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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

James Elkin and K.E., a minor child, by his nearest friend Tammy Elkin,

Plaintiffs and Appellants,

vs.

Thomas Wehner a/k/a Thomas Wenger, Sovereign Housing LLC,

Defendants.

Hexco, LLC

Defendant and Appellee.

Supreme Court No. 20190108

Appeal from Judgment, dated March 28, 2019, and Order Granting Hexco, LLC's N.D.R.Civ.P. 56 Motion for Summary Judgment, dated April 30, 2018

ORAL ARGUMENT REQUESTED

Williams County District Court
Northwest Judicial District
The Honorable Joshua B. Rustad
Case No. 53-2014-CV-996

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INTRODUCTION

[¶1] Appellee Hexco, LLC ("Hexco") respectfully submits its response to Appellants James Elkin's and KE's (collectively, "the Elkins") opening brief ("Elkin Brief."). The case is relatively straight forward. Former defendant Sovereign Housing, LLC ("Sovereign") constructed a portable housing unit and transported it to Williston, North Dakota. Sovereign placed the housing unit on a pad it rented from Hexco. Almost immediately the Elkins rented the housing unit from Defendant Thomas Wehner ("Wehner") or Sovereign, his closely held entity. A gas line to a dryer in the housing unit was not properly hooked up and the dryer exploded, injuring the Elkins. Hexco had no agreement with the Elkins and exercised no control over the housing unit. The district court properly concluded that Hexco owed the Elkins no duty of care and awarded summary judgment to Hexco. That order should be affirmed.

I. STATEMENT OF THE CASE

[¶2] The material facts demonstrate the propriety of the district court's award of summary judgment for Hexco. The Elkins' brief repeats arguments made below and fails to explain how the district court erred in its application of the law to the material undisputed facts.

[¶3] Hexco leased property from former co-defendants Wade and Melissa Smith ("the Smiths") for use as an RV park. In turn, Hexco leased lots on the property to tenants in the Williston area, including former defendants Wehner and Sovereign.

[¶4] Sovereign built and moved a duplex housing unit to Williston. It placed the housing unit on a pad on the Smiths' property, within the camp operated by Hexco. Sovereign leased one of the two subunits, which had a washer-dryer combination appliance in it, to the Elkins. The appliance was not connected when the Elkins moved in.

[¶5] An associate of Wehner's named Matthew Jolley ("Jolley") successfully connected a propane line to a washer-dryer in the duplex housing unit *adjacent* to the Elkins' unit. That entailed installing an attachment enabling the dryer to run on propane. He was unable to make the same conversion in the Elkins' unit because the Elkins' appliance was full of water and clothes. James Elkin admitted to helping turn on the propane and lighting the propane gas to the water heater connected to the shower and washer unit, working with the water hose to the washer, and to personally hooking up the dryer vent hose. *App*[1]. 119-120 (J. Elkin Dep.) at 32:24-33:12, 121-122 at 34:7-35:17, 125-126 at 38:5-39:4.

[¶6] Early the next morning, propane leaking from a poor connection to the dryer caught fire and exploded. The only people who had access to the dryer unit after Jolley left were the Elkins.

[¶7] Hexco did not construct, transport, place, or maintain the housing unit. Hexco did not purchase, deliver, install, or hook up the dryer. As a matter of law, Hexco owed no duty of care to the Elkins.

[¶8] As they did below, the Elkins devote a significant part of their brief addressing Wehner's criminal history untethered to the circumstances in this case. However, they do not explain how the district court may have *erred* by disregarding that irrelevant and inadmissible information. For that reason, reinforced by the district court's well-reasoned rejection, the Elkins' use of Wehner's criminal history to try and create prejudice may similarly be disregarded by this Court.

[¶9] Ultimately, the Elkins attribute error to the district court's conclusion that Hexco exercised no control over the subject property and that, as a result, Hexco owed the Elkins no duty of care. The district court properly relied upon undisputed material facts established through unrebutted

[1] Hexco refers to its Appendix as "App." and to the Elkins' Appendix as "Elkin App."

testimonial and documentary evidence. Summary judgment for Hexco was appropriate and should be affirmed.

II. STATEMENT REGARDING ORAL ARGUMENT

[¶10] Oral argument will likely assist the Court in this matter. The parties' arguments, and the records contained within their respective appendices, may require context and elaboration to clarify the absence of any relationship between Appellee, Appellants, and the housing unit at issue

III. STATEMENT OF FACTS

A. The Elkins' Representations of Facts are Inaccurate

[¶11] The limited factual materials the Elkins cite consist of brief, cherry picked, excerpts, from an otherwise well-developed record. The Elkins also make factual representations that are unsupported, inconsistent with the record, or are simply incorrect. Though most of those deviations were pointedly identified in Hexco's briefing in the court below, the Elkins repeat them here. A fair review of the record demonstrates why the district court's order was justified and appropriate.

[¶12] • The Elkins represent that both Hexco and the Smiths applied for a conditional use permit. *Elkin Br*. ¶ 6. That is incorrect.

i. Fact: the permit was applied for by, and granted to, Wade Smith. *Elkin App.* 112. In fact, the Elkins in their Amended Brief in Opposition to Hexco's Motion for Summary Judgment advised the district court that, "[t]he Smiths had to obtain the conditional use permit because it was their land . . .." *App*. at 305 (Elkin Summ. J. Br.) ¶ 11; *Elkin App* 112, 113.

[¶13] • The Elkins suggest that the pad or the man camp itself are the property at issue in this suit. *Elkin Br.* ¶¶ 10, 11. That is incorrect.

i. Fact: the cause of the explosion at issue was the gas connection to the dryer in the housing unit that Sovereign rented to the Elkins. There is no allegation that Hexco's pad or the Smiths' park were defective or dangerous, and the Elkins cite no facts supporting any such contention.

[¶14] • The Elkins contend that a lease agreement between the Smiths and Hexco required Hexco to comply with housing and building codes, local and state laws, and to ensure the "premises" were clean and safe. *Elkin. Br.* ¶ 9 (citing *Elkin App.* 115, unexecuted Lease Agreement). That is incorrect.

i. Fact: the unexecuted lease agreement the Elkins cite for support was not an agreement between Hexco and the Smiths. The actual agreement was oral and consisted of: 1) the Smiths being paid rent; 2) the Smiths having no responsibility for keeping up with rules and regulations of the camp; and 3) the Smiths being insured. *App.* 30 (*Smith Dep.*) at 16:19-17:12.

ii. Even if it was applicable, the lease agreement says tenants were to ensure compliance of "all persons in or about the premises with Tenant's permission . . . with all rules and regulations made jointly by Tenant and Landlord for lessees for all living unit pads or RV hookups." *Elkin App.* 91, ¶ 13. That did not create an obligation to enter and inspect units on the camp. Further, there is no evidence of any rule or regulation *violated* by anyone on the pad rented by Sovereign that might be pertinent to the issue before the district court and the Elkins identify no such violation.

[¶15] • Citing to the deposition of a woman named Shannon Moser, the Elkins state Moser "understood that Hexom was taking over [the property management] role himself." *Elkin Br*. ¶ 8. That is not what Moser said.

i. Fact: the Moser testimony cited by the Elkins was simply that Hexco had laid off its property manager for financial reasons. *Elkin App.* 103 at 17:10-20.

[¶16] • The Elkins suggest that some unidentified "rules of the man camp" were "incorporated into the conditional use permit." *Elkin Br.* ¶ 9. That contention lacks support.

i. Fact: nowhere does the Smiths' Conditional User Permit indicate that rules of the camp were somehow "incorporated" into the permit. *Elkin App.* 113.

[¶17] • The Elkins tell the Court, without reference to the record, that the subject housing unit was "brought to the Hexco man camp through Kyle Hexom's direct action . . .." *Elkin Br*. ¶ 11. That is misleading.

i. Fact: Wehner wanted to move a rental housing unit to Williston. He asked to place that rental unit on one of Hexco's spots in the Smith RV Park. *App*. 51 (*Hexom Dep*.) at 43:10-44:6.

ii. Wehner contacted Hexco to see if Sovereign could rent a pad. Sovereign manufactured, owned, transported, placed, and maintained the housing unit. App. 51 (*Hexom Dep*.) at 43:16-44:10, 71-72 at 124:25-125:17; *App*. 10-11 (*Hexom Aff*.), ¶¶ 5-7; *App*. 331 (*Jolley Dep*.) at 29:13-30:5, 337-338 at 56:20-57:8, 339 at 63:3-23. Hexco never spoke to the Elkins and played no part in the transport or placement of Sovereign's housing unit. *App.* 71 (*Hexom Dep.*) at 123:14-125:17; *App.* 328 (Jolley Dep.) at 17:2-

24, 331 at 29:10-30:2, *App.* 333 at 37:25-38:16, *App.* 337-338 at 55:7-57:8.

[¶18] • The Elkins suggest the Sovereign housing unit was poorly constructed or was a "homebuilt shack." *Elkin Br.* at ¶¶ 10, 11, 21, 22, 34, 35. That is both irrelevant and unsupported by the record.

i. Fact: first, the constitution of the housing unit is not at issue here.

ii. Second, there are no facts supporting the contention that the housing unit was improperly constructed or that a construction defect, if there was one, was at all related to the explosion. The Elkins identify no violation or unsafe condition other than the connection of the dryer. There are no facts indicating that faulty plumbing or electrical work played any role in the accident. *See id.* ¶ 18.

[¶19] • The Elkins state that Wehner built the housing unit. *Elkin Br.* ¶ 12. That is incorrect.

i. Fact: the Sovereign discovery response cited by the Elkins states that *Sovereign* constructed the unit, not Wehner. *Elkin. App.* 37, Answer to Interr. No. 4.

[¶20] • The Elkins posit that, "[a]s Wehner's employer, Hexco knew what type of work he was qualified to do." *Elkin Br.* ¶ 18. That is unsupported conjecture.

i. Fact: Wehner began work for Hexco as a construction-type surveyor in Fall, 2011. His tenure was short - he left Hexco's employ sometime in early 2012, two years before the accident at issue. *App.* 50 (*Hexom Dep.*) at 40:6-19; *App.* 327-328 (*Jolley Dep.*) at 16:2-17:1, 338 at 58:18-19, 339 at 61:3-62:9. There is no evidence that Hexco knew what type of work

Wehner was qualified to do during his short tenure with Hexco, nor that it knew of Wehner's experience when he returned to Williston. Wehner could very well have been a certified carpenter, plumber or electrician in Massachusetts, Idaho, or another State. Ultimately, it makes no difference – Wehner was leasing out a housing unit, not working as a contractor, and certainly there is no evidence he was in any way working with or for Hexco when Sovereign brought in its housing unit.

[¶21] • The Elkins, without citation, tell the Court that Sovereign's placement of the housing unit violated some unidentified regulation or rule. *Elkin Br*. ¶¶ 11, 19. That is incorrect.

i. Fact: other than the Elkins' unsupported argument, there is no suggestion anywhere in the record that placement of the housing unit violated a Williams County regulation or the Smiths' park rules.

[¶22] • The Elkins suggest "[t]hey did not know which appliances might be propane operated." *Elkin Br*. ¶ 12. That is incorrect.

i. Fact: the Elkins were expressly told not to use the dryer unit until it had been converted to use propane. *App.* 330 *(K.E. Dep.*) at 26:1-28:1, 28:10-29:4; *App*. 352 (*Daugherty Dep*.) at 29:-30:20, 353 at 32:13-33:25, 363 at 73:23-75:23. The fact that they paid no attention to the gas connections (*Elkin Br*. ¶ 12) does not create an issue of material fact here. What matters is that the dryer hook up was not done by Hexco and was inside the Sovereign housing unit over which Hexco had no access or control.

[¶23] • The Elkins advise that the housing unit was not inspected as required by a conditional use permit. *Elkin Br*. ¶ 20. That is both inconsistent with the record and misleading.

i. Fact: Kyle Hexom testified he believed that a County inspection *did* take place, he just wasn't sure what it entailed. *App.* 61 (*Hexom Dep*.) at 81:22-82:10. Counsel's affidavit that he could find no inspection record (*Elkin Br*. ¶ 18) does not establish that there wasn't an inspection and is inadmissible hearsay.

ii. Further, there is no evidence reflecting any obligation to *have* the housing unit inspected. A Williams County letter to Wade Smith (*Elkin App*. 113) made the Smiths' conditional use permit contingent on third party inspection of "the property located at W ½ SW ¼ of Section 31, T156N R100W on 60th St (CR60), East Fork Township", or the bare ground itself and not the units that would be placed upon it. As a result, Mr. Smith did not advise the County that he was *conducting* such inspections. *Elkin App.* 114.

[¶24] • The Elkins cite to testimony purported to reflect Hexco's knowledge that the housing unit was unsafe and noncompliant with county regulations. *Elkin Br*. ¶ 22. That is not what it says.

i. Fact: Hexco testified he had advised Wehner that if Wehner did something that did "not comply with the regulations, then [Hexco would] have the opportunity to ask [him] to leave." *Elkin App.* 86-87.

[¶25] • The Elkins represent that Hexco knew about Wehner's criminal history before hiring him in 2011, three years before the accident at issue. *Elkin Br*. ¶¶ 13, 15. That is pure speculation and unsupported by the record.

i. Fact: the testimony the Elkins cite indicates only that Hexco did a background check on Wehner of some sort at some time while Wehner was previously employed by Hexco. *Elkin App*. 91. Even if it was in any way admissible or relevant to the facts in question, there is no evidence that Hexco knew about Wehner's criminal history when Sovereign rented to the Elkins. Further, the Elkins cite no facts showing that, even if Wehner had criminal convictions, the incident was a result of criminal activity. It is clearly a ploy by the Elkins to try and create prejudice from irrelevant, immaterial information.

B. Undisputed Facts

[¶26] The district court relied on the following undisputed facts in granting summary judgment. Those undisputed facts demonstrate the absence of a relationship between Hexco and the Elkins and the lack of control possessed and exercised by Hexco.

1. There Was No Relationship Between Hexco and the Elkins

a. The Smiths, former defendants here, owned the land on which the Sovereign housing unit was situated, and leased a portion of that land to Hexco. *App.* 10 (*Hexom Aff*.) at ¶ 2; *App.* 27 (*Smith Dep*.) at 4:9-11; 6:4-16, 28 at 10:12-15, 30 at 16:6-17:1; *App.* 42 (*Hexom Aff*.) at 5:12-15; 43 at 9:9-14, 44 at 15:7-25, 46 at 21:3-22:7.

b. Hexco, in turn, leased one of the lots on the property to Sovereign. *See App.* 10-11 (*Hexom Aff*.) at ¶¶ 5-8; *App*. 51 (*Hexom Dep*.) at 43:16-19, 44:1-16, 52 at 45:17-22, 47:6-21, 55 at 59:25-61:9.

c. Wehner wanted to move a rental housing unit to Williston. *App*. 51 (*Hexom Aff*.) at 43:10-15. He asked to place that rental unit on one of Hexco's spots in the Smith RV Park. *Id.* at 43:16-44:6.

d. Sovereign and Hexco entered a lease agreement for that spot. *Id.* at 44:11-16, 62 at 87:25-88:4, 71 at 124 21-24. That was the extent of the relationship. *Id.* at 45:17-22.

e. Wehner was not a Hexco employee, agent, or representative. *App.* 51 (*Hexom Aff*.) at 43:3-44:16. He had worked for Hexco as a surveyor two years before the accident at issue. *App.* 50 at 40:3-14, 51 at 41:14-20, 43:3-9.

f. Sovereign manufactured, owned, transported, placed, and maintained Sovereign's housing unit. *App.* 10-11 (*Hexom Aff*.) at ¶¶ 5-7; *App.* 331 (*Jolley Dep*.) at 29:13-30:5, 337-338 at 56:20-57:8, 339 at 63:3-23.

g. Hexco played no part in the construction, transport, placement, or maintenance of Sovereign's housing unit or in hooking up the dryer in the unit. *App*. 71-72 (*Hexom Dep*.) at 124:25-125:17; *App.* 328 (*Jolley Dep*.) at 17:2-24, 333 at 37:25-38:16, 331 at 29:10-30:2, 337-338 at 55:7-57:8.

h. Sovereign leased one of its two subunits to the Elkins. *App*. 58 (*Hexom Dep*.) at 49:14-18, 55 at 57:6-59:3, 62 at 87:25-89:13; *App.* 10 *(Hexom Aff*.) at ¶ 8.

i. Hexco did not own, lease, or control the unit in which the Elkins were injured. *App.* 11-12 (*Hexom Aff*.) at ¶¶ 8, 14, 16; *App.* 67 (*Hexom Dep*.) at 106:21-107:10, 69 at 113:14-114:23, 116:19-24; *App*. 71 – 72 (*J. Elkin Dep.*) at 123:14-127:12.

j. The Elkins did not rent the property from Hexco. *App.* 11 at (*Hexom Aff.*) ¶¶ 6, 9, 12; *App.* 55 (*Hexom Dep.*) at 57:8-59:3, 62-63 at 88:17-89:23.

k. There was no lease agreement between Hexco and the Elkins, and the Elkins paid Hexco no deposit or rent. *See generally Elkin App.* 11-19; *App.* 11 (*Hexom Aff*.) at ¶ 9*; App.* 55 (Hexom Dep.) at 57:8-59:3, 62-63 at 88:17-89:23, 69 at 116:7-24, 70 at 117:11-14, 71-72 at 123:14-127:12; *App.* 95 (*J. Elkin Dep*.) at 8:22-24, 106 at 19:10-13; *App*. 209-210 (*K.E. Dep*.) at 15:7-16:6.

l. The Elkins paid their security deposit to a Sovereign representative. *App*. 11 (*Hexom Aff*.) at ¶ 9; *App*. 93 (*J. Elkin Br*.) at 6:12-15, 94 at 7:12-18; *App*. 205-206 (*K.E. Dep*.) at 11:22-12:24, 209-210 at 15:18-16:1; *App*. 264 (*T. Elkin Dep*.) at 4:12-14, 280 at 20:6-22.

m. The Elkins moved into the unit on the evening of May 21, 2014, two days before the accident. *App*. 95-96 (*K.E. Dep*.) at 8:25-9:2. They occupied the unit before they were supposed to, and before the washer and dryer unit had even been hooked up. *Elkin Br*. at ¶ 12; *App*. 328-329 (*Jolley Dep*.) at 20:18-21:6, 331-332 at 32:21-33:23; *App*. 352-353 (*Daugherty Dep*.) at 31:17-32-33:22. Hexom was not even aware the Elkins had moved onto the site. *App*. 63 (*Hexom Dep*.) at 89:14-23.

n. The accident occurred on May 23, 2014. *Elkin App*. 14, ¶ 21. The cause of the explosion occurred <u>inside</u> Sovereign's housing unit. *Id.*

2. Hexco Did Not Install or Hook up the Dryer Unit which caused the explosion

[¶27] The Elkins do not, and cannot, dispute the following, material, facts:

a. [11] Sovereign placed the washer and dryer unit inside the housing unit. *App.* 111-112 (*J. Elkin Dep*.) at 24:6-25:11; *App.* 20 (*Jolley Aff*.) at ¶¶ 2-4.

b. [11] Matthew Jolley, Wehner's acquaintance, stopped at the residence to hook the washer and dryer up at Wehner's request on May 22, 2014. *App.* 123-124 (*J. Elkin Dep.*) at 36:23-37:13; *App.* 21 (*Jolley Aff.*) at ¶¶ 5-8; *App.* 215 (*K.E. Dep.*) at 21:1-19; *App.* 327 (*Jolley Dep.*) at 17:8-24, 19:23-20:15.

c. [11] Jolley observed that the dryer was not hooked up to a disconnected gas line and advised the Elkins he had to install certain parts before it could be used. *App.* 21 (*Jolley Aff.*) at ¶¶ 10-12; *App.* 328-329 (Jolley Dep.) at 20:18-21:23.

d. Jolley went to the subunit adjacent to the Elkins' unit to assist in the installation of the neighbor's washer and dryer on May 22, 2014, the evening of the explosion. He then went to the Elkins' unit and attempted to connect their dryer. *App.* 126-128 (*J. Elkin Dep.*) at 39:18-41:5, 123 at 36:23-38:3, ; *App.* 215 (*K.E. Dep.*) at 21:18-21; *App.* 329 (*Jolley Dep.*) at 21:24-22:3.

e. When Jolley left the Elkins' housing unit, the dryer was not connected to the gas line. *App.* 332 (*Jolley Dep.*) at 33:7-35:2, 329 at 22:14-23:22.

f. Jolley advised the Elkins <u>not</u> to connect or use the dryer until he could install the correct part to convert the dryer to accept liquid propane. Because the Elkins left the unit to go to the store, Jolley could not install the parts. *App.* 127- 129 (*J. Elkin Dep.*) at 41:5-42:18; *App.* 22 (*Jolley Aff.*) at ¶¶ 13-14, 17; *App.* 329 (Jolley Dep.) at 21:3-18, 330 at 27:8-28:1, 333 at 39:22-40:15; *App.* 216 at 22:1-9; *App.* 353 (*Daugherty Dep.*) at 34:18-35:2.

g. Hexco had no involvement with hooking the dryer up. *App*. 72 (*Hexom Dep*.) at 125:13-17; *App*. 11 (*Hexom Aff*.) at ¶¶ 9-10; *App*. 333 (*Jolley Dep*.) at 37:25-38-16.

h. There is no evidence of any defect in the housing unit's construction. The explosion at issue occurred on May 23, 2014 when a gas line was improperly connected to the dryer inside the unit. *App*. 332 (*Jolley Dep*.) at 34:17-35:5; *App*. 359 (*Daugherty Dep*.) at 56:2-57:17.

3. Hexco Played No Role in Wehner's Presence in Williston

[¶28] The Elkins do not, and cannot, dispute the following, material, facts:

a. Wehner first came to Williston in 2011 to assist with planting a church. *App*. 332-333 (*Jolley Dep*.) at 36:10-37:17, 336 at 49:5-7.

b. While in Williston for the church plant, Wehner applied to work for Hexco. *App*. 337 (*Jolley Dep*.) at 53:2-12; *App*. 50 (*Hexom Dep*.) at 40:6-25.

c. Hexco did not know Wehner before he applied. *App*. 50, (*Hexom Dep*.) at 40:12-14.

d. Wehner left Hexco's employ in Fall, 2012. *Id.* at 40:3-14.

e. Wehner had a rental property in Williston, unassociated with Hexco or the Smiths' camp. *Id.* 43:10-15.

f. In the Spring of 2014, Wehner contacted Hexco to see if Hexco had any available lots to rent. *App*. 51 (*Hexom Dep*.) at 43:16-44:10. Hexco said, yes, it had lots that would fit Wehner's trailer. *Id.*

g. Wehner had been engaged in no criminal activity since May, 2003, more than nine years before he was hired. *Elkin App.* 53-54; *Elkin Br*. 13, ¶ 13. There is

no evidence that Wehner was engaged in any criminal activity in Williston at any time. Elkins can point to no evidence that their injury was related in any way to criminal activity.

IV. LEGAL ARGUMENT

[¶29] The undisputed material facts supported the district court's entry of summary judgment. The Hexco had no relationship with the Elkins, and Hexco had no ownership, supervision, or control over the housing unit at issue. Hexco owed the Elkins no duty upon which relief can be had.

A. The District Court Correctly Disregarded Immaterial Facts and Inadmissible Evidence

1. <u>The property at issue is the Sovereign housing unit, and Hexco exercised no control over it.</u>

[¶30] To circumvent summary judgment, and now on appeal, the Elkins attempted to distract from a fundamental fact – the "property" at issue here was the rental unit (specifically the washer-dryer), not the pad or RV park. They argue that Hexco's lease of the Smith's <u>lot</u> upon which the subject housing unit sat is sufficient to establish a duty. They are mistaken. There is no evidence, or even a colorable contention, that either the pad rented by Hexco or the camp itself were in any way dangerous or negligently maintained. Further, there is no evidence that the Sovereign housing unit itself was improperly constructed or that it played a role in the accident. The Elkins allege no such defect. The only "property" at issue is the improperly connected dryer located in a housing unit that Sovereign rented to the Elkins.

[¶31] The North Dakota Supreme Court has held, "[u]nder our premises liability law, a property owner must have control over the property where the injury occurred in order to find the owner owed a duty to an injured party. Before a duty of care is owed, it must be demonstrated the

defendant had control of the premises and, therefore, an opportunity to observe any duty." *Id*. at ¶ 13. Without control over the property at issue, no duty exists. When a landlord transfers possession of a premises to a tenant, he "often diminishes the [ ] opportunities for discovery and control of dangerous conditions that may arise on the premises." *Bellemare v. Gateway Builders, Inc.,* 420 N.W.2d 733, 741 (N.D. 1988).

[¶32] The property at issue in this case is the housing unit Sovereign placed on the Hexco lot and then rented to the Elkins. The North Dakota Supreme Court recognizes a "tenant has opportunities for discovery" of dangerous conditions "which may rival or exceed those of the landowner." *Id*. at 740. It is well-established in North Dakota that, absent proven knowledge and concealment, "the lessor of land is not liable to his lessee or others on the land for physical harm caused by any dangerous condition which existed when the lessee took possession . . ." *Newman v. Sears, Roebuck & Co*., 77 N.D. 466, 477, 43 N.W.2d 411, 418; *Francis v. Pic*, 226 N.W.2d 654, 659 (N.D. 1975). There was no such knowledge here and, even if there were, it would have been possessed by Sovereign, which leased its housing unit to the Elkins.

B. Authority and Argument the Elkins Present for the First Time on Appeal Should Not Be Considered

[¶33] The Elkins' argument and legal authority presented here differs significantly from that presented to the district court. They asked the district court to consider the Court's *Redford v. Willbros Grp., Inc.*, decision. 2014 WL 3547393 (D.N.D. 2014). On appeal, they discard that decision and associated analysis. They substitute authority and argument the district court was unable to consider. *Elkin Br*. ¶¶ 32-33. Arguments not raised before the district court are not considered for the first time on appeal. *Jury v. Barnes Cnty. Mun. Airport Authority*, 2016 ND

106, ¶ 21, 881 N.W.2d 10 (citation omitted). Even if the argument were considered, the Elkins' own cited authorities undermine their argument.

[¶34] The Elkins now, for the first time, make a policy argument in support of their position. Citing a 2009 Iowa decision and the Restatement (Third) of Torts, but no controlling authority, they argue that there must be a "countervailing policy" for a district court to overcome the "default rule (that everyone owes a duty to exercise reasonable care so as not to harm others) . . .." *Id.* ¶¶ 32-33 (citing *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009); Third. Rest. (proposed Final Draft No. 1, 2005) § 7(a)) cmt. i.). Those authorities do not avail them.

[¶35] The Elkins argue that no "countervailing policy" justifies finding the absence of a duty owed to them. *Id.* ¶ 33. In essence, the Elkins argue that the Court should disregard decades of North Dakota precedent and, instead, adopt the Restatement's rather vague suggestion regarding an uncertain public policy[2]. Regardless, the Iowa Supreme Court has held that, in circumstances like those at bar, the Restatement supports the *absence* of a duty.

[¶36] In *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009), the Iowa Supreme Court considered whether a property owner owed a duty to an independent contractor on its property. *Id.* 691-92. Citing *Kaczinski* and the Restatement, it concluded that the landowner owed the plaintiff no duty "because the summary judgment record is devoid of evidence tending to prove [defendants] exercised control [ ] to such an extent as would support a broader duty. . . ." "'[T]he issue of retained control is inescapably part of the duty issue, which is necessarily and property determined as a matter of law by the court.'" *Id.* at 697 (citation omitted). The district court here was not permitted to consider this argument and it is properly rejected. However, even

[2] The undersigned has been unable to locate authority indicating that North Dakota has adopted that portion of the Restatement addressed by the Iowa Supreme Court in *Kaczinski*.

if *Kaczinszki* were binding authority, and even if the Restatement section the Elkins cite has been adopted in North Dakota, those authorities undermine rather than support their argument.

[¶37] The undisputed facts here show that Hexco did not own, rent, or control the housing unit in which the Elkins were injured. The Elkins never met with anyone from Hexco, and made their rent checks out to Wehner. *App*. 94 (*J. Elkin Dep*.) at 7:5-18, 95 at 8:14-18. Sovereign built the housing unit, placed it on site, and put the dryer inside. Jolley, an acquaintance of Wehner's, attempted to connect the dryer unit but was unable to do so as the Elkins had already hooked up the dryer vent, filled the washer with water, and started to wash clothes. *App*. 353 (*Daugherty Dep*.) at 32:10-25, 33:2-22, *App*. 328-329 (*Jolley Dep*.) at 20:18-22:25, 23:4-12. Someone then connected the dryer to a gas line and the Elkins used it after being told not to do so. The Elkins were in a much better position to observe any defects than Hexco. There is no evidence that Hexco had knowledge of or concealed information about the housing unit's condition or the dryer, and Plaintiffs have alleged no such concealment. *See e.g. Elkin App.* 1, generally.

C. Wehner's Criminal History Is Irrelevant and Inadmissible and The Elkins Do Not Argue The District Court Erred By Not Considering It.

[¶38] The Elkins argue Hexco knew of Wehner's criminal history when he was hired in 2012, two years before the accident at issue. *Elkin Br*. ¶¶ 13, 16. They devote three pages of their brief and 17 pages of their Appendix to Wehner's criminal history before and after the accident at issue. *Elkin Br.* 12-16; *Elkin App.* 52-69. However, that effort seems to have been for naught – the Elkins do not assign error to the district court's reasoning for refusing to consider it. *Elkin App*. 32-33, ¶¶ 16-18.

1. Wehner's criminal conduct is irrelevant to the issue of duty

[¶39] Wehner's pre-accident criminal conduct ended in 2003, nine years before the accident at issue. As the district court found, the Elkins provide no credible rationale for how it might be relevant in this case. *Id.* ¶ 17. Any criminal activity was entirely isolated by time and space from Sovereign's construction and placement of the housing unit and installation of the washer-dryer therein. The explosion was caused by an improperly connected dryer not any criminal activity. That evidence is irrelevant to the issue at bar and the district court properly refused to consider it.

2. Wehner's pre-accident criminal history is inadmissible under North Dakota Rule of evidence 609.

[¶40] The only evidence of Wehner's criminal history that could conceivably be relevant is that from before he was hired in 2012. The Elkins' exhibits demonstrate that those convictions occurred in 2003 and earlier. Under North Dakota Rule of Evidence 609(b), "[e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of conviction or of the release of the witness from any confinement imposed for the conviction, whichever is the later date . . .." N.D.R.Evid. 609(b). 14 years have elapsed since Wehner's convictions.

[¶41] Statements and facts may only be considered on summary judgment if they are admissible in evidence. N.D.R.Civ.P. 56(e); *Markgraf v. Welker*, 2015 ND 303 ¶12, 873 N.W.2d 26. Because the evidence and Plaintiffs' argument are inadmissible, they cannot be considered when ruling on Hexco's motion for summary judgment.

3. Evidence of Wehner's pre-accident criminal history is inadmissible hearsay.

[¶42] To be considered, affidavits opposing a summary judgment motion must "be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant

is competent to testify on the matters stated." *McColl Farms, LLC v. Pflaum*, 837 N.W.2d 359, ¶ 30, 2013 ND 169 (quoting R. 56(e), N.D.R.Civ.P). If an affidavit is not based on the affiant's personal knowledge, it is properly refused. *Id.* (internal citations omitted). The Elkins' affidavits and associated materials do not satisfy that requirement - they are not based on personal knowledge, but simply state what the affiant read somewhere else.

[¶43] Hearsay statements are generally not admissible and are not considered when deciding a summary judgment motion. *Id.* (internal citations omitted). An attorney's affidavit is "made on information and belief, and not personal knowledge." *Id.* at ¶ 31. Records submitted *with* such an affidavit are also inadmissible hearsay and are not considered in deciding a motion for summary judgment. *Id.* at ¶ 43 (internal citations omitted). The court has no duty to search the record for evidence that would defeat summary judgment. *Id.* Exceptions to the rule of non-admissibility are conditioned upon the unavailability of the declarant. *Matter of Estate of Stanton*, 472 N.W.2d 741, 745 (1991)(quoting N.D.R.Evid. 804(a)(5). There is no evidence, or even suggestion, that Wehner, his family, the charging officers, or any other individuals reflected in those documents are unavailable.

[¶44] The Elkins submit two affidavits citing to a number of criminal charging documents, statements from investigating officers and witnesses, plea agreements, newspaper articles, etc. involving Wehner's past criminal conduct. The documents cited are irrelevant as well as inadmissible hearsay and the affidavits referring to them contain inadmissible hearsay within hearsay. The district court could not consider the Elkins' exhibits, and the arguments based upon them, in ruling on Hexco's summary judgment motion. Even if they were not inadmissible hearsay, those documents and arguments are also inadmissible character evidence.

[¶45]

4. Wehner's criminal history is barred by North Dakota Rule of Evidence 404.

[¶46] Evidence of criminal conduct is not admissible to show that a person would act in conformity with the character reflected by that prior conduct. N.D.R.Evid. 404(b)(1). That appears to be precisely why the Elkins cited Wehner's criminal conduct.

[¶47] The Elkins submitted records showing Wehner's commission of crimes involving battery, receipt of stolen property, possession of controlled substances, and possession of a loaded firearm from 2003 and earlier. They suggested that, since Wehner had committed such crimes in the past, Hexco should have known he would act consistently with that criminal conduct after 2011 when he was hired. Even more remotely, they suggest Hexco should have known Wehner would act in accordance with his criminal history after he *returned* to North Dakota in 2014. But the explosion was not caused by any criminal conduct. Wehner's criminal history has nothing to do with any duty owed by Hexco. Evidence of past criminal conduct is inadmissible, and the district court was correct in refusing to consider it when ruling on summary judgment.

V. CONCLUSION

[¶48] The relevant material facts here remain undisputed. There was no communication, no rental agreement, no interactions, and simply no relationship between Hexco and the Elkins. It is undisputed that Hexco exercised no control nor was it required to exercise any control over the subject housing unit, and thus Hexco owed the Elkins no legal duty. Hexco was not the Elkins landlord, accepted no money from the Elkins, and did not maintain the housing unit at issue. Because Hexco was not the landlord and had no control of the unit or the washer/dryer in the unit, Hexco is entitled to judgment as a matter of law, and an award of summary judgment on its behalf is proper.

[¶49] The explosion did not arise from any defect in the lot leased by Hexco to Sovereign nor from any defective construction of the unit. As to installation of the dryer unit, the explosion resulted from an improperly hooked up dryer within the Sovereign housing unit occupied by the Plaintiffs. The undisputed facts demonstrate Hexco did not hook up the dryer. As a matter of law, Hexco owed the Elkins no duty. The district court was correct in entering summary judgment in favor of Hexco pursuant to N.D.R.Civ. P. 56 and that ruling should be affirmed.

[¶50] Dated this 12th day of June, 2019.

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CERTIFICATE OF COMPLIANCE

[¶49] The undersigned certifies under N.D.R.App.P. 32(e) that the above brief complies with the page limitation with this brief having 25 pages.

/s/ Kent Reierson
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CERTIFICATE OF SERVICE

[¶50] I hereby certify that on the 12th day of June, 2019, a true and correct copy of the foregoing brief of Appellees was served as follows:

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