact." Collette v. Clausen, 2003 ND 129, ¶ 7, 667 N.W.2d 617. Even if a resisting party presents evidence, such evidence does not preclude summary judgment "if reasonable minds can draw only one conclusion from the evidence." Dahlberg v. Lutheran Social Services of North Dakota, 2001 ND 73, ¶ 11, 625 N.W.2d 241.

[33] Finally, since agency must be established by clear and convincing evidence, courts must consider that higher standard of proof when ruling on a summary

judgment motion. Good Bird, 2007 ND 103, ¶ 5, 733 N.W.2d 601. Thus, Greer had to present to the District Court competent, admissible evidence sufficient to show, by clear and convincing evidence, that Advanced Ag had authority as an agent to bind Global to the dryer purchase contract between Greer and Advanced Ag.

B. CERTIFICATION UNDER N.D.R.CIV.P 54(b).

[34] Global agrees with Greer's statement that in reviewing certification under N.D.R. Civ.P. 54(b) this Court is "not bound by a trial court's determination, but will sua sponte review a Rule 54(b) certification to determine if the court abused its discretion." Sinclair v. Kirkwood, 1997 ND 40, ¶ 5, 560 N.W. 2d 532.

V. LAW AND ARGUMENT

A. THE DISTRICT COURT PROPERLY FOUND THAT ADVANCED AG DID NOT HAVE AUTHORITY TO ACT ON BEHALF OF GLOBAL.

[35] The District Court correctly found that "Advanced Ag did not have authority to act on behalf of Global." (Doc. ID #103 at ¶11). Contrary to Greer's argument, the District Court properly addressed all of the evidence Greer submitted and found that Greer failed to meet his burden of proving that Advanced Ag had actual or ostensible authority. (App. At 17- 19). This Court should affirm the District Court's summary judgment.

[36] Agency is a relationship that results where one person, called the principal, authorizes another person, called the agent, to bind him in dealing with third persons. N.D.Cent.Code § 3-01-01. An agency relationship rests on either actual or ostensible authority. N.D.Cent.Code § 3-01-03; See also Farmer's Union Oil Co. of Dickinson v. Wood, 301 N.W.2d 129 (N.D. 1980). The burden of establishing agency rests on the party alleging it, here Greer. E.g. Vaux v. Hamilton, 103 N.W.2d 291, 293

(N.D. 1960). Agency is never presumed, and if an agency relationship is denied the party alleging agency has to establish it *by clear and convincing evidence*. Id. at 147 (citing Argabright v. Rodgers, 659 N.W.2d 369 (N.D. 2003) (emphasis added). The law and undisputed facts show that Greer failed to present evidence sufficient to show, by clear and convincing evidence, that Advanced Ag was Global's agent.

1. Greer Did Not Have Actual Authority.

a. Greer Waived Any Argument That Advanced Ag Had "Actual Authority" To Bind Global To The Contract.

[37] Greer's appellate brief regarding agency rests on his claim that Advanced Ag had ostensible authority to act on behalf of Global. (Greer Brief, p. ¶¶ 32-41). Greer does not argue that Advanced Ag had actual authority to bind Global to the purchase contract. Greer has therefore waived any argument or claim based on actual authority. See, e.g., Friedt v. Moseanko, 484 N.W. 861, 863 (N.D. 1992) (this Court will not consider additional issues attempted to be raised in reply brief).

b. Advanced Ag Did Not Have Actual Authority.

[38] Regardless, the District Court correctly found that Advanced Ag did not have actual authority to act as Global's Agent.(App. at 18). Actual authority exists to bind a principal when the agent really is employed by the principal. N.D.Cent.Code. § 3-01-03. It is undisputed that neither owner nor any representatives of Advanced Ag were ever employed by Global. (Doc. ID # 80, at ¶ 32). There has never been any written agreement between Global and Advanced Ag. (Doc. ID#70 at No. 15, pg 5). There is no evidence that Advanced Ag had actual authority to act as an agent of Global, or actual authority to bind Global to the agreement at issue.

[39] Actual authority can exist when the principal intentionally confers upon the agent or by want of ordinary care allows the agent to believe himself to possess such authority to bind the principal. Wood, supra., 301 N.W.2d at 133. Here, there are no facts or evidence that Advanced Ag believed it was Global's agent instead of simply being a non-exclusive dealer for some of Global's products. Greer has produced no communications from Global to Advanced Ag showing that Advanced Ag believed it was Global's agent and could bind Global to contracts entered into between Advanced Ag and Advanced Ag's customers. Greer admits that he has never seen a written agreement between Global and Advanced Ag. (Greer Depo., Doc. ID#68 at 104:12-104:15). Therefore, the District Court's order should be affirmed.

2. Advanced Ag Did Not Have Ostensible Authority To Bind Global.

[40] Ostensible authority "is such as the principal intentionally or by want of ordinary care causes a third person to believe the agent possesses." N.D.Cent.Code. § 3-02-02. Determining ostensible agency "rest[s] upon conduct or communications of the principal which, reasonably interpreted, causes a third person to believe that the agent has authority to act for and on behalf of the principal." N.D.Cent.Code. § 3-02-02. See also Lagerquist v. Stergo, 2008 ND 138, ¶ 10, 752 N.W.2d 168, 172 (citing Krank v. A.O. Smith Harvestore Prods., Inc., 456 N.W.2d 113, 118 (N.D. 1981)); McLane v. F.H. Peavey & Co., 8 N.W.2d 308, 310 (N.D. 1994). In order for an ostensible agent to bind the principal to a contract made on the principals' behalf, the principal must cause a third person to believe the alleged agent actually has such authority. N.D.C.C. § 3-02-02; Lagerquist, 752 N.W.2d at 173. Thus, unlike with actual authority where the focus is on the communications between the principal and the purported agent, ostensible agency

looks at the conduct between the principal and the third party, here between Global and Greer.

[41] Greer's arguments on ostensible authority fail for a number of reasons. First, the "conduct" that Greer claims supports ostensible authority is simply that Advanced Ag was a dealer who advertised and sold Global products and used Global/NECO's brochure and logo. That "conduct" does not, as a matter of law, establish ostensible authority. Second, the communications between Greer and Global also did not establish ostensible authority. Simply because Global advised Greer that he had to purchase a dryer through a dealer does not, as a matter of law, establish ostensible agency. Third, Greer ignores the critical time period regarding the conduct and communications by Global that can be considered when addressing ostensible authority. Finally, Greer's legal authority does not support his argument.

a. That Advanced Ag Was A Non-Exclusive Dealer Does Not Result In Advanced Ag Being Global's Agent.

[42] To establish ostensible authority Greer must prove by clear and convincing evidence that Global's conduct caused Greer to reasonably believe Advanced Ag could bind Global to the dryer purchase contract. N.D.C.C. § 3-02-02; Lagerquist, N.W.2d at 173. That Advanced Ag was a dealer for Global and used Global/NECO's brochures is, as a matter of law, not sufficient.

[43] It is undisputed that Advanced Ag was a non-exclusive dealer of the products manufactured by Global. (Doc. ID #70 at No. 15). Advanced Ag sold equipment from numerous manufacturers; it did not solely sell Global's products. (Doc. ID #72). Advanced Ag was one of many companies who could sell Global's products. (Doc. ID #70 at No. 15).

[44] It has long been the law in North Dakota that simply categorizing a business relationship with words such as "agent" or "dealer" does not itself create an agency relationship. See Poirier Mfg. Co. v. Kitts, 18 N.D. 556, 120 NW 558 (N.D. 1909). In Kitts, this Court held that a contract did not create an agency relationship even where the written contract used the word "agent":

> The word 'agent' is employed in more than one sense, and it is frequently used to indicate that a merchant or dealer has the exclusive right to sell a specified article in certain territory, when in fact no agency exists. The dealer in no sense represents the manufacturer, but simply buys from him in the regular course of trade, and sells the specified article to the public.

Id. at 560.

[45] Courts have consistently held that the fact a dealership sells a manufacturer's product, and uses the manufacture's trademark and signs, literature, products, brochures, and plaques, does not cause an agency relationship to arise. Thornton v. Ford Motor Co., 297 P.3d 413 (Ct. App. Ok. 2012); Malmberg v. Am. Honda Motor Co., 644 So.2d 888, 891 (Ala. 1994); Summit Automotive Group, LLC v. Clark and Kia Motors, 298 Ga.App. 875, 681 S.E.2d 681 (2009); DaimlerChrysler Motors Company, LLC v. Clemente, 294 Ga.App. 38, 668 S.E.2d 737 (2008); Ortega v. General Motors Corp., 392 So.2d 40 (Fla.Dist.Ct.App.1981); Zeno v. Ford Motor Co., 480 F.Supp.2d 825, 845 (W.D. Pa. 2007); John Deere Const. Equipment Co. v. England, 883 So.2d 173 (Ala. 2003); McLemore v. Ford Motor Co., 628 So.2d 548 (Ala.1993).

[46] Greer did not cite to any authority supporting his argument that because Advanced Ag was an authorized dealer and/or used Global/NECO's brochure that a third person could reasonably believe that the dealer could bind the manufacturer to a sales contract. Rather, Greer erroneously argues that the dealership cases cited above are

distinguishable because car dealers have inventory available on location where here Global had to build the grain dryer if purchased by Advanced Ag. (Appellant Brief at ¶47). Greer does not cite, nor can he, any case law, including involving a car dealership, that turned on a finding that the manufactured product were in inventory versus having to be ordered. Also, Greer presents no evidence that car dealers only sell cars that are onsite as opposed to cars specially ordered. It is more likely courts would find that car dealers are agents for car manufacturers than finding that a non-exclusive dealer of grain dryers is an agent for the dryer manufacturer because (a) car dealers are usually exclusive to a single manufacturer; (b) car manufacturer's typically exercise significant control over the actions of dealers; and (c) car manufacturers stock dealers with product on consignment. None of that is true as to Global and Advanced Ag.

[47] The car dealership cases are from jurisdictions that require dealers to have licensing and surety bonds with the manufacturer. See Ala. Code § 40-12-51; Fla.Stat. § 320.27; Ga.Code § 40-2-38, § 43-47-8; Okla. Stat. Ann. tit. 47 § 564, § 583; 63 Pa. Stat. Ann. § 818.5. These automobile dealer licensing and bond requirements are nearly identical to North Dakota's. See N.D.C.C. ch. 39.22; §39-22-05.

[48] Car dealerships are required to maintain licensing, inventory, bonds, and have written dealership agreements, and yet are still generally not deemed to be agents of a manufacturer. If automobile dealerships in North Dakota, and other jurisdictions, must have these requirements with the manufacturers but are still generally not deemed to be agents of the manufacturer, then clearly grain handling equipment dealers like Advanced Ag, which are not required to meet these high standards, cannot be labeled "agents" of the manufacturer. Thus, the differences in car dealerships and grain handling dealerships

raised by Greer actually strengthens Global's position that there was no agency relationship between Global and Advanced Ag.

b. Global's Communications To Greer Do Not Establish Ostensible Authority.

[49] Global's communications with Greer also do not, as a matter of law, establish ostensible authority.

[50] This Court has held that only communications between the purported principal and third party prior to the contract are relevant to showing ostensible authority. E.g. Lagerquist v. Stergo, 2008 ND 138, ¶ 10, 752 N.W.2d 168, 174. In Lagerquist, this Court found that the district court erred as a matter of law in finding ostensible authority based on communications between the purported principal and the plaintiff after the contract was created.

[51] Judicial admissions made in a pleading make it unnecessary for the adverse party to offer any evidence on the admitted matter and are generally held to be conclusively established. Gallagher v. Haffner, 77 N.D. 570, 44 N.W.2d 491, 494-95 (N.D. 1950); Kunnanz v. Edge, 515 N.W.2d 167, 170 (N.D. 1994)("subject to relevance, a party's factual statement in another pleading are generally received as an evidentiary admission by that party"). Greer judicially admitted in his complaint that he entered into the contract with Advanced Ag on December 5, 2011. (Doc. ID#1 at ¶8). There is no evidence in the record of any communications between Greer and Global prior to that date. Thus, there were no communications by Global prior to the contract upon which Greer could claim he relied to reasonably believe Advanced Ag was Global's agent.

[52] Greer argues that the date of the contract is December 30, 2011. (Greer's Brief at ¶4). Even using the December 30, 2011 date, the result is the same - **at no time**

prior to December 30, 2011 did Global have any communications with Greer regarding Advanced Ag. That dispositive fact is undisputed.

[53] Greer does not cite to one communication by Global to Greer stating that Advanced Ag was Global's agent. Greer does not cite to one communication by Global to Greer stating that Advanced Ag could bind Global to the purchase contract, or any other contract. Greer has not cited to even one communication prior to December 30, 2011 in which Greer claims Global discussed Advanced Ag at all.

[54] There is no evidence that Global was involved in Greer's contract with Advanced Ag. Greer admits that no individuals from Global were involved with or signed any documents pertaining to the sale of the dryer from Advanced Ag to Greer. (Greer Dep., Doc ID #68 at 79:2-79:6). It is also undisputed, as shown in the statement of facts above, that Greer paid Advanced Ag for the dryer and not Global; Advanced Ag never paid Global any amounts to manufacture the dryer, including any part of the $237,075.00 check Greer paid to Advanced Ag; Greer never paid Global any money related to the purchase of this dryer; and, the check from Greer to Advanced Ag was deposited in Advanced Ag's bank account. Greer provides no admissible evidence that establishes an agency relationship existed between Advanced Ag and Global related to this contract, let alone any clear and convincing evidence establishing such ostensible authority.

[55] It is further undisputed that the only direct communications between Greer and Global prior to December 30, 2011 was Global informing Greer that: (1) Greer could not become a dealer; (2) if Greer wanted to purchase a dryer he needed to go through a dealer; (3) Global does not sell dryers directly to customers; and, (4) Global referred Greer to Triple E with regard to Greer's inquiry into buying a dryer. (Greer Depo., Doc.

ID #68 at 4, 36:3-37:8; 115:17-25). Those communications in no way advised Greer that Advanced Ag could bind Global to a contract with Greer. Also, that Global did not tell Greer that he should not purchase from Advanced Ag is a *non sequitur* – Advanced Ag was not even discussed during any of these communications. Rather, Global simply referred Greer to Triple E, a dealer in the Fargo-Page, N.D. area.

[56] Greer attempts to manufacture "factual questions" on his agency theory by relying on unsubstantiated claims of what he "believed" and speculate as to what others believed. (Appellant Br. at ¶36). Greer cannot rely on speculation or his subjective beliefs. As a matter of law, mere speculation is not enough to defeat a motion for summary judgment. Barbie v. Minko Constr., Inc., 2009 ND 99, ¶ 6, 766 N.W.2d 458; Iglehart v. Iglehart, 2003 ND 154, ¶ 10, 670 N.W.2d 343 (citing BTA Oil Producers v. MDU Res. Group, Inc., 2002 ND 55, ¶ 49, 642 N.W.2d 873). Hearsay statements are also not admissible and will not be considered in deciding a motion for summary judgment. McColl Farms, LLC v. Pflaum, 2013 ND 169 (N.D. 2013), 837 N.W.2d 359. Further, "[f]actual assertions in a brief are insufficient to raise an issue of material fact." Dinger ex.rel Dinger v. Strata Corp., 2000 ND 41, ¶ 27, 607 N.W.2d 886 (citing L.C. v. R.P., 1997 ND 96, ¶ 6, 563 N.W.2d 799). In sum, "[a] scintilla of evidence is not sufficient to support a claim, there must be enough evidence for a reasonable jury to find for the plaintiff." Wishnatsky v. Huey, 1998 ND APP 8, ¶ 5, 584 N.W.2d 859 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

[57] Greer cites to his affidavit and his deposition testimony. Such a self-serving affidavit, or self-serving deposition testimony, stating Greer's beliefs or

unfounded conclusions, such as his conclusory "belief" any dealer was an agent of Global, is not competent and does not establish an agency between Global and Advanced Ag. Such self-serving arguments are not sufficient to defeat summary judgment. E.g. Dinger ex.rel Dinger v. Strata Corp., 2000 ND 41, ¶ 27, 607 N.W.2d 886 (citing L.C. v. R.P., 1997 ND 96, ¶ 6, 563 N.W.2d 799).

[58] Greer asked the District Court to speculate on what Greer or others believed, without providing the District Court any supporting evidence, such as a communication between Greer and Global prior to December 30, 2011. Such evidence is not sufficient. E.g., Barbie v. Minko Constr., Inc., 2009 ND 99, ¶ 6, 766 N.W.2d 458. As explained by this court in Argabright v. Rodgers, 2003 ND 59, ¶6, 659 N.W.2d 369, "Agency is never presumed, and . . . the party alleging agency must establish it by clear and convincing evidence." Greer failed to meet his burden.

c. Greer Cannot Rely On Post-December 30, 2011 Communications or Conduct.

[59] Greer erroneously claims that communications/conduct subsequent to December 30, 2011 can be considered to establish an agency relationship, citing to Fleck v. Jacques Seed Co., 445 N.W.2d 649 (N.D. 1985). (Appellant Br. at ¶42). Contrary to Greer's argument, this Court has explained that only communications from Global to Greer prior to the contract with Advanced Ag are relevant in addressing ostensible authority. E.g. Lagerquist v. Stergo, 2008 ND 138, ¶10, 752 N.W.2d 168, 174. Considering evidence after the contract was formed would be reversible error. Id. Greer's reliance on Fleck is also misplaced.

[60] Fleck involved a claim by a farmer that a dealer for Jacques Seed Company ("JSC") was also an agent of JSC. In affirming the district court's ruling that the dealer was, under the facts in that case, an agent of JSC, this Court explained that:

> Fleck [the plaintiff] had bought seed corn from JSC for several years before purchasing through Berger [the dealer], who told him in 1984 that he was a "salesman" for JSC. JSC provided the order forms and delivery receipts, preprinted with its emblem, for use by Berger [the dealer]. After Fleck discovered that the wrong seed had been delivered, he contacted an area supervisor for JSC, who in turn contacted JSC's district sales manager. The district sales manager contacted Fleck and negotiated for a possible adjustment with him. The trial court also relied on JSC's handling of orders from Berger by credit with complete allowance for all returns; its policy of carrying insurance on its products while in the possession of its dealers; and its continued involvement in all adjustments and decisions about the seed corn after delivery to its dealers. We affirm the trial court's finding that Berger was JSCH's agent.

445 N.W.2d at 652. None of those salient facts exist here.

[61] Unlike in Fleck, there is no evidence that Advanced Ag represented to Greer that it was solely Global's "salesman". Global did not provide order forms or delivery receipts to Advanced AG for its use, and in fact, the undisputed evidence is that Global had no involvement in the documents underlying the sale. Global also refused to allow Advanced Ag to operate on credit in purchasing equipment.

[62] Similarly, in Fleck the date of the contract was not necessarily the date the seed was delivered to the farmer. To the contrary, this Court noted that FSC had a continued involvement in all adjustments and decisions about the seed corn after delivery to its dealers. Id. at 652. Thus, any offer to adjust price in Fleck was not necessarily after the date of the contract, *i.e.*, the date that the third party had already bound itself to the deal. Rather, it appears that in Fleck it was understood that price revisions could be made even post-seed delivery. See Id. That is not the case here.

[63] Thus, in Fleck this Court did not hold that post-contract communications could be considered in determining the existence of ostensible authority. That issue was not before the Court. To the extent it was, this Court's holding in Laqerquist, supra., decided thirteen years after Fleck controls. In addition to misapplying Fleck, the post-contract communications Greer relies, even if considered, do not establish ostensible authority.

[64] The communications raised by Greer at paragraph 42 of his brief merely show that (1) Advanced Ag failed to pay Global for the dryer; (2) that Greer knew that fact in January of 2012; and (3) while Global was willing to try to assist Greer, any dryer still had to be purchased through a dealer. Global's attempt to settle the dispute with Greer in 2012 involved the possibility of Global building a dryer and selling it to a dealer, such as Triple E, at cost. (Fargo Depo, Doc. ID #86 at pp 106 - 107). Triple E would then sell the dryer to Greer. Id. The price at which Triple E sold the dryer to Greer would be up to Triple E Id. at 107. Thus, the post-contract communications further show that Global consistently represented that its dealers were not Global's agents that could bind Global to sales contracts because (1) customers had to buy directly from the dealers and (2) dealers had to independently negotiate the terms and conditions of their dryer sales with the customers. Otherwise, Global would not have had to work through its dealer Triple E for Greer to purchase a dryer. Greer's arguments in paragraph 49 of its brief also fail to show ostensible authority.

[65] Greer again argues that Global only sold products through its dealers, Global referred its customers to dealers, and Greer had to pay Advanced Ag in full before Advanced Ag would order the dryer from Global. Again, Greer ignores that prior to

December 30, 2011, Global never referred to Greer to, or even mentioned, Advanced Ag. Moreover, whether or not Advanced Ag had to pay Global in full for a dryer before Global would manufacture the dryer has nothing to do with whether Advanced Ag could bind Global to a contract as an agent of Global. Greer cites no authority for his arguments. To the contrary, if Advanced Ag did not like any terms Global "imposed", Advanced Ag was free to sell a customer other dryers not manufactured by Global. If Greer didn't like any terms that Advanced Ag "imposed", Greer could have sought to purchase the dryer from a different dealer, e.g. Triple E, from whom Greer admits he received pricing information for the dryer to compare against Advanced Ag's quote. (Doc. ID #68, Jacob Greer Depo., at pp 125-126). Thus, Greer's citation to "facts" is not only inaccurate, those facts do not establish ostensible agency.

d. Greer's Legal Authority Does Not Support His Agency Claim.

[66] Finally, Greer's legal authority does not support his claim. Greer erroneously relies heavily upon this Court's decision in Hagel v. Buckingham Woods Prods., Inc., 261 N.W.2d 869 (N.D. 1977).

[67] In Hagel, the plaintiffs purchased a pre-fabricated home manufactured by Midwestern Homes through Ed Koch, who was Midwestern Home's representative. Id. at 872. Unlike Global here, the evidence in Hagel showed that Midwestern Homes was actively involved in the transaction between agent Koch and plaintiffs. The evidence showed that Midwestern assisted plaintiff in obtaining financing, sent representatives to the plaintiffs' property, and assisted in the construction of the home. Id. at 870-71. No such evidence exists here where the undisputed facts are that Global was never involved

in negotiating Greer's contract with Advanced Ag and never discussed Advanced Ag with Greer prior to December 30, 2011, when Greer paid Advanced Ag.

[68] The critical issue in Hagel, was whether Koch could also bind Midwestern to constructing the home in addition to binding Midwestern to delivering the prefabricated home. Id. at 871. It appears that Midwestern agreed that Koch could bind Midwestern to an obligation to furnish the home. The issue was whether a "continuing relationship of principal and agent existed between Midwestern Homes and Koch for the construction of the home, making Midwestern Homes liable for the breach of contract committed by Koch, its agent." Id. Here, unlike in Hagel, the issue is not one of "continuing agency." The issue is whether Advanced Ag was Global's agent in the first place and could bind Global to a sales contract to furnish a dryer, and whether the terms of the agreement did in fact bind Global.

[69] In Hagel, Midwestern sent a letter to plaintiffs stating that Midwestern's representative [Koch] "is an expert in his field and will be most happy to assist you with your home planning problems." Id. at 872. This Court found that the letter was designed to carry the message that Midwestern Homes not only sold, but constructed, the homes. Id. at 873. Thus, this Court found that the letter sent directly from Midwestern Homes to the purchaser, and the subsequent proposal signed by Koch, bound Midwestern to construct the home. Id. Here, there is no evidence that Global ever advised Greer that Advanced Ag was an agent or a representative of Global or had any communications with Greer about Advanced Ag. There is no evidence that prior to the December 30, 2011 payment Global ever mentioned Advanced Ag to Greer. Unlike Hagel, Global refused to

assist Advanced Ag in financing purchase of the dryer. Thus, if anything, Hagel further supports the District Court's Summary Judgment.

[70] Greer argues that under North Dakota law an agent may act in the agent's own name if doing so is in the usual course of business, citing N.D.C.C. § 3-02-05. (Appellant Br. at ¶50). First, Greer does not fully quote all the relevant language from that statute. Section 3-02-05 provides that "An authority expressed in general terms, however broad, does not authorize an agent to act in the agent's own name, unless doing so is in the usual course of business to define the scope of the agent's agency . . ." Thus, section 3-02-05 first requires a showing that an agent had "general authority," which as explained above Greer has failed to do here. Second, Greer presents no evidence that it was in the usual course of business for Global to allow Advanced Ag (or any dealer) to bind Global to a purchase agreement between a customer and Advanced Ag (or any dealer). Greer's "usual course of business" argument therefore fails.

B. WHETHER THE DISTRICT COURT ERRED IN GRANTING CERTIFICATION UNDER RULE 54(b)

[71] Global did not object to Greer's motion for Rule 54(b) certification, with the caveat that any default judgment entered against Advanced Ag could not be imputed against Global, including through *res judicata* or collateral estoppel. (Doc. ID# 118 at ¶1) The District Court's order granting 54(b) certification specifically provides that the court did "not make any finding as to whether the doctrines of *res judicata* or collateral estoppel apply to relitigating the issue of damages as argued by Plaintiff in his brief." (App. at pg. 24, ¶ 2).

[72] Global does not contend that the District Court erred in granting that motion. Global does, however, raise its concern, as it did below, that this Court not base a

determination on 54(b) certification on whether the default judgment can be imputed to Global. Since the District Court did not make any finding as to the imputation argument made by Greer, that issue is not properly before this Court. See, e.g. N.D.C.C. § 28-27-02; Triple Quest, Inc. v. Cleveland Gear Co., 627 N.W.2d 379, 383 (N.D. 2001); Prod. Credit Ass'n of Grafton v. Porter, 390 N.W.2d 50, 50 (N.D. 1986). If, however, this Court does consider the issue when addressing 54(b) certification, then the Court must find that a default judgment against Advanced Ag cannot be imputed to Global.

[73] Greer's brief on appeal argues that if agency is established between Advanced Ag and Global, Global would not be able to defend against damages Greer is awarded against Advanced Ag in any default judgment. (Appellant Br. at ¶ 52). Greer does not cite any legal authority to support his belief that damages awarded against Advanced Ag in a default judgment can be imputed against Global in any subsequent proceeding. The reason is because the law is to the contrary.

[74] There is a longstanding principle that a default judgment against one defendant does not preclude a co-defendant from contesting the plaintiff's claim. Pfanenstiel Architects, Inc. v. Chouteau Petroleum, Co., 978 F.2d 430, 432-33 (8th Cir. 1992). A default judgment entered by a court binds only "the party facing the default as having admitted all of the well-pleaded allegations in the plaintiff's complaint." Angelo Iafrate Const., LLC v. Potashnick Const., Inc., 370 F.3d 715, 722 (8th Cir. 2004). A plaintiff's recovery of a judgment by default in a prior action lacks "any persuasive effect" in the plaintiff's suit against different defendants "brought upon the same basic cause of action." Rhodes v. Meyer, 334 F.2d 709, 718 (8th Cir.), cert. denied, 379 U.S. 915 (1964). That rule applies in cases of agency or vicarious liability as a default

judgment is not a judgment on the merits. E.g. Dade County v. Lambert, 334 So.2d 844, 847 (Fla.Dist.Ct.App. 1976) (finding county could not be held vicariously liable based on its employee bus driver's failure to answer, "the default of one defendant, although an admission by him of the allegations of the complaint, does not operate as an admission of such allegation against a contesting co-defendant."); United States v. McKee, 628 P.2d 310, 313 (N.M. 1981) (refusing to set aside default judgment entered against employees but finding that the employer would nevertheless be "entitled to try the issues of negligence, respondeat superior and the amount of damages"); Henderson-Jones v. City of New York, 993 N.Y.S.2d 19 (1st Dept. 2014) (default judgment entered against City and one police officer on arrestee's wrongful arrest could not bind remaining officers).

[75] Similarly, a "judgment obtained – against [a] defaulting defendant is not entitled to collateral estoppel affect against the non-defaulting defendants who would otherwise be denied a full and fair opportunity to litigate issues of liability." Gannon v. Sadeghian, 151 A.D.3d 1586, 1588, 57 N.Y.S.3d 252 (N.Y.App. Div. 2017). Moreover, a closer review of the elements of res judicata and collateral estoppel further establish that Greer's argument is without merit.

[76] *Res judicata* and collateral estoppel are similar doctrines, one applying to claim preclusion and the other issue preclusion. *Res judicata* "prohibits the relitigation of claims or issues that were raised or could have been raised in a prior action between the same parties or their privies and which was resolved by final judgment of the court of competent jurisdiction." Simpson v. Chicago Pneumatic Tool Co., 205 N.D. 55, ¶8, 693 N.W.2d 612, 616. This Court has adopted the following four-part test in analyzing whether *res judicata* applies:

(1) A final decision on the merits in the first action by a court of competent jurisdiction;

(2) The second action involves the same parties, or their privies, as the first;

(3) The second action raises an issue actually litigated or what should have been litigated in the first action;

(4) An identity of the causes of action.

Missouri Breaks, LLC v. Burns, 2010 N.D. 221, ¶12, 791 N.W.2d 33,39. Similarly, collateral estoppel, a/k/a issue preclusion, generally forecloses on the re-litigation, in a second action based on a different claim, of particular issues of fact or law which were, or by implications must have been, litigated in the prior suit. Simpson, 205 N.D. 55, ¶8, 693 N.W.2d 612. North Dakota utilizes the following four-part test to determine whether collateral estoppel applies:

(1) Was the issue decided in the prior adjudication identical to the one presented in the action in question?;

(2) Was there a final judgment on the merits?;

(3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?; and

(4) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 384 (N.D. 1992). The elements applicable to *res judicata* and collateral estoppel, therefore, are substantially similar.

[77] Global and Advanced Ag are not in privity. "Privity exists [for *res judicata* and collateral estoppel] if a person is so identified in interest with another that he represents the same legal right." Ungar v. N.D. State University, 206 N.D. 1985, ¶12, 721 N.W.2d 16. "He must have been directly interested in the subject matter of the

proceedings, with the right to make defense, to induce testimony to cross-examine the witness on the opposite side, to control in some degree the proceeding, and to appeal from the judgment. Persons not having these rights are regarded as strangers to the cause." Id. (emphasis added). As Greer recognizes, because Summary Judgment was entered in Global's favor, Global is no longer a party for purposes of trial and will not be permitted to defend against the damages evidence that may be submitted against Advanced Ag. (Appellant Br. at p. 20-21). Thus, Global will not be a party to the proceedings that will result in default judgment against Advanced Ag and is not in privity with Advanced Ag for purposes of *res judicata* or collateral estoppel.

[78] Global also would not have a full and fair opportunity to be heard as to any default action against Advanced Ag. Global will not have any opportunity to contest Greer's evidence on damages presented in the default judgment trial.

[79] Greer's claims against Advanced Ag and Greer's claims against Global are not identical. As Greer admits in his brief, "[w]ith the dismissal of Global, only the question of the damages suffered by Greer remained." (Appellant Br. at ¶52). Thus, the claims to be adjudicated in the default action do not involve whether Advanced Ag was Global's agent.

[80] The default proceeding is not a final judgment on the merits as required to apply *res judicata* or collateral estoppel. Even in cases where agency is alleged, default judgments against one defendant cannot be used to preclusive effect against other defendants. E.g., United States v. McKee, 628 P.2d 310, 313 (N.M.1981). Accordingly, any default judgment Greer obtains against Advanced Ag cannot be used for preclusive effect against Global, by res judicata or collateral estoppel.

CONCLUSION

[81] Appellee Global Industries, Inc., Nebraska Engineering Co., a Division of Global Industries, Inc., respectfully asks this Court to affirm the District Court's Summary Judgment dismissal of the claims asserted against it by Appellant Jacob Greer. Global also respectfully asks the Court to deny Greer's attempt to impute any default judgment against Advanced Ag against Global via Rule 54(b) certification. Finally, Global requests that Global be awarded its costs and disbursements on appeal.

DATED this 3rd day of May, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee, Global Industries, Inc., Nebraska Engineering Co., a Division of Global Industries, Inc., in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellant Procedure, that the Brief of Appellee was prepared with proportional typeface and 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 this certificate of compliance, totals 7,795.

DATED this 3rd day of May, 2018.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jacob Greer, d/b/a Greer Farm, Appellant, vs. Global Industries, Inc., Nebraska Engineering Co., a Division of Global Industries, Inc., Advanced Ag Construction Incorporation, Appellees.	Supreme Court No.: 20170453 Barnes Co. Case No.: 02-2014-CV-00220 **AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL**

STATE OF NORTH DAKOTA)
)ss
COUNTY OF CASS)

Brenda Jo Brunelle, being first duly sworn on oath, deposes and says that she is of legal age, is a resident of Fargo, North Dakota, not a party to nor interested in the action, and that she served the attached:

BRIEF OF APPELLEE GLOBAL INDUSTRIES, INC.

on the following persons by electronic mail only on May 2, 2018.

Ronald H. McLean **rmclean@serklandlaw.com**
Kasey D. McNary **kmcnary@serklandlaw.com**

To the best of Affiant's knowledge, the e-mail addresses above given are the actual electronic mail addresses of the parties listed above. The undersigned knows the persons served to be the persons named in the papers served and the persons intended to be served.

Dated this 3rd day of May, 2018.

Brenda Jo Brunelle

SUBSCRIBED AND SWORN to before me on May 3, 2018.

SARAH D. IVERSON
Notary Public
State of North Dakota
My Commission Expires July 13, 2022

Notary Public