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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

Dylan Devore,

Plaintiff and Appellant,

vs.

American Eagle Energy Corporation, Integrated Petroleum Technologies, Inc. and Brian Barony,

Defendants and Appellees.

Supreme Court No. 20190117

Appeal from Order Granting Defendant American Eagle Energy Corporation's Motion for Summary Judgment filed January 31, 2019 (Doc. No. 244) and corresponding Judgment of Dismissal filed February 22, 2019 (Doc. No. 250) and Order Granting Defendants Integrated Petroleum Technologies and Brian Barony's Motion for Summary Judgment filed January 31, 2019 (Doc. No. 245) and corresponding Judgment of Dismissal filed February 27, 2019 (Doc. No. 256)

Divide County District Court
Northwest Judicial District
The Honorable Joshua B. Rustad
Case No. 12-2015-CV-00003

BRIEF OF APPELLEE AMERICAN EAGLE ENERGY CORPORATION

ORAL ARGUMENT REQUESTED

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I. STATEMENT OF THE ISSUES

[1] The district court did not err in granting Defendant American Eagle Energy Corporation's Motion for Summary Judgment, dismissing with prejudice all of the causes of action Plaintiff Dylan Devore asserted against Defendant American Eagle Energy Corporation in his Complaint.

II. STATEMENT OF FACTS

A. MATERIAL UNDISPUTED FACTS of the district court

[2] In its Order Granting Defendant American Eagle Energy Corporation's Motion for Summary Judgment ("the Order"), the district court delineated the MATERIAL UNDISPUTED FACTS in this case that are quoted with citation:[1]

> 1. As of March 2, 2014, [Defendant American Eagle Energy Corporation ("American Eagle")] was the operator of the Haugen 15-12-163-103 oil and gas well ("the Well") in Divide County, North Dakota, and work to undertake a fracking operation was commenced at the Well on or about February 27, 2014. Dep. Barony 141:17–142:12 (APP 94); Daily Completion Report (AE04270) (APP 197).
>
> 2. For this fracking operation, American Eagle had the authority to pull water from a farmer's pond that was at least three miles away from the Well ("the Pond"). Dep. Barony 111:13–21, 137:16–22 (APP 86, 93); Dep. Devore 118:8–19 (APP 231). FBS would pump water into a tank near the Pond and then the water was transferred by truck to the frac location. Dep. Devore 392:10–22 (APP 355).
>
> 3. American Eagle's objective was fracking the Well. Dep. Barony 48:1–8 (APP 71) (explaining that American Eagle gave IPT a frac plan).

[1] Instead of the exhibit and docket references that the district court included in the Order, the undersigned has cited in this Statement of Facts to the applicable page of the Appellant's Appendix ("APP"). The following footnotes 2 through 8 are quoted from the Order as well, which is why they are single-spaced.

4. Due to the complexity and various areas of specialization required, oil and gas well operators, like American Eagle, commonly engage separate entities to perform the actual fracking operation and another entity with significant experience to oversee and coordinate all aspects of the work. See Dep. Barony 296:11–24 (APP 133).

5. American Eagle was interested only in the results obtained by its independent contractors, relying on their expertise to complete the work. Dep. Am. Eagle 19:22–25 (APP 394) ("American Eagle maintained control in terms of design of work. American Eagle did not maintain control in terms of execution of work.").

6. American Eagle recognized and respected the right and ability of its independent contractors to perform their specialized functions to meet its objective of fracking the Well.

7. American Eagle engaged multiple independent contractors to provide specialized services for this fracking operation on the Well in accord with the independent contractors' own safety procedures and policies. Dep. Am. Eagle 71:22–25 (APP 407).

8. Each independent contractor had control over its own employees and its own work. Dep. Am. Eagle 71:3–13 (APP 407).

9. American Eagle had only one employee in North Dakota who was working as a field superintendent not overseeing drilling operations or fracking operations. Dep. Am. Eagle 74:1–20 (APP 408); Am. Eagle Resp. to Int. No. 3 (APP 437–438).

10. American Eagle did not have any employees at the Well between February 27, 2014 and March 2, 2014. Dep. Barony 296:25–27 (APP 133); Dep. Am. Eagle 74:1–13 (APP 408); Am. Eagle Resp. to Int. No. 3 (APP 437–438).

11. American Eagle contracted with [Defendant Integrated Petroleum Technologies, Inc. ("IPT")] to provide frac consultant services because IPT held itself out to American Eagle as being qualified to safely and efficiently oversee a fracking operation. Dep. Barony 111:22–24 (APP 86); Dep. Am. Eagle 14:17–21:13, 23:24–15 (APP 393–395); Am. Eagle Resps. to Ints. Nos. 4 & 9 (APP 438–439).

12. A signed written contract has not been located between American Eagle and IPT, but the unsigned contract expressly identified IPT[2] as an independent contractor. Dep. Am. Eagle 16:17–17:1, 18:24–19:8 (APP 394); Consulting Services Agreement (unsigned) (APP 441–446).

13. Both American Eagle and IPT understood IPT to be an independent contractor of American Eagle. Dep. Barony 111:22–24, 292:3–18 (APP 86, 132); Dep. Am. Eagle 16:24–17:1, 25:3–20, 24:9–25, 73:22–25 (APP 394, 396, 408); Am. Eagle Resp. to Int. No. 4 (APP 438).

14. [Defendant Brian Barony ("Barony")] (an employee of IPT) as the frac consultant was in charge of implementing American Eagle's plan. Dep. Barony 296:11–17 (APP 133); Dep. Am. Eagle 21:8–13 (APP 395).

15. The frac consultant was in charge of making sure the fracking operation being conducted at the Well was efficient, safe, and according to plan. Dep. Barony 35:3–12, 39:10–16, 84:10–16, 99:19–22, 259:12–260:19 (APP 67–68, 80, 83, 123–124); Dep. Am. Eagle 23:18–25, 26:18–21, 30:7–13, 43:4–44:5 (APP 395–397, 400).

16. The frac consultant coordinates the other independent contractors to keep the task moving and has ultimate control over the operation at the Well. Dep. Barony 39:10–16, 67:19–68:12, 84:6–16, 97:23–98:6, 99:19–22, 131:14, 136:7–16 (APP 68, 75–76, 80, 83, 91, 93); Dep. Am. Eagle 26:22–27:20, 28:24–29:7 (APP 396–397); Dep. FBS 111:3–112:9, 113:5–12 (APP 477–478).

17. The frac consultant would complete a daily electronic progress report for American Eagle, so it could see what was happening in the field. Dep. Barony 84:20–25, 139:14–140:14, 154:20–156:21 (APP 80, 93–94, 97–98); Am. Eagle Completion Report (AE 04270–04271) (APP 197–198).

18. The frac consultant kept American Eagle updated. Dep. Barony 255:24–256:2 (APP 122–123); see also Dep. Barony 254:6:10 (APP 122) ("I still have to communicate and contact American Eagle and let them know what's going on.").

[2] Peterson Energy Management, Inc. was purchased by Peterson Energy Technologies, LLC, a wholly owned subsidiary of IPT, and IPT and American Eagle understood, acknowledged, and agreed that the rights and obligations of Peterson Energy Management, Inc. to American Eagle were assigned to and assumed by IPT. Dep. Am. Eagle 15:9–16:2 (APP 393–394); Letter from Peterson Energy to Am. Eagle (Oct. 12, 2012) (APP 511).

19. If there was a safety concern for the fracking operation, the frac consultant was responsible for addressing it. Dep. Am. Eagle 26:18–21, 40:1–5 (APP 396, 400); Dep. FBS 113:13–20 (APP 478). However, [FBS Consulting Services LLC ("FBS")] had its own safety program for its employees to follow, which included the ability to "stop work" if other contractors told FBS to do something unsafe, and [Plaintiff Dylan Devore ("Devore")] was responsible for, among other things, ensuring the safety of his crew members. See Dep. Devore 43:3–9, 47:1-20, 50:8–11 (APP 212–214); Dep. Am. Eagle 66:8–9 (APP 406); Dep. FBS, 52:12–24 (APP 462).

20. American Eagle contracted with FBS to provide water transfer services[3] after FBS held itself out to American Eagle as being qualified to safely and efficiently provide water transfer services in fracking operations. Dep. Devore 297:7–298:7 (APP 331–332); Dep. Am. Eagle 62:3–19, 69:17–20, 72:11–14 (APP 405, 407–408); Dep. FBS 13:12–20, 39:10–19, 40:9–12, 86:22–87:4, 160:21–161:1 (APP 453, 459, 471, 489–490); Am. Eagle Resps. to Ints. Nos. 4 & 9 (APP 438–439).

21. Though there is not a written contract between the parties, FBS understood FBS to be a contractor of American Eagle. See Dep. FBS 11:6–12, 28:14–22 (APP 452, 456).

22. American Eagle considered FBS to be an independent contractor. Dep. Am. Eagle 25:13–20 (APP 396); Am. Eagle Resps. to Ints. Nos. 4 & 9 (APP 438–439).

23. FBS was in charge of the day-to-day activities of its job and did not rely on other companies or the consultant to tell it how to do its job. Dep. Barony, 298:10–25 (APP 133); Dep. FBS 39:10–19, 87:9–17, 158:22–159:5 (APP 459, 471, 489).

24. In its work, FBS took direction from the consultant not an employee of the operator. Dep. FBS 87:22–88:8, 16–17, 90:6–13, 115:17–116:5 (APP 471–472, 478).

25. FBS was hired to transfer the water from the Pond to the Well for use in the fracking operation. Dep. Devore 61:11–16 (APP 217); Dep. Am. Eagle 62:3–19 (APP 405); Dep. FBS 105:19–23 (APP 476).

26. FBS recognized that it was to do its job safely. Dep. FBS 164:7–21 (APP 490).

[3] FBS has a contract with Fort Berthold Services to service oilfield companies like American Eagle. Dep. FBS 7:16–8:22 (APP 451). FBS is a contractor of Fort Berthold Services, but they operate as one unit. Dep. FBS 8:9–22, 163:16–19 (APP 451, 490).

27. FBS's crew retained exclusive control over the method and manner of its work. Dep. FBS 158:20–25 (APP 489) ("Was it your expectation that the FBS work crew would control the method and the manner in which it would do water transfer? A. Yes."); see also Dep. Am. Eagle 66:2-13 (APP 406) ("Were [FBS's employees] expected to provide their own methods and means for doing the work? A. Yes.").

28. Devore was employed by FBS because he represented himself to FBS as having extensive water transfer experience and knowledge. Dep. FBS 7:13–15, 20:6–8, 42:25–43:22, 87:5–7, 160:21–161:1 (APP 451, 454, 460, 471, 489–490).

29. Devore started in the oil and gas industry in December of 2011 with a water transfer company where he started as a member of the water transfer crew and worked his way up to supervisor in February of 2013. Dep. Devore 33:7–34:12 (APP 210).

30. Devore was in charge of the FBS water transfer crew for this particular fracking operation on the date of the incident. Dep. FBS 33:23–34:2, 49:5–8 (APP 458, 462).

31. Being in charge of the crew, Devore had the same duties as the crew members but also had other duties such as being the contact for the consultant, designing and laying out the job site, doing job-safety-analyses (JSAs) to locate and identify safety hazards before undertaking the job, and ensuring the safety of the crew members. See Dep. Devore 43:3–9, 47:1-20, 50:8–11 (APP 212–214).

32. FBS was expected to use its own equipment or equipment that was leased to transport the water not American Eagle equipment. Dep. Am. Eagle 66:5–7 (APP 406).

33. This equipment included a long "lay-flat" hose ("the Pipe"). Dep. Devore 86:8–10 (APP 223).

34. The Pipe is not a hard PVC, metal, or similar type of material; rather, it is made of a polyethylene blend, can bend, and is more flexible than a PVC or metal pipe. Dep. Devore 68:5–69:18 (APP 219).

35. The lay-flat hose can be rolled on reels because it "lays flat" when there is not water running through it. Dep. Devore 87:12–18, 183:20–184:2 (APP 223, 247–248).

36. FBS would pump water through the Pipe into a tank near the Pond and then the water was transferred by truck to the frac location. Dep. Devore 392:10–22 (APP 355).

37. For water transfer jobs, FBS is responsible for its equipment, including the Pipe. Dep. Devore 37:25–38:6, 57:11–58:5, 183:16–184:9 (APP 211, 216, 247–248); Dep. Am. Eagle 66:5–7 (APP 406); Dep. FBS 159:1–5 (APP 489).

38. FBS is responsible for keeping the Pipe free of any obstructions and controlling the manner and method of water transfer. Dep. Am. Eagle 66:11–13 (APP 406); Dep. FBS 158:22–25 (APP 489).

39. One way that water transfer crews like FBS ensure that their line stays free of any obstructions is by undertaking a process that is referred to as 'pigging the line.' Dep. Devore 71:5–10 (APP 219); Dep. FBS 144:20–145:3 (APP 485–486).

40. This process involves an air compressor being hooked up to one end of the line to blow air through the line. Dep. Devore 99:13–101:17 (APP 226–227).

41. After air has been blown through the line for some time, a foam object ('the pig') is placed in that same end of the line. Dep. Devore 99:13–101:17 (APP 226–227).

42. Once 'the pig' is in the line, the air compressor is hooked up to the line behind 'the pig,' and then the compressed air pushes 'the pig' from one end of the line to the other end of the line. Dep. Devore 99:13–101:17 (APP 226–227).

43. When 'the pig' gets to the far end of the line, a contraption has already been hooked up there for the purpose of catching 'the pig.' Dep. Devore 102:20–104:6, 105:7–15 (APP 227–228).

44. This contraption is used to help avoid 'the pig' shooting out of the end of the line because of all of the air pressure behind it and potentially injuring someone. Dep. Devore 102:20–104:6, 105:7–15 (APP 227–228).

45. While traveling through the line, 'the pig' essentially works like a squeegee,[4] soaking up all of the excess water in the line and moving small obstructions (like dirt and weeds) that are in front of it. Dep. Devore 71:1–72:14, 88:9–15 (APP 219–220, 224).

[4] A squeegee is "an implement edged with rubber or the like, for removing water from windows after washing, sweeping water from wet decks, etc," and squeegeeing is "to sweep, scrape, or press with or as if with a squeegee." WEBSTER'S DICTIONARY.

46. The process of 'pigging the line' is commonly undertaken when the operation at hand stops calling for the transfer of water, which makes sense because 'the pig' works to squeegee the excess water out of the line to avoid any water settling in the pipe and freezing. Dep. Devore 74:4–11 (APP 220).

47. 'Pigging the line' immediately after stopping the transfer of water is the best way for water transfer crews to avoid dealing with ice obstructions in the water transfer line. Dep. Barony 168:22–169:7, 176:17–22 (APP 101, 103); Dep. Devore 177:23–178:3 (APP 246) ("Don't let it freeze in the first place."); Dep. FBS 144:20–145:3, 147:15–23 (APP 485–486).

48. Barony had worked with Devore and the FBS water transfer crew on a previous job that was unrelated to this Well. Dep. Barony 171:8–24 (APP 101).

49. At that job, FBS had allowed its lay-flat hose to get an ice obstruction in it somewhere between the water source and the wellsite. Dep. Barony 172:1–7 (APP 102); Dep. Devore 189:17–190:15 (APP 249).

50. FBS—with Devore's knowledge—decided to 'pig the line' to remove the ice obstruction. Dep. Barony 172:8–22 (APP 102); Dep. Devore 222:7–228:1 (APP 257–259).

51. While the compressed air was hooked up to the lay-flat hose with 'the pig' somewhere in the lay-flat hose, FBS employees were banging on the lay-flat hose with sledgehammers where they believed the ice obstruction to be located. Dep. Barony 174:15–21 (APP 102); Dep. Devore 223:6–9, 226:7–11, 227:15–23 (APP 257–258).

52. Barony was watching Devore and FBS undertake this process on that particular job, and, according to Barony, he had never seen this done before, so he asked Devore if the process was appropriate. Dep. Barony 171:11–174:6 (APP 101–102).

53. According to Barony, Devore told him that was the only thing that FBS could do to clear the ice obstruction.[5] Dep. Barony 174:15–24, 187:1–15 (APP 102, 105).

[5] Devore was aware of other things that could be done to remove ice obstructions from pipe or to otherwise transfer water, including, but not limited to, vac trucks, heater trucks, torches, running a new line, pumping hot water, and breaking the pipe down and removing ice in sections. Dep. Devore 70:21–71:8, 73:2–9 ("['pigging the line'] is not necessarily the only way to get the ice out"), 90:13–22, 94:24–95:4, 135:19–24, 362:4–14 (APP 219–220, 224–225, 235, 348).

54. At some point, these combined efforts of the compressed air, 'the pig,' and the sledgehammers caused the ice obstruction to break up or move in the lay-flat hose. Dep. Barony 177:2–178:1 (APP 103).

55. When that happened, the lay-flat hose immediately and uncontrollably jumped or whipped around on itself because of the pressure change. Dep. Barony 178:7–15 (APP 103).

56. FBS had used this method of clearing ice obstructions in its lay-flat hose on at least three occasions prior to the incident in this case, which is evidenced by the fact that the FBS crew videoed themselves on those occasions. Dep. Devore 214:11–215:8, 230:4–231:16, 235:13–237:12 (APP 255, 259–261).

57. The FBS employees posted the videos on YouTube and entitled them things like "Black Hose of Death-Hilarious" and "Hose explosion 2," which titles describe what the lay-flat hose looks like jumping or whipping around on itself. Dep. Devore 211:2–7 ("It did a little bit of a Slinky effect. Like when the ice would come out, it just kind of peeled it back along – it was kind of like a snake shedding its skin almost."), 218:10–11, 234:6–11 (APP 254, 256, 260).

58. Devore saw the videos, and he even made one of the videos. Dep. Devore 215:18–20, 236:15–16 (APP 255, 261); see also DVD containing .mp4 videos that were Ex. 8[6] and Ex. 9 to Dep. Devore (APP 512).[7]

59. Between the time that Barony saw FBS clear the ice obstruction from the line on the previous job by 'pigging the line' and using sledgehammers and this fracking operation at the Well, Barony told FBS and Devore that FBS was not authorized to and should not use that process for clearing ice obstructions anymore. Dep. Barony 170:10–25, 182:2–8, 190:1–191:18 (APP 101, 104, 106); Dep. Devore 248:1–5, 251:4–12, 391:16–19, 392:6–9 (APP 264, 355).

60. No one talked to an American Eagle employee about this. Dep. Barony 193:13–19 (APP 107).

[6] See Dep. Devore 232:4–235:11 (APP 260) (explaining that the video marked as "Exhibit 8" to Devore's deposition was on Devore's YouTube page and had FBS employees in it).
[7] See Dep. Devore 235:12–239:8 (APP 260–261) (explaining that the video marked as "Exhibit 9" to Devore's deposition was on Devore's YouTube page, had FBS employees in it, and was filmed by Devore).

61. On or about February 28, 2014, FBS rigged up its equipment at the Pond, the Pipe, and any associated equipment at the Well, and FBS started to transfer water from the Pond. Am. Eagle Completion Report (AE 04270–04271) (APP 197–198).

62. FBS would pump water into a tank near the Pond and then the water was transferred by truck to the frac location. Dep. Devore 392:10–22 (APP 355).

63. On or about March 1, 2014, the transfer of water was stopped, and it is unknown whether FBS 'pigged the [Pipe]' when the transfer of water stopped to avoid ice building up in the Pipe. Am. Eagle Completion Report (AE 04270–04271) (APP 197–198).

64. Regardless, by the morning of March 2, 2014, if not before, water had frozen in the Pipe. Dep. Barony 304:4–14 (APP 135).

65. Both Barony and Devore knew that the Pipe had an ice obstruction in it somewhere. Dep. Barony 231:20–23 (APP 116); Dep. Devore 325:11–21 (APP 338).

66. According to Devore, Barony told Devore to have FBS 'pig the Pipe' because the fracking operation needed water within a few hours. Dep. Devore 248:1–250:2, 326:3–5 (APP 264, 339).

67. According to Devore, in response to Barony, Devore in his own deposition testified he said something "jokingly" to the effect of "Aren't we not supposed to do that?" Dep. Devore 259:6–262:5 (APP 266–267).

68. According to Devore, Barony "implied the urgency behind the situation on how fast he wanted things done," so Devore told Barony that he would take the FBS crew over to see what they could do to get the water moving. Dep. Devore 259:6–262:5 (APP 266–267).

69. Barony denies that he told Devore to 'pig the Pipe' and denies that he knew that Devore and FBS were 'pigging the Pipe.' Dep. Barony 294:5–16, 297:4–16 (APP 132–133).

70. Regardless of what Barony told Devore, both Barony and Devore testified that American Eagle did not direct either of them about when and how to deliver the water for the fracking operation. Dep. Barony 291:12–15 (APP 131); Dep. Devore 269:24–270:2 (APP 269); see also Dep. FBS 87:9–88:8 (APP 471) (explaining that the day-to-day work is up to FBS and they are told when to transfer water by the consultant).

71. Devore took the FBS crew to work on the ice obstruction in the Pipe. Dep. Devore 262:3–5, 331:3–9 (APP 267, 340).

72. Barony stayed at the Well to oversee the rest of the fracking operation. Dep. Barony 271:20–272:1 (APP 126).

73. FBS discovered the location of the ice obstruction in the Pipe either at or near the Pond, which location was not within eyesight of the Well. Dep. Barony 149:8–13, 270:14–271:1 (APP 96, 126); Dep. Devore 312:24 (explaining the video of the incident includes the Pond), 324:17–18 (APP 335, 338).

74. No one other than FBS employees were there; no IPT or American Eagle employees were present. Dep. Barony 109:4–7 (APP 86); Dep. Devore 243:24–245:25, 265:8–14, 318:1–7 (APP 262–263, 268, 337).

75. FBS 'pigged the Pipe,' and at least one crew member was using a sledgehammer to hit the Pipe. Dep. Devore 243:20, 305:20–306:1, 324:6–9, 351:25–352:11 (APP 262, 333–334, 338, 345).

76. An FBS employee was videoing the crew. Dep. Devore 241:20–242:2 (APP 262); see also DVD containing .mp4 video that was Ex. 12[8] to Dep. Devore (APP 512).

77. According to Devore, all of the crew members were supposed to be standing back, but they were not and Devore did not make them. Dep. Devore 301:12–304:10 (APP 332–333).

78. With one of the strikes of the sledgehammer, the Pipe broke apart near a metal fitting in the Pipe and immediately and uncontrollably jumped and whipped around on itself. Dep. Devore 348:1–349:1 (APP 344).

79. Devore—who had been walking right alongside the Pipe—was hit by the end of the Pipe while it was whipping around and was injured. Dep. Devore 246:14–247:5, 312:15–18 (APP 263, 335).

Order (APP 1549–1562).

[8] See Dep. Devore 241:20–247:14 (APP 262–263) (explaining that the video marked as "Exhibit 12" to Devore's deposition was the video of the incident that is the subject of this lawsuit).

B. Devore has forwarded 'facts' without evidentiary support or has made citation to the record where the material cited does not stand for the 'fact' forwarded by Devore.

[3] Nothing in the Statement of Facts in Appellant's Brief ("Devore's Brief") refutes the "MATERIAL UNDISPUTED FACTS" in the Order that are quoted above. To the extent there are any "facts" alleged in Devore's Brief that appear contrary to the "MATERIAL UNDISPUTED FACTS" in the Order, those "facts" from Devore have at least two issues: either (1) those 'facts' are unsupported by citation to any evidence in the record, or (2) the testimony cited by Devore does not actually stand for the proposition for which it is cited as a 'fact' by Devore.

[4] As to the first issue, Devore sets out the following:

> a. "[S]worn testimony of various deponents . . . makes clear the shared responsibilities [of IPT and Barony] with American Eagle." Devore's Br. ¶ 13 (without citation).
>
> b. "American Eagle and IPT/Barony were keenly aware of the dangers of continuing frac operations – including continuing efforts to move water through a frozen water line – without a sufficient number of water heaters. Nonetheless, American Eagle and IPT/Barony 'put [their] heads together, and made the 'joint decision' to 'keep fighting the good fight' (i.e. continue to pursue frac-ing the Well in spite of the frozen water lines)." Devore's Br. ¶ 20 (without citation).
>
> c. "[A]ll Appellees knew that the Haugen frac location lacked a sufficient number of water heaters to assure the safe transfer of water (and/or to allow for the thawing of the existing, frozen water line). Nonetheless, American Eagle and IPT/Barony made a 'joint decision' to 'keep fighting the good faith (to keep pushing the job)." Devore's Br. ¶ 24 (without citation).
>
> d. "American Eagle and IPT/Barony made a 'joint decision' to engage an unsafe practice. American Eagle and IPT/Barony directly controlled the details of what process, and thereby tools, were used by FBS/Devore to clear the frozen water line." Devore's Br. ¶ 24 (without citation).

Devore makes these "unsupported conclusory allegations," which is not enough under applicable caselaw to reverse summary judgment. See Part III(A)(i) below.

[5] As to the second issue, Devore asserts that "American Eagle and IPT/Barony were charged with the responsibility to assure that the Well location had all needed equipment (including heaters for water transfer)." Devore's Br. ¶ 31 (citing Dep. Am Eagle p. 41 (APP 1295)). But, the testimony Devore cites for that assertion is expressly to the contrary:

> **Q: [S]houldn't the consultant make sure that the safety issue is being addressed in a way that is an approved safe practice?**
>
> A: That's -- that's not a clear-cut question in this business. So there's not a yes-or-no answer to that question. The consultant's job dealing with whatever service company, whatever third party is out there, is to say, "Okay" -- and in this situation, say, "Okay, we would like for you to transfer water." Okay? Then the water transfer company is supposed to attempt to transfer water. If they cannot for whatever reason, then it's their job to come tell the consultant, We can't. We can't for this reason or for that reason or for safety concerns." They have to -- they have to communicate that to him. And at that point, we do not mandate to anyone how to use their equipment or what the limitations of their equipment are. You either can do what we ask you to at the time or you can't.
>
> **Q: When you say "we," you're talking about you, the oil company, American Eagle?**
>
> A: Well, I'm talking about our representative, the consultant that we have hired who is on location, they have to tell him that either they can do it or they can't.
>
> **Q: Well, Mr. Barony, for example, has testified that one of his responsibilities is to make sure that all equipment that is needed is on location. Do you degree with that?**
>
> A: Yes.

Dep. Am. Eagle 40:6–41:17 (APP 1295) (objections omitted).

[6] Devore also asserts that "Barony testified that American Eagle was . . . specifically kept informed about the heaters not functioning on the Haugen location[and t]hereafter,

and in spite of the known dangers of 'pigging' a frozen water line, Appellees made the 'joint decision' to push the job." Devore's Br. ¶ 33 (citing Dep. Barony 221:16–19, 296:18–24 (APP 114, 133)). But, again, the testimony Devore cites is not on point.

Dep. Barony 221:16–19 (APP 114)

Q. But on May -- March 2nd, you [Barony] certainly knew that water transfer was still frozen between the pond and the holding tank, right?

A. That's what I [Barony] was informed of, yes.

Dep. Barony 296:18–24 (APP 133)

Q. If you ran into issues that were going to be a problem, you [Barony] would keep American Eagle informed?

A. Correct.

Q. And work together to reach a resolution?

A. Yes, sir.

Q. If there was time?

A. Yes, sir.

[7] Even the testimony he goes on to quote (only in part) in Devore's Brief at paragraph 33 does not stand for Devore's proposition he forwards for this Court:

> **Q. Were you [Barony] the one making the decisions about whether to try to repair the heaters or not?**
>
> A. As I [Barony] stated before, it was -- you know, I relayed -- or we, myself and Doug, relayed to American Eagle in our chain email that Hamm & Phillips was having issues with their heaters, and that they were working on trying to get them back up and going. And that -- I can't remember if it was in the email or it was a phone call stating that, you know, they were working on possibly acquiring another heater service due to the issues that we have, or had had with Hamm & Phillips, and the constant equipment issues and stuff like that. So it would be a joint decision. It would be me saying, Well, for the time being -- or, you know, I recommend, you know -- and then the ultimate decision would come from them, yes.
>
> **Q. "Them" being?**
>
> A. American Eagle, yes.

Dep. Barony 264:1–19 (APP 125). The foregoing is not evidence of any "'joint decision' to push the job." See Devore's Br. ¶ 33.

C. Devore has taken certain undisputed facts out of context in an attempt to create factual issues.

[8] Devore points to Barony's testimony to support the idea that American Eagle "retained control" and made "joint decisions" with Barony about how to address the frozen water line because "[e]verything that happened out [at the Well] was communicated to American Eagle," which Barony *believed* to include "the circumstances with the heater trucks." Devore's Br. ¶ 20 on p. 20 (quoting Dep. Barony 255:24–256:3 (APP 122–123)). The words that Devore chooses to ignore in those passages are that Barony was communicating to American Eagle, but American Eagle was only asking, in return, that Barony "keep them [American Eagle] updated." Dep. Barony 255:24–256:2 (APP 122–123); see also id. 254:8–10 (APP 122) ("I still have to communicate and contact American Eagle and let them know what's going on.").

[9] In quoting Richard Pershall who provided testimony on behalf of American Eagle at its 30(b)(6) deposition in this case, Devore highlights that IPT and American Eagle "were both decision makers." Devore's Br. ¶ 21 (quoting Dep. Am. Eagle 19:9–14 (APP 394)). But, what Devore did not provide to this Court for context was the specific explanation that Mr. Pershall provided on that point regarding what decisions each make:

> **Q: Okay. So did you regard American Eagle's relationship with Peterson [IPT] as one where Peterson [IPT] and American Eagle were both decision makers?**
>
> A: In different situations, they were both decision makers.
>
> **Q: Okay. So American Eagle maintained control in some circumstances over the decision making even if –**

> **even if Peterson [IPT] was on a location acting as the consultant?**
>
> A: I guess I don't understand the specifics of your question. American Eagle maintained control in terms of design of work. American Eagle did not maintain control in terms of execution of work.

Dep. Am. Eagle 19:9–25 (APP 394) (objections omitted).

[10] Important to his argument, Devore deduces from Barony's testimony that there was an alleged decision to move forward without heater trucks and that such decision was a "joint decision" with American Eagle " to push the job." See Devore's Br. ¶ 20 on pp. 19–22 and ¶ 33 (quoting only limited excerpts of Barony's deposition and running them together, which include 254:16–23, 255:3–256:2, 257:21–260:19, 262:20–263:14, 264:1–17, 296:18–22 (APP 122–126, 133)). But, a review of Barony's actual testimony lays out, at most, the following:

(a) For certain things—particularly when time was of the essence—Barony would make decisions and report them to American Eagle later; however, for other things—if there was time—Barony and American Eagle would "put [their] heads together to find . . the safest and best way to do [something]."

(b) Barony *believes* that he communicated to American Eagle the fact that some of the heater trucks were not working or broken down, that Hamm & Phillips (the company that supplied the heater trucks) was "working on trying to get them back up and going," that they may need to be repaired or replaced, and that the communication between Barony and American Eagle may have been either through

an e-mail chain or a phone call.

(c) Barony "can't remember" if "American Eagle was working on getting in touch with possibly another [heater company]" or "acquiring another heater service." But, he made recommendations to American Eagle about how to proceed, with American Eagle making an "ultimate decision" on it.

(d) In the meantime, Barony recalls being told "keep fighting the good fight and . . . try to do the best [you] can and . . . have them do the best they can to get their heaters back up and going."

(e) Then, either upon Barony's delay or his recommendation to American Eagle that it be delayed, the fracking operation at the Well was delayed until March 3, 2014, due to the weather.

Dep. Barony 257:3–266:7 (APP 123–125).

[11] Even if all of the actual 'facts' from Barony's testimony that Devore relied on above are taken as true, Devore has shown only the following:

(a) American Eagle had certain vendors (independent contractors) that it had agreements with to complete the fracking operation. If the vendors were creating safety issues, Barony was not required by American Eagle to use them.

(b) IPT employees, including Barony, communicated with American Eagle to keep it updated about what was going on with the fracking operation at the Well.

(c) When Barony ran into issues that he did not feel he could address

on his own or were being fully addressed by his own efforts, he communicated with American Eagle about them, *potentially* including the issues with the heater trucks. In those instances, Barony and American Eagle would make decisions together with American Eagle having the ultimate say in the end goal.

(d) American Eagle was *potentially* working on procuring different heater trucks and told Barony, in the meantime, to "keep fighting the good fight and . . . try to do the best [you] can and . . . have them do the best they can to get their heaters back up and going." American Eagle did not instruct or direct that the fracking operation continue at all costs or in any manner prescribed by American Eagle.

III. ARGUMENT

A. The district court did not err in granting American Eagle Energy Corporation's Motion for Summary Judgment, dismissing with prejudice all of the causes of action Devore asserted against American Eagle in his Complaint.

[12] "'An actionable negligence consists of a duty on the part of an allegedly negligent party to protect the plaintiff from injury, a failure to discharge that duty, and a resulting injury proximately caused by the breach of the duty.'" Botner v. Bismarck Parks & Recreation Dist., 2010 ND 95, ¶ 10, 782 N.W.2d 662, 665 (quotation omitted). American Eagle did not owe any duty to Devore, and, to the extent (if any) that it did, the alleged breach of said duty was not the proximate cause of Devore's injuries. Thus, summary dismissal by the district court was appropriate.

i. Standard of Review

[13] This Court has made clear the standard for reviewing a district court's decision OF granting summary judgment as a matter of law.

> Whether summary judgment was properly granted is "a question of law which we review de novo on the entire record." Wahl v. Country Mut. Ins. Co., 2002 ND 42, ¶ 6, 640 N.W.2d 689.
>
> > Summary judgment is a procedural device for promptly and expeditiously disposing of an action without a trial if either party is entitled to judgment as a matter of law and no dispute exists as to either the material facts or the reasonable inferences to be drawn from undisputed facts, or resolving the factual disputes will not alter the result. Issues of fact may become questions of law if reasonable persons could reach only one conclusion from the facts. Summary judgment is appropriate against parties who fail to establish the existence of a factual dispute on an essential element of their claim and on which they will bear the burden of proof at trial.
>
> Hilton v. North Dakota Educ. Ass'n, 2002 ND 209, ¶ 23, 655 N.W.2d 60 (citations omitted). The evidence is reviewed in a light most favorable to the party opposing the motion, and that party receives the benefit of all inferences that can reasonably be drawn from the evidence. Trinity Health v. North Central Emergency Services, 2003 ND 86, ¶ 15, 662 N.W.2d 280.
>
> This Court has stated:
>
> > Although the party seeking summary judgment has the burden of showing that there is no genuine issue of material fact, the party resisting the motion may not simply rely upon the pleadings. ***Nor may the opposing party rely upon unsupported, conclusory allegations. The resisting party 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 by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an issue of material fact.***

> ***In summary judgment proceedings, neither the trial court nor the appellate court has any obligation, duty, or responsibility to search the record for evidence opposing the motion for summary judgment. The opposing party must also explain the connection between the factual assertions and the legal theories in the case, and cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief.***
>
> Anderson v. Meyer Broad. Co., 2001 ND 125, ¶ 14, 630 N.W.2d 46 (quoting Peterson v. Zerr, 477 N.W.2d 230, 234 (N.D.1991) (citations omitted)). ***Additionally, mere speculation is not enough to defeat a motion for summary judgment.*** BTA Oil Producers v. MDU Res. Group, Inc., 2002 ND 55, ¶ 49, 642 N.W.2d 873. ***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 (1986)).

Iglehart v. Iglehart, 2003 ND 154, ¶¶ 9–10, 670 N.W.2d 343, 347 (emphasis added).

[14] Devore has not "present[ed] competent admissible evidence" "which raises an issue of material fact;" but, instead, he has left this Court "to search the record for evidence opposing the motion for summary judgment" and "the chore of divining what facts are relevant or why facts are relevant, let alone material, to [Devore's] claim for relief." See id. ¶ 10 (quoting Anderson v. Meyer ¶ 14). If "[a] scintilla of evidence is not sufficient to support a claim" and survive dismissal by summary judgment, certainly the non-existence of any evidence to support Devore's claim should not afford a reversal of the Order in this case. See id. ¶ 10 (citing Wishnatsky ¶ 5).

ii. When an employer does not retain control over its independent contractors' work, the employer cannot be found liable for the negligence of the independent contractors.

[15] "Generally, an employer of an independent contractor is not liable for the negligence of its independent contractor." Pechtl v. Conoco, Inc., 1997 ND 161, ¶ 9, 567

N.W.2d 813, 816 (citing Kristianson v. Flying J Oil & Gas, Inc., 553 N.W.2d 186, 188–89 (N.D. 1996)); Grewal v. ND Ass'n of Cntys & Northwest Contracting, Inc., 2003 ND 156, ¶ 10, 670 N.W.2d 336, 339; Fleck v. ANG Coal Gasification Co., 522 N.W.2d 445, 447–48 (N.D. 1994); Madler v. McKenzie Cnty., 467 N.W.2d 709, 711 (N.D. 1991); Newman v. Sears, Roebuck & Co., 43 N.W.2d 411, 414 (N.D. 1950); see also RESTATEMENT (SECOND) OF TORTS § 409 (1965)).

[16] One recognized exception under North Dakota law to the general rule of nonliability for an employer of an independent contractor is found in Section 414 of the Restatement (Second) of Torts.

> Restatement (Second) of Torts § 414 creates an exception to the general rule for an employer who retains control over the independent contractor's work:
>
> > "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."
>
> In Fleck, 522 N.W.2d at 448, we explained the degree of retained control necessary to impose a duty on the employer:
>
> > ***"The liability created by Section 414 arises only when the employer retains the right to control the method, manner, and operative detail of the work;*** it is not enough that the employer merely retains the right to inspect the work or to make suggestions which need not be followed. Comment c to Section 414 explains the difference:
> >
> > > " 'In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. ***It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which***

> ***need not necessarily be followed, or to prescribe alterations and deviations.*** Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.' "
>
> The doctrine of retained control does not make the employer of an independent contractor vicariously liable for the contractor's acts; rather, it creates a separate basis of liability for the employer's failure to exercise retained control with reasonable care. Kristianson; Fleck; Zimprich v. Broekel, 519 N.W.2d 588 (N.D. 1994). The duty created by Section 414 may arise either by an express contractual provision giving the employer the right to control the operative details of the independent contractor's work, or by the employer's actual exercise of retained control of the work. Fleck; Madler.

Pechtl, 1997 ND 161, ¶¶ 9–11, 567 N.W.2d at 816 (emphasis added); see also Grewal, 2003 ND 156 at ¶¶ 10–12, 670 N.W.2d at 339–40 (citing Rogstad v. Dakota Gasification Co., 2001 ND 54, ¶¶ 14–16, 623 N.W.2d 382); Doan v. City of Bismarck, 2001 ND 152, ¶ 27, 632 N.W.2d 815, 824. "An employer of an independent contractor who retains control of the work owes a duty of care to the independent contractor's employees to exercise the retained control with reasonable care." Kronberg v. Oasis Petroleum N. Am. LLC, No. 4:13-cv-011, 2015 WL 12591736 at *3 (D.N.D. Feb. 27, 2015) (citations omitted).

[17] In considering whether an employer is liable for the acts of an independent contractor, a court first must determine whether the relationship involved is one of employer-independent contractor or one of employer-employee, and after determining a relationship is one of employer-independent contractor, a court then must determine whether the employer retained sufficient control over the operative details and workings of

the independent contractors. For the employer to retain sufficient control, "'direct supervision over the step-by-step process of completing the work'" is required. Barton v. Pioneer Drilling Servs., Ltd., 2012 WL 6082716 at * 4 (D.N.D. Dec. 4, 2012) (quoting LeJeune v. Shell Oil Co., 950 F.2d 267, 270 (5th Cir. 1992) (internal citations omitted)). Without retained control, there can be no duty.

[18] In the following cases, this Court determined that liability did not arise and retained control was not sufficiently shown when:

(a) An employer's employee checked on the work of the independent contractor to assure compliance with the contract *but* did not directly supervise or control any aspect of the work. Fleck, 522 N.W.2d at 449.

(b) "[T]he employer [had] a general right to order the work stopped or resumed, to inspect its progress, or to receive reports or other rights generally reserved to employers . . . ." Grewal, 2003 ND 156, ¶ 21; Pechtl, 1997 ND 161, ¶ 19 ("Any inspections and monitoring by [the operator's] employees to ensure compliance with the contract do not raise an inference that [the operator] retained control of the operative details of [the independent contractor]'s work . . . to create a duty under Section 414.").

(c) Even though 98% of an independent contractor's work was for only one operator for an extended period of years, that alone did not prove "control" by an employer. Pechtl, 1997 ND 161, ¶ 14.

(d) An employer gave "some general direction for the result of the work," but an employer's retention of a right to inspect work, receive reports, or make non-binding suggestions does not trigger the exception to

an employer's non-liability. Crocker v. Morales-Santana, 2014 ND 182, ¶ 32, 854 N.W.2d 663, 674.

(e) Where "[the employer] did not provide . . . any written instructions or specifications relating to the details of how the [specific job] was to be performed" and none of the employer's employees were present at the site, there was "no actual control of the work involved." Madler, 467 N.W.2d at 712.

(f) "[An] employer did not retain actual control over the scope of work performed by the employee of the independent contractor even if the employer informed the employee what work to do and periodically checked on the progress of that work." Doan, 2001 ND 152 at ¶ 20.

[19] The U.S. District Court for the District of North Dakota and the Eight Circuit Federal Court of Appeals have also had opportunity to consider these issues involving operators of oil and gas properties under North Dakota law a number of times.

(a) Receiving a daily report, giving information about an end goal, providing equipment for use without direct supervision or control on its use, and making engineering plans and surveys available are not sufficient to establish control of day-to-day operations to give rise to employer liability under Section 414 of the Restatement (Second) of Torts. Kronberg, 2015 WL 12591736, at **4–6; see also Kronberg v. Oasis Petroleum N. Am. LLC, 831 F.3d 1043, 1047–49 (8th Cir. 2016) (affirming Kronberg 2015 WL 12591736) (finding it instructive that the consultant could complete the job as he wished – free to use his expertise for the objective requested).

(b) Even where the operator had imposed its own safety regulations upon its independent contractors and had access to the premises to ensure compliance, those factors did not constitute an exercise of retained control. Barton, 2012 WL 6082716, at * 4. Further, even the fact that the operator may have owned the chain that broke (which led to the decedent's untimely death) was not enough to constitute an exercise by the operator of retained control that was sufficient to create a duty because the operator did not "directly supervise or control[] its use, or instruct[] the independent contractor's employee on use of the equipment." Id. at *5.

(c) Receiving written status reports and making a certain piece of equipment available, without directing whether, when or how to use it, is not a "level of retained control [] sufficient to create a duty for the employer of an independent contractor." Iverson v. Bronco Drilling Comp., Inc. 667 F. Supp. 2d 1089 (D.N.D. 2009).

iii. American Eagle is not liable for any negligence of its independent contractors because American Eagle did not retain control over the independent contractors' work.

[20] IPT and FBS are independent contractors of American Eagle because, among other things, American Eagle and each of IPT and FBS considered IPT and FBS independent contractors of American Eagle. See Iverson, 667 F. Supp. 2d at 1095–96. Devore did not contest this in response to American Eagle's motion. See Devore's Resp. Br. ¶¶ 4, 19–20 (APP 515, 533–534) (describing IPT and FBS as "contractors" of American Eagle). The only way that American Eagle may be subject to any liability in this action is if it had

retained control over the independent contractors' work. The undisputed record in this case demonstrates that American Eagle did not retain such control.

[21] Though not conceded in response to American Eagle's motion,[9] it appears in his most recent briefing that Devore actually acknowledges this delegation of control by American Eagle to IPT and FBS. See Devore's Br. ¶ 14 ("IPT and Barony were directly in control of the work location / frac processes . . . ."), ¶ 16, ¶ 34 ("IPT/Barony were directly in charge (face-to-face with Devore) of the decision-making processes about whether to delay the frac (or not); about whether to send the flat-bed truck for a new lay-flat water line; about whether to use the one (1) remaining heater to thaw the frozen line (rather than keep it on th[e] AST tank); about whether to wait for a new vendor to be contracted by American Eagle to show up with functioning heaters; and/or about whether to use more rudimentary tools (compressed air and a sledgehammer) to 'pig' the line."). Devore argues that because IPT/Barony allegedly instructed him and FBS "precisely what process . . . to follow," "FBS was not entirely free to do the work its own way;" however, these alleged instructions of IPT/Barony do not constitute retained control by American Eagle. See Devore's Br. ¶ 35(1).

[22] American Eagle played no active role in the incident or in the set-up, execution, or supervision of the operations at the Well or at the Pond or any area in between. No American Eagle employees were present or directed, controlled, performed, or supervised the fracking operation for the Well, including the transfer of water from the Pond. Rather, each of those functions was delegated to an independent contractor with experience and expertise in its respective area. As he recognizes in Devore's Brief, American Eagle

[9] See Devore's Resp. Br. ¶¶ 13, 14, 20 (APP 529–530, 534).

provided the goal, and the independent contractors were "to execute the frac plan"[10] – under North Dakota law this is not retained control by American Eagle.

[23] Each contractor had the exclusive right to direct, control, perform, or supervise its work and the work of its employees. The frac consultants from IPT had and exercised complete control over the site of the Well to ensure safe operations and completion of the work. Like the facts in the cases that are detailed in Part (A)(ii) above, IPT obtained its information about an end goal from American Eagle, was free to use its expertise for the objective requested, and provided reports to American Eagle. Just because American Eagle employees may have coordinated on a daily basis, American Eagle did not retain control. By law, unless the "control over the method of work" is shifted to the employer, "mere retention of supervisory controls" "meant to guarantee that the final results were in accord with [the employer's] plans" is not an employer exercising "actual control over the details of performing the work." Madler, 467 N.W.2d at 712.

[24] Both IPT and FBS knew that they should do their associated work in a safe and efficient manner. The undisputed evidence is clear that American Eagle made safety its top priority – "anybody can shut down [an American Eagle] job" without retribution. Dep. Am. Eagle 73:6–13 (APP 408). Barony knew he could 'stop work' and override American Eagle if something was unsafe. Dep. Barony 184:10–19 (APP 105). FBS knew it had 'stop work' authority as well. Dep. FBS 52:12–24 (APP 462). If American Eagle was the be-all, end-all for every decision, the foregoing would not be the case.

[10] See Devore's Br. ¶ 30.

[25] IPT and FBS made decisions of what equipment to use and when and how to use it. Even if American Eagle allegedly was responsible for the heater trucks that were available for the fracking operation,[11] it is not retained control. ***"'[M]erely providing equipment is not the kind of control that creates a duty.' Instead, 'a duty arises only if the employer, in addition to providing the equipment, also directly supervises or controls its use, or instructs the independent contractor's employee on use of the equipment.'"*** Barton, 2012 WL 6082716 at *5 (emphasis added) (quoting Kristianson, 553 N.W.2d at 190); see also Iverson, 667 F. Supp. 2d at 1098 (citing Kristianson for the same proposition).

[26] Devore makes an unsupported jump in his argument when he starts with the notion that an alleged joint decision with or a decision by American Eagle to look for a different heater truck equates to American Eagle being the final decision maker for every decision at the Well and for this fracking operation. See Devore's Br. ¶ 33 (asserting that all "Appellees shared the retained control of critical operation decision-making details"). The undisputed material facts show otherwise. When Barony ran into issues that he did not feel he could address on his own, he communicated with American Eagle about them, including the issues with the heater trucks, and they would make decisions together, with American Eagle having the ultimate say. Even if true, this decision-making process is not American

[11] Compare Devore's Br. ¶ 31 ("American Eagle and IPT/Barony were charged with the responsibility to assure that the Well location had all needed equipment (including heaters for water transfer).") with Devore's Br. ¶ 20 on p. 19 ("Richard Pershall testified that IPT/Barony were responsible for assuring needed equipment on the location.").

Eagle restricting its independent contractors' freedom to actually carry out the work in its own way. It is not retained control.

[27] American Eagle gave the overall objective of what was to occur and could check in on the status; but, the details of conducting and finalizing the operation were up to the independent contractors with their specialized knowledge, skill set, and experience. The independent contractors were trusted and empowered to satisfy the objectives of their respective contracts with American Eagle in the customary manner and were required to simply report to American Eagle the progression of the work. The independent contractors knew this and did this.

[28] The "MATERIAL UNDISPUTED FACTS" show that American Eagle did not retain control over its independent contractors' work. Because it did not retain control,[12] American Eagle is not, as a matter of law, liable for any negligence of its independent contractors. Thus, summary dismissal of Devore's claim against American Eagle was appropriate as a matter of law.

iv. Even if an employer has a duty based on retained control or otherwise, the alleged breach of that duty must be the proximate cause of the injury in order to be liable.

[29] "To warrant a finding that a person's conduct is the proximate cause of an injury, the injury must be the natural and probable result of the conduct and must have been foreseen or reasonably anticipated by that person as a probable result of the conduct."

[12] Even assuming American Eagle retained any control over its independent contractors' work, Devore has not provided—and cannot provide—**any** evidence that such retained control was not exercised with reasonable care.

Kimball v. Landeis, 2002 ND 162, ¶ 7, 652 N.W.2d 330, 334; see also Moum v. Maercklein, 201 N.W.2d 399, 402 (N.D. 1972) ("[I]t must appear not only that the injury complained of was a natural and probable consequence of the negligent act of the defendant, but that such consequence ought reasonably to have been anticipated by a person of ordinary intelligence in the light of attending circumstances." (citation omitted)).

[30] "Proximate cause is that cause which, as a natural and continuous sequence, unbroken by any controlling intervening cause, produces the injury, and without which it would not have occurred." Jones v. Ahlberg, 489 N.W.2d 576, 581 (N.D. 1992). "[A]n intervening cause must be both independent and unforeseeable. . . . The intervening cause must be one which severs the connection of cause and effect between the original negligent act and the injury." Loper v. Adams, 2011 ND 68, ¶ 20, 795 N.W.2d 899, 905 (citations omitted); see also Miller v. Diamond Resources, Inc., 2005 ND 150, ¶ 13, 703 N.W.2d 316, 320–21.

v. Even assuming it was American Eagle's duty to provide working heater trucks, the absence of working heater trucks was not the proximate cause of Devore's injuries as a matter of law.

[31] Devore assumes two things in his argument: (1) American Eagle had a duty to supply working heater trucks, and (b) the issues with the heater trucks were the only thing that caused the Pipe to freeze. See Devore's Br. ¶ 31. For its motion and this appeal, American Eagle is willing to take those assumptions as true because they have no effect on the legal analysis.

[32] Devore's premise is that, because the heater trucks were down, the consequence was a frozen Pipe, which "create[d] a very dangerous situation that Dylan Devore was then ordered by Barony to address – and thus Dylan Devore['s] leg was substantially ripped

from his body." Devore's Br. ¶ 31 (footnote omitted). A frozen Pipe on the ground is not dangerous. Undertaking a cursory review of that sentence, one can see that there is an extremely large gap in the causation analysis. The facts here are clear that the proximate cause of Devore's injuries was the act of 'pigging the Pipe' by Devore and his own crew, which resulted in the Pipe immediately and uncontrollably jumping and whipping around on itself to hit and injure Devore. See DVD containing .mp4 video that was Ex. 12 to Dep. Devore (APP 512) (containing video of the incident).

[33] A review of the record shows that, at a minimum, the decision to and resulting action of 'pigging the Pipe' and hitting the Pipe with sledgehammers was, as a matter of law, the proximate cause of Devore's injuries. In fact, Devore points to this in his own Complaint. See Compl. ¶¶ 12–13 (APP 13–14).

[34] Devore asserts that "American Eagle/IPT/Barony made the decisions that were the cause of Dylan Devore's injuries," including "den[ying] the use of equipment (flat-bed and forklift) that would otherwise have been used to procure a new lay-flat line for installation," "fail[ing] to provide a heater . . . to thaw the frozen lay-flat water line . . .," and making joint decisions to "instruct[] FBS/Dylan Devore to 'pig' the frozen lay-flat water line." Devore's Br. ¶ 35(2). But, all of the evidence is to the contrary as related to American Eagle. In fact, Devore emphasizes the facts to this Court in Devore's Brief at paragraph 34 (already quoted in paragraph 21 above), noting that IPT/Barony did these things without any mention of American Eagle.

[35] The omission of any reference to American Eagle is likely because there is no evidence showing that American Eagle knew about or had any part in the order or decision to 'pig the Pipe.' See Dep. Barony 193:13–19, 291:12–15 (APP 107, 131); Dep. Devore

269:24–270:2 (APP 269). No one from American Eagle was present—or in North Dakota—when FBS was 'pigging the Pipe.' Dep. Barony 109:4–7 (APP 86); Ex. C, Dep. Devore 243:24–245:25, 265:8–14, 318:1–7 (APP 262–263, 268, 337). Devore does not cite to anything done by American Eagle requiring Devore to 'pig the Pipe.' See Devore's Br. ¶ 32 (setting out alleged refusals and directives from Barony regarding how to deal with the frozen Pipe not American Eagle).

[36] There is no evidence that American Eagle would have been able to foresee that FBS would 'pig the Pipe' and hit it with sledgehammers. American Eagle contracted with FBS because FBS held itself out to American Eagle as being qualified to safely and efficiently provide water transfer services in fracking operations in North Dakota. Dep. Devore 297:7–298:7 (APP 331–332); Dep. Am. Eagle 62:3–19, 69:17–20, 72:11–14 (APP 405, 407–408); Dep. FBS 13:12–20, 39:10–19, 40:9–12, 86:22–87:4, 160:21–161:1 (APP 453, 459, 471, 489–490); Am. Eagle Resps. to Ints. Nos. 4 & 9 (APP 438–439). This process for dealing with a frozen line was unusual in the industry. In fact, FBS had a number of safer options it could use for dealing with the frozen line that Devore was aware of himself, including vac trucks, torches, running a new line (particularly given the fact that this line was, at most, only 1,000 feet long), and breaking the Pipe down and removing ice in sections. See Dep. Devore 70:21–71:8, 73:2–9, 90:13–22, 94:24–95:4, 135:19–24, 177:23–178:3, 362:4–14 (APP 219–220, 224–225, 235, 246, 348).

[37] Further, one of the options that American Eagle could have foreseen was FBS shutting down the job. Even if American Eagle did tell Barony to "keep fighting the good fight and . . . try to do the best [you] can and . . . have them do the best they can to get their heaters back up and going," the facts show that American Eagle made safety its top priority

and would have expected "anybody [to] shut down [an American Eagle] job" without retribution if it was unsafe. Dep. Am. Eagle 73:6–13 (APP 408). FBS knew it could 'stop work' if it was unsafe. Dep. FBS 52:12–24 (APP 462). American Eagle could have foreseen shutting down the fracking operation, but the obviously dangerous approach that FBS and Devore took to try to clear the Pipe was not anywhere within American Eagle's purview based on the facts before this Court.

[38] Devore's position is similar to plaintiff's position in the case of Johnson v. Mid Dakota Clinic, P.C. wherein plaintiff alleged that "but for the [defendant] clinic's refusal to treat [plaintiff] he would not have fallen in the vestibule while trying to re-enter the mall [to go to a different clinic]." See 2015 ND 135, ¶ 17, 864 N.W.2d 269, 275. Just because defendant's action or inaction could be negligent and put a sequence of events into play, that is not the end of the analysis. In denying plaintiff's argument, this Court noted that

> [Plaintiff is] partially correct in that a different sequence of events might have occurred had [plaintiff] been treated[, but] that does not make [defendant] liable for the ***remote result*** of its decision to deny treatment to him. The term 'proximate cause' strictly contemplates "an immediate cause which in natural and probable sequence produces the injury complained of" and expressly excludes any assignment of legal liability "based on speculative possibilities, or circumstances and conditions remotely connected with the events leading up to the injury." Moum, 201 N.W.2d at 403–04.

Johnson, 2015 ND 135 at ¶ 17 (emphasis added).

[39] Devore's position is also similar to plaintiff's position in the case of Moum v. Maercklein cited in Johnson above. 201 N.W.2d 399 (N.D. 1972). In Moum, an employer had an employee report to work during a weather event that created white-out conditions. Id. at 403–04. While driving to work, the employee negligently attempted passing a car in the white-out conditions and struck oncoming traffic. Id. at 404. This Court determined

that the employee's negligence could not have been foreseeable to the defendant and, thus, was an intervening, proximate cause of plaintiff's injury.

> The law requires that a person reasonably guard against probabilities – not against all possibilities. The law will not hold a person liable for the unusual.
>
> . . . Thus a party is not chargeable with all possible consequences of his negligent act, and he is not responsible for a consequence which is possible according to occasional experiences. He is liable only for the consequences which are probable according to the ordinary, usual experiences of mankind.
> . . . [Proximate cause] excludes the idea of legal liability based on speculative possibilities, or circumstances and conditions remotely connected with the events leading up to the injury.

Id. at 403–04 (citations omitted).

[40] The evidence shows that the independent contractors' negligence in deciding to 'pig the Pipe' and actually 'pigging the Pipe' was not a probable result on these facts. American Eagle had no knowledge from IPT, Barony, or FBS of the process being used. See Dep. Barony 193:13–19 (APP 107). With such a unique and unusual circumstance, legal liability cannot lie against American Eagle.

[41] American Eagle's actions or inactions were not the proximate cause of Devore's injuries. Without proximate cause, there can be no negligence as a matter of law. Summary dismissal of Devore's claim against American Eagle was appropriate as a matter of law.

IV. ORAL ARGUMENT REQUESTED

[42] Oral argument will likely assist the Court in this matter. Where 'facts' have been forwarded without appropriate citation and undisputed facts have been taken out of context and twisted in Devore's argument, the undersigned will be able to clarify those issues and point to the applicable facts in the record when responding to any questions that the Court may have about the arguments presented.

V. CONCLUSION

[43] For the foregoing reasons, American Eagle respectfully requests that this Court enter an order affirming the decision of the district court in its Order Granting Defendant American Eagle Energy Corporation's Motion for Summary Judgment.

[44] DATED this 11th day of September, 2019.

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VI. CERTIFICATE OF COMPLIANCE

[45] I, Lisa M. Six, one of the attorneys of the law firm of Crowley Fleck PLLP, hereby certify that the foregoing brief complies with the page limitation in Rule 32, N.D.R.App.P., as it is a total of 38 pages.

/s/ Lisa M. Six
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VII. CERTIFICATE OF SERVICE

[46] I, Lisa M. Six, one of the attorneys of the law firm of Crowley Fleck PLLP, hereby certify that on this 11th day of September, 2019, true and correct copies of the **BRIEF OF APPELLEE AMERICAN EAGLE ENERGY CORPORATION** was served upon the following persons by E-mail:

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