20190117
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 27, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

DYLAN DEVORE,

Plaintiff-Appellant,

vs.

AMERICAN EAGLE ENERGY CORP., INTEGRATED PETROLEUM TECHNOLOGIES, INC., and BRIAN BARONY,

Defendants-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 Judge Joshua R. Rustad
District Court No. 12-2015-CV-00003

BRIEF OF APPELLEES INTEGRATED PETROLEUM TECHNOLOGIES, INC. AND BRIAN BARONY

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

[1] Appellant Dylan Devore ("Devore") was injured on March 2, 2014, while working as a supervisor for FBS Consulting Services LLC ("FBS"), a company that was providing water transfer services for oil and gas operations at a pond several miles away from the wellsite. Devore asserts claims for negligence and gross negligence against American Eagle Energy Corp., the operator of the wellsite; IPT, a fracking consultant; and Barony, an IPT employee who had no expertise in water transfer and was not present at the pond. The district court granted summary judgment in IPT and Barony's favor, as well as in American Eagle's favor.

1. Was the district court correct in finding IPT and Barony did not owe Devore a duty of care and did not proximately cause Devore's injuries?

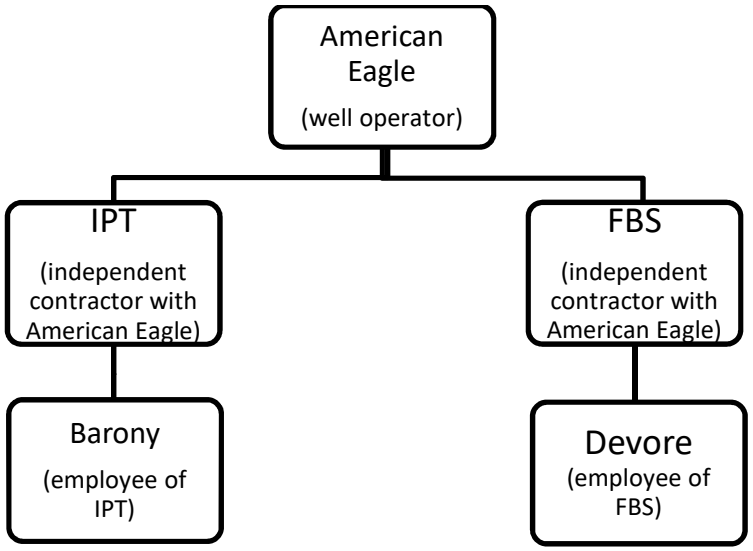
STATEMENT OF THE CASE

[2] American Eagle operated a well, the Haugen 15-12-163-103 (the "Haugen wellsite"), in Divide County, North Dakota. American Eagle hired IPT to serve as a fracking consultant. As an IPT employee, Barony worked as a wellsite supervisor at the Haugen wellsite and other wells operated by American Eagle.

[3] American Eagle also hired many other independent contractors, including a water transfer expert to provide water transfer services for its oil and gas operations. As a supervisor at FBS, Devore represented to American Eagle that he was an expert in water transfer. FBS also represented to American Eagle that it could ensure American Eagle received the water it needed by preventing its water lines from freezing in the middle of North Dakota winters. Based on these assurances, American Eagle hired FBS to provide water transfer services at American Eagle's wells, including the Haugen wellsite.

[4] As the water transfer experts, FBS and its employees had exclusive control over the method and manner of performing their duties for American Eagle, meaning FBS was expected to provide its own employees, equipment, and safety procedures to perform its duties for American Eagle. Moreover, FBS employees had "stop work" authority pursuant to which an employee could shut down work, without retribution, if he observed a safety issue. IPT, on the other hand, was not authorized to control the manner and means of FBS's work, and neither IPT nor Barony had authority to terminate FBS.

[5] Below is a chart illustrating the contractual and employment relationships among the parties:



[6] Despite FBS's assurances that it would not allow its water lines to freeze, Devore and his crew repeatedly allowed ice obstructions to form in their water lines while working for American Eagle. Indeed, on March 2, 2014, ice formed in a water line set up by Devore and his crew near the pond approximately three to five miles away from the Haugen wellsite. In an attempt to clear water out of the line, Devore's crew inserted a sponge-like object known as the "pig" into the water line and turned on an air compressor. At the time, neither Barony nor any other IPT employee was present at the pond. After the compressor

was turned on, the pig got stuck somewhere inside the line. An FBS crewmember then decided to pound on the frozen segment of the line with a sledgehammer to dislodge the ice. Though all crewmembers were supposed to stand back, Devore, the crew's supervisor, decided to stand immediately adjacent to the line while his crewmember pounded on the pressurized line. The crewmember's pounding soon dislodged the ice and caused the line to whip back and strike Devore's leg (referred to throughout as the "Incident"). All of this was captured on video by another crewmember.

[7] Devore subsequently filed an action against American Eagle, IPT, and Barony alleging claims for negligence and gross negligence. Specifically, Devore alleged that American Eagle, IPT, and Barony owed him a duty to provide a safe work place, this duty was breached, and the breach proximately caused Devore's injuries. IPT and Barony moved for summary judgment on Devore's claims, and based on its review of the evidence, the district court granted their motion, finding IPT and Barony did not owe Devore a duty of care or proximately cause his injuries.

[8] The central issue in this case is Devore's failure to establish a genuine issue of material fact that IPT and Barony owed him a duty of care or proximately caused his injuries.

[9] The district court thoroughly analyzed the record and legal issues and rejected Devore's claims. On appeal, Devore does not challenge the district court's holding that IPT and Barony did not proximately cause his injuries. On that basis alone, the district court's judgment should be affirmed. But even if the Court considers Devore's arguments, the undisputed evidence shows that IPT and Barony are not liable for Devore's injuries.

REQUEST FOR ORAL ARGUMENT

[10] IPT and Barony request the Court schedule oral argument under N.D.R.App.P. 28(h). This matter involves the district court's determination of the absence of genuine issues of material fact, and oral argument would be helpful in the Court's de novo review of the district court's decision.

STATEMENT OF FACTS

[11] The following facts are undisputed for purposes of this appeal.

I. The Parties

A. American Eagle

[12] American Eagle was the operator of the Haugen wellsite. (Devore Br. ¶ 12; Appellant's Appendix ("App.") at 24.)

B. IPT and Barony

[13] American Eagle entered into a Consulting Services Agreement with Peterson Energy Management, Inc. (the "Consulting Agreement"), under which American Eagle retained Peterson on a "non-exclusive basis to provide petroleum engineering and wellsite supervision consulting services utilizing information provided to Peterson by [American Eagle]." (App. at 1042.)[1] Peterson subsequently assigned its rights and obligations under the Consulting Agreement to IPT. (*Id*. at 393–94, 1049.)

[14] Under the Consulting Agreement, IPT was charged with ensuring the fracking operation conducted at the Haugen wellsite was efficient, safe, and complied with

[1] Although the Consulting Agreement cited by the district court is unsigned, American Eagle confirmed to the district court that this document reflects the terms of its agreement with IPT. (App. at 26 (relying on the unsigned agreement as evidence that IPT was an independent contractor for American Eagle), 393–94, 1049.)

American Eagle's plan. (*Id*. at 123–24, 395–96, 400–01.) At all relevant times, Barony was an employee of IPT and worked at wells operated by American Eagle, including the Haugen wellsite. (*Id*. at 1064, 1065–66.)

[15] American Eagle and IPT agreed that American Eagle "operates the well, and owns or represents the owner(s) of the well." (*Id*. at 1042.) American Eagle and IPT further agreed that American Eagle "ha[d] superior knowledge of the well" and that IPT was "working at [American Eagle]'s sole direction and instruction." (*Id*.) The Consulting Agreement is silent as to IPT's responsibility for or knowledge of water transfer services. (*Id*. at 1042–47.)

C. FBS

[16] FBS provides water transfer services in connection with oil and gas operations. In general, water transfer crews are responsible for transferring water to fracking wells from nearby sources, which are typically either ponds or water tanks. (*Id*. at 216–17.) A water transfer crew lays down pipe or water lines that can span miles. (*Id*.) Once the pipe or line is set, the water transfer crew is responsible for monitoring water levels at the wellsite and maintaining water flow as required to perform the fracking operation. (*Id*.)

[17] FBS held itself out to American Eagle as qualified to provide water transfer services for fracking operations. (*Id*. at 331–32, 459, 490, 1058.) Indeed, as is crucial for oil and gas operations during North Dakota winters, FBS represented to American Eagle that it would prevent its water lines from freezing. (*Id*. 1053–54, 1060–61.) Devore, an FBS employee who pitched FBS's services to American Eagle, represented to American Eagle that he was an "expert" in water transfer. (*Id*. at 984, 1058, 1076–78.)

[18] Based on these assurances, American Eagle contracted with FBS to provide water transfer services at its wells, including the Haugen wellsite.[2] (*Id*. at 1053–54, 1075.) For use in its fracking operations at the Haugen wellsite, American Eagle obtained permission from a local farmer to draw water from the pond. (*Id*. at 24.) The pond is located approximately three to five miles away from the Haugen wellsite. (*Id*. at 249.) Pursuant to its agreement with American Eagle, FBS would pump water into a tank near the pond, and the water was then transferred by truck to the wellsite.[3] (*Id*. at 1054–55.)

[19] American Eagle expected FBS to be the expert in water transfer for the Haugen well. According to both American Eagle and FBS, FBS had exclusive control over the method and means of performing their water transfer duties for American Eagle. Travis Leach, the FBS 30(b)(6) representative, confirmed during his testimony that the "FBS work crew would control the method and the manner in which it would do water transfer[,]" and "FBS didn't need somebody else to tell it how to deal with laying the hose and transferring the water and all those other details[.]" (*Id*. at 1083.) Likewise, Richard Pershall, American Eagle's 30(b)(6) representative, expressly agreed that FBS was expected to provide its own employees, equipment, and safety procedures to perform its duties for American Eagle. (*Id*. at 1055.) In addition, FBS has its own safety program for its employees, which included the ability to "stop work" if another contractor told FBS to do something it believed was unsafe. (*Id*. at 1079, 1080.)

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[2] Separately, American Eagle contracted with Hamm & Phillips to provide heater trucks and ensure their operation. (App. at 248, 411.)

[3] Though there is no written contract between American Eagle and FBS, FBS understood that it was a contractor of American Eagle. (App. at 452, 456.)

[20] In contrast, American Eagle did not expect IPT or Barony to be experts in water transfer, nor did it expect or authorize IPT or Barony to control the method and manner of FBS's work. (*Id*. at 1056.) IPT and Barony did not have authority to hire or fire any contractor, including FBS or Devore. (*Id*. at 1057.)

D. Dylan Devore

[21] Devore began working in the oil and gas industry in December 2011 when he was hired by a water transfer company called Rockwater Energy Solutions, LLC. (*Id*. at 1357.) Devore began as a member of the water transfer crew at Rockwater and eventually worked his way up to supervisor in February 2013. (*Id*. at 969-70.) But soon after, in May 2013, Devore was terminated from Rockwater. (*Id*. at 970.) After briefly working at two other water transfer companies, Devore represented to FBS that he had extensive water transfer experience and knowledge, (*id*. at 454, 471, 489–90), and thereafter was hired to begin working on December 27, 2013, as a lead or supervisor. (*Id*. at 221, 222.)

[22] As a supervisor for the FBS water transfer crew for the Haugen wellsite, Devore was required to serve as the contact for IPT, design and lay out the jobsite, perform job-safety-analyses to identify safety hazards, and ensure the safety of the crewmembers. (*Id*. at 212–213.)

[23] While still at Rockwater, Devore learned a technique for clearing water from a water line that he calls "pigging the line." (*Id*. at 974–75, 983.) According to Devore, "pigging the line" involves connecting an air compressor to one end of the water line, so the air is forced through the line to clear water from the line. (*Id*. at 981–83.) Once this process is complete, a sponge-like object known as the "pig" (which Devore compares to a Nerf football) is inserted in the line, and the compressor is used to push the object through

the line. (*Id*.) As the object passes through the line, it removes water from the line, akin to a squeegee at a gas station. (*Id*. at 982.)

[24] Sometimes the "pig" can get stuck if the crew has allowed ice to form in the line. (*Id*. at 990–91.) To clear the obstruction, Devore learned to hit the frozen segment of the water line with a sledgehammer to dislodge the ice. (*Id*.) This can cause the line to whip around due to built-up air pressure when the obstruction is finally cleared. (*Id*. at 14.)

[25] During Devore's first shift at FBS, at an unrelated wellsite prior to the American Eagle job, Devore and his crew attempted to clear ice from a line by "pigging the line." (*Id*. at 583–84, 778–80.) When the pig got stuck behind the ice, Devore and his crew decided to take turns pounding on the frozen obstruction with a sledgehammer over the course of two ten-hour days. (*Id*. at 784.) The ice eventually broke and was pushed out the open end of the line by the compressed air, causing the line to whip around on itself. (*Id*. at 585, 780.)

[26] Despite FBS's assurances that it did not allow its water lines to freeze, Devore repeatedly encountered ice obstructions in FBS's water lines during the Haugen job. (*Id*. at 979–80.) Just as they had done before, on at least three separate occasions, Devore and his crew attempted to clear the obstructions by banging on the frozen lines with sledgehammers. (*Id*. at 784, 788–90.)

[27] During that time period, Devore and other crewmembers posted multiple videos on YouTube of themselves banging on frozen lines with sledgehammers. During each of the videos, crewmembers can be seen pounding on the line with a sledgehammer, eventually causing the line to whip around from built up pressure when the ice gives way. (*Id*. at

1099–1100,[4] 1011–18 (Devore discussing videos).) During one of the videos, Devore can be heard telling another crewmember, "keep hitting it. She'll go in a second." (*Id*. at 1017.)

[28] During his employment at FBS, Devore also watched a video posted by another FBS employee in 2011, titled "Black Hose of Death Hilarious." (*Id*. at 1101; *see also id*. at 995 (Devore discussing video).) During this video, the cameraman laughs hysterically after the line begins whipping around and knocks over the subject of the video. Devore testified that he watched this video two or three times before he was injured. (*Id*. at 785.)

II. The Incident

[29] On or before March 2, 2014, ice formed in a water line set up by Devore and his crew at a pond located approximately three to five miles away from the Haugen wellsite. (*Id*. at 12–13.) Devore claims that he met with Barony at the Haugen wellsite around noon that day. According to Devore, Barony knew FBS's equipment was broken and the water line was frozen. (*Id*. at 1021, 1024.) Barony allegedly informed Devore that he wanted to start pumping in a couple of hours and asked Devore if he could pig the line.[5] (*Id*. at 1021–22, 1025, 1026.) Devore purportedly responded "[o]kay" and said his crew would "finish this." (*Id*. at 1027.)

[30] Devore returned to the pond location, where it is undisputed that neither Barony nor any other IPT employee was present at the time of the Incident. (*Id*. at 1020.) Devore's crew proceeded to insert the pig and turn on the compressor. (*Id*. at 1038–39.) The pig got

[4] Citations to page numbers 1099–1102 of the Appendix are cover pages for DVD exhibits to IPT and Barony's summary judgment motion. Devore has represented that he mailed copies of this disk to the Court.

[5] Though Barony denies discussing any procedures to clear the frozen water line on the day of the Incident, for purposes of this appeal, IPT and Barony do not dispute Devore's testimony. As set forth below, whether Barony told Devore to "pig the line" is irrelevant to the question of Barony and IPT's liability.

stuck somewhere in the line. Juan, a member of Devore's crew, decided to pound on the frozen segment with a sledgehammer to dislodge the ice. (*Id*. at 792.)

[31] A member of Devore's crew began filming the Incident on his cellphone. (*Id*. at 791–92.) With one of the strikes of the sledgehammer, the ice dislodges and the line begins whipping around. (*Id*. at 14, 1102.) During the video, Devore's crewmembers can be heard laughing as the line whips around due to built-up air pressure. Eventually, the line comes to a rest, and the video ends after crewmembers discover that Devore was injured. (*Id*. at 792, 1102.)

[32] Devore admits that all crewmembers were supposed to be standing back. (*Id*. at 861–62.) Nevertheless, Devore chose to stand immediately adjacent to the frozen water line while Juan pounded on it. (*Id*. at 873.) The following photograph, a still image from thirty-four seconds into the video, shows Devore in the left side of the frame after the ice dislodged and the line began whipping around:

IPT/Barony MSJ Exhibit L at 0:34

(*Id*. at 1102.) The next photograph, a still image from thirty-six seconds into the video, shows Devore in the far right side of the frame, unable to run away:

IPT/Barony MSJ Exhibit L at 0:36

(*Id*.) Finally, the remaining two images show Devore falling after the water line strikes his leg:

IPT/Barony MSJ Exhibit L at 0:37.25

IPT/Barony MSJ Exhibit L at 0:44

(*Id*.) After viewing this video, Mr. Leach, the FBS representative, testified that he believed Devore was responsible for the decision to bang on the frozen line with a sledgehammer. (*Id*. at 1084.) Specifically, Mr. Leach testified that he would have expected Devore, as the most senior supervisor on location with the most knowledge about FBS, "to see the dangers before they happened and to mitigate them and to be responsible for the safety of everyone there, including himself." (*Id*.)

III. Procedural History

[33] Devore brought claims for negligence and gross negligence against American Eagle, IPT, and Barony. (*Id*. at 10–19.) IPT and Barony moved for summary judgment, arguing that Devore failed to raise a genuine issue of fact that IPT or Barony owed him a

duty of care or proximately caused his injuries. (*Id*. at 941–66.) Devore argued that IPT and Barony had a duty because they retained control over the method by which Devore conducted his work, and Barony's alleged instruction to Devore to "pig the line" ultimately caused Devore's injuries. (*Id*. at 1108–40.)

[34] The district court held a combined hearing on American Eagle's summary judgment motion, as well as IPT and Barony's summary judgment motion. (*Id*. at 1573.) During the hearing, the district court reviewed the video of the Incident and still shots from the video. (*Id*.) Based on its review of the evidence, the district court granted IPT and Barony's summary judgment motion on two alternative grounds. The court first concluded that Devore failed to raise a genuine issue of material fact that IPT or Barony owed him a duty of care. (*Id*. at 1574.) As an initial matter, the court found that the "retained control" doctrine did not apply, because that doctrine applies only to *employers* of independent contractors. (*Id*. at 1585.) IPT and Barony, who did not employ and had no contractual relationship with FBS or Devore, did not owe Devore a duty of care under the "retained control" doctrine. (*Id*.) But even assuming the "retained control" doctrine did apply, the court found that Devore failed to show that IPT and Barony possessed the requisite degree of control over Devore, the water transfer expert, to establish a duty of care. (*Id*. at 1585–91.) As the court noted, even accepting Devore's allegations that Barony asked him to "pig the line," Devore and his crew—not Barony or IPT—controlled the manner and means by which they conducted their water transfer activities, including their decision to pound on a pressurized, frozen water line with a sledgehammer. (*Id*. at 1591–92.)

[35] Second, the court found that Devore failed to raise a genuine issue of material fact that IPT or Barony proximately caused his injuries. (*Id*. at 1574.) The court reasoned that

Devore's decision to pound on the pressurized, frozen water line with a sledgehammer was unforeseeable, as was his decision to stand immediately adjacent to the water line while his crewmember pounded on it. (*Id*. at 1593.)

[36] Based on these findings, the district court granted IPT and Barony's summary judgment motion and dismissed Devore's claims. (*Id*.) The district court likewise granted American Eagle's summary judgment motion. (*Id*. at 1548–49.) This appeal followed.

STANDARD OF REVIEW

[37] A grant of summary judgment is reviewed de novo on appeal. *Johnson v. Mid Dakota Clinic, P.C.*, 2015 ND 135, ¶ 9, 864 N.W.2d 269, 273. Summary judgment is appropriate whenever there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* N.D.R.Civ.P. 56(c). To establish a genuine issue of material fact, "the non-moving party cannot rely on speculation and must present enough evidence for a reasonable jury to find for the plaintiff." *Johnson*, 2015 ND 135, ¶ 9, 864 N.W.2d at 272–73.

ARGUMENT

I. DEVORE'S FAILURE TO ADDRESS THE DISTRICT COURT'S ALTERNATIVE HOLDING REGARDING PROXIMATE CAUSE IS FATAL TO HIS APPEAL.

[38] On appeal, Devore only vaguely suggests that IPT and Barony "caused" his injuries. (Devore Br. ¶¶ 12, 23, 32, 35.) He does not, however, challenge the district court's conclusion that neither IPT nor Barony proximately caused Devore's injury. (*See* App. at 1593.) By not challenging one of the two independent grounds of the district court's judgment, Devore has waived any claim of error.[6] *See Maher v. City of Chicago*, 547 F.3d

[6] Moreover, the Court should refuse any attempt by Devore to remedy his fatal omission in his reply brief. *See Turnage v. Fabian*, 606 F.3d 933, 942 n.9 (8th Cir. 2010) (declining to consider argument made for the first time in a reply brief). "Considering an argument advanced for the first time in a reply brief . . . is not only unfair to an appellee [who lacks

817, 821 (7th Cir. 2008) ("[I]n situations in which there is one or more alternative holdings on an issue, we have stated that failure to address one of the holdings results in a waiver of any claim of error with respect to the court's decision on that issue.") (citation omitted). The district court's order should be affirmed on this basis alone.

II. EVEN IF THE COURT CONSIDERS DEVORE'S ARGUMENTS, THE UNDISPUTED EVIDENCE SHOWS THAT IPT AND BARONY ARE NOT LIABLE FOR DEVORE'S INJURIES.

[39] To establish a claim for negligence, Devore must prove (1) IPT and Barony owed Devore a duty of care, (2) IPT and Barony breached that duty, and (3) Devore suffered an injury that was proximately caused by IPT and Barony's breach. *Palmer v. 999 Quebec, Inc.*, 2016 ND 17, ¶ 9, 874 N.W.2d 303, 309. The district court correctly applied North Dakota law in dismissing Devore's claims for negligence and gross negligence, finding that IPT and Barony did not owe Devore a duty of care or proximately cause his injuries.[7]

A. IPT and Barony Did Not Owe Devore a Duty of Care.

[40] Whether a duty exists is a question of law for the court and is appropriately decided on summary judgment. *Rogstad v. Dakota Gasification Co*., 2001 ND 54, ¶ 12, 623 N.W.2d 382, 385. "To establish a cause of action for negligence, a plaintiff must show the defendant has a duty to protect the plaintiff from injury." *Id*. "Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal

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an opportunity to respond] but also entails the risk of an improvident or ill-advised opinion on the legal issues tendered." *McBride v. Merrell Dow & Pharms., Inc*., 800 F.2d 1208, 1211 (D.C. Cir. 1986).

[7] The district court correctly concluded that Devore's gross negligence claim fails for the additional reason that Devore did not present evidence showing that IPT or Barony "manifeste[d] a mental attitude of indifference that evince[d] a reckless disregard toward the safety and well being of others," as is required by North Dakota law. *Jones v. Ahlberg,* 489 N.W.2d 576, 581 (N.D. 1992). Devore also does not challenge this holding on appeal.

obligation on the actor's part for the benefit of the injured person." *Azure v. Belcourt Pub. Sch. Dist*., 2004 ND 128, ¶ 10, 681 N.W.2d 816, 820 (citation omitted).

1. Because the "Retained Control" Exception Does Not Apply, IPT and Barony Did Not Owe Devore a Duty of Care.

[41] In the case of an independent contractor, the general rule is that "one who employs an independent contractor is not liable for the negligence of the independent contractor." *Rogstad*, 2001 ND 54, ¶ 14, 623 N.W.2d at 386. The "retained control" doctrine is an exception to this general rule, pursuant to which an employer may be liable for the acts or omissions of the independent contractor's employees if the employer "retains the control of any part of the [independent contractor's] work[.]" Restatement (Second) of Torts § 414 (1965).

[42] Section 414 of the Second Restatement of Torts "makes an *employer* liable when that *employer* retains control over the work." *See Kristianson v. Flying J Oil & Gas, Inc*., 553 N.W.2d 186, 188 (N.D. 1996). Where a general contractor is not an employer of an independent contractor, the general contractor does not owe the independent contractor a duty of care. *Walters v. Kellam & Foley*, 360 N.E.2d 199, 204–05 (Ind. App. 1977) (general contractor did not owe a duty of care to a mechanical contractor absent a contractual relationship).

[43] Here, the "retained control" exception is inapplicable, because neither IPT nor Barony had a contractual relationship with FBS or Devore. It is undisputed that FBS contracted directly with American Eagle, and neither IPT nor Barony had authority to terminate FBS or Devore on American Eagle's behalf. (App. 393–94, 1049, 1057.) Because IPT and Barony did not employ Devore and they had no contractual relationship with FBS, the "retained control" exception does not apply. As the district court correctly

noted, were it to hold as Devore requests, the "retained control" exception would swallow the rule, making general contractors liable for the negligence of independent contractors they did not hire.

[44] Devore has set forth no specific facts evincing a contractual relationship between Devore and IPT or Barony. Having failed to show that the "retained control" doctrine applies, Devore cannot establish that IPT or Barony owed him a duty of care. His claims therefore fail as a matter of law. Accordingly, the district court correctly granted IPT and Barony's summary judgment motion.

2. Even if the "Retained Control" Exception Applies, IPT and Barony Did Not Retain the Requisite Level of Control to Create a Duty.

[45] Even if the "retained control" exception could apply in the absence of a contractual relationship (which it cannot), Devore has not shown IPT and Barony retained the requisite level of control to create a duty of care.

i. The Law Requires an Employer Retain Control over the Method, Manner, and Operative Detail of an Independent Contractor's Work.

[46] As this Court has explained, "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." *Fleck v. ANG Coal Gasification Co*., 522 N.W.2d 445, 448 (N.D. 1994). It is not enough that the employer retains a general right to order the work stopped or resumed, to inspect progress, to receive reports, to make recommendations that need not be followed, or prescribe alterations to the work. *Id*. Indeed,

> Such [] general right[s] [are] 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.

Id. (quoting Comment c to Restatement (Second) of Torts § 414).

[47] Accordingly, the "retained control" exception requires the employer exercise more than mere supervisory controls to ensure compliance with the contract. In *Fleck*, this Court affirmed dismissal of a negligence claim asserted by the employee of an independent contractor against the operator of a coal gasification plant. *Id*. at 449. The plaintiff alleged he developed occupational asthma as a result of exposure to hazardous chemicals while working at the defendant's plant. *Id*. at 447. The plaintiff maintained that the defendant owed him a duty of care because the defendant retained control over the plaintiff's work by, among other things, monitoring the plaintiff's work and providing the plaintiff with safety equipment, including rubber slickers, boots, and gloves. *Id*. at 448. Nevertheless, the Court concluded that the defendant did not owe a duty of care, because it did not retain control over the method, manner, or operative detail of the plaintiff's work. *Id*. at 449. The Court reasoned that there was no evidence that the defendant "directly supervised or controlled any aspect of the work." *Id*. Instead, the defendant's actions constituted "mere inspection and monitoring to assure compliance with the contract, which did not give rise to liability" under the "retained control" exception. *Id*.

[48] Moreover, the mere reservation of certain rights in the contract is not sufficient to trigger the "retained control" exception. In *Schlenk v. Nw. Bell Telecom Co*., 329 N.W.2d 605, 612 (N.D. 1983), this Court concluded the defendant-employer did not owe a duty of care to an independent contractor's employee, even though the defendant "reserved the right to designate the order in which the work [by the independent contractor's employee] was to be performed; to specify the quality of the materials furnished by the contractor; to make additions, subtractions, or other changes regarding the work; to prohibit use of

equipment which might interfere with telephone service; to inspect work and materials furnished by the contractor; and the right to condemn, reject, or take over the work if the contractor failed to conform to the terms of the contract." These rights did not give the defendant the right to control the method or manner of performing the work, but instead "generally related to [the defendant's] right to make certain that the results obtained conformed to the specifications and requirements of the contract." *Id*. at 613.

[49] Rather, the "retained control" doctrine requires the employer have "direct supervision over the step-by-step process of completing the work." *Barton v. Pioneer Drilling Servs., Ltd*., No. 4:11-CV-037, 2012 WL 6082716, at *4 (D.N.D. Dec. 4, 2012) (citing *LeJeune v. Shell Oil Co*., 950 F.2d 267, 270 (5th Cir. 1992)). This is a high burden. Indeed, since *Fleck* and *Schlenk*, this Court has concluded no duty of care existed in cases where the defendant-employer retained a much higher degree of control than the control Devore alleges IPT or Barony retained in this case. *See, e.g*., *Rogstad*, 2001 ND 54, ¶¶ 25–33, 623 N.W.2d at 387–89 (no duty of care even though employing entity monitored contractor's employees multiple times each day and required them to review and comply with extensive safety manuals and videos); *Pechtl v. Conoco, Inc*., 1997 ND 161, ¶ 13–19, 567 N.W.2d 813, 817–18 (no duty of care even though employing entity provided equipment to contractor and was heavily involved in safety issues, including providing safety manual, and even though contractor worked almost exclusively for the employing entity); *see also Spaulding v. Conopco, Inc*., 740 F.3d 1187, 1192–95 (8th Cir. 2014) (no duty of care even though employing entity required contractor to participate in periodic safety trainings and instructed contractor's employees on which tasks they would perform each day).

[50] For the reasons described below, Devore has failed to demonstrate an issue of fact that IPT or Barony had authority to control the method, manner, and operative detail of Devore's or FBS's work.

ii. American Eagle and FBS's Contract Precludes That Kind of Control.

[51] American Eagle, the only party that contracted with FBS, testified that control over the method, manner, and operative details of FBS's work belonged exclusively to Devore and his crew. (App. at 1055, 1058.) American Eagle hired FBS to serve as the water transfer expert at the Haugen well. (*Id*. at 1057.) According to Mr. Pershall, FBS was expected to provide its own employees, equipment, safety procedures, and methods and means for performing its work. (*Id*. at 1055.) IPT and Barony did not hold themselves out as water transfer experts and were "not responsible for dictating to FBS the manner and means by which [FBS] performed [its] duties for American Eagle." (*Id*. at 1058.)

[52] FBS confirmed American Eagle's interpretation of its contract with FBS. An FBS representative expressly agreed that it was FBS's "expectation that the FBS work crew would control the method and the manner in which it would do water transfer" and FBS "didn't need somebody else to tell it how to deal with laying the hose and transferring the water and all those other details." (*Id.* at 1083.) Moreover, FBS had "stop work" authority, so an employee could stop work at any point if he encountered a safety issue. (*Id*. at 1079, 1080.)

[53] The district court correctly concluded that the testimony of American Eagle and FBS is "significant, if not dispositive," on the issue of control since it is *their* contractual relationship that governed Devore's work. (*Id*. at 1588.) Indeed, IPT did not have a contractual relationship by which to retain control over Devore's work. Moreover, IPT's

contract with American Eagle confirms that neither IPT nor Barony had control over the operative detail of any contractor's work, including FBS's work. (*Id.* at 1042–47.) The contract states that American Eagle "ha[d] superior knowledge of the well" and that IPT was "working at [American Eagle]'s sole direction and instruction." (*Id*. at 1042.)

[54] Accordingly, even accepting as true Devore's allegation that Barony told him to "pig the line" and "pigging the line" means banging on a pressurized, frozen water line with a sledgehammer, Barony's alleged statement would have been nothing more than a mere suggestion or recommendation that Devore was free to disregard. *See Kristianson*, 553 N.W.2d at 189 ("It is not enough . . . to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations.") (quoting Restatement (Second) of Torts § 414). Indeed, there were numerous alternative options available to FBS for remedying a frozen water line that Devore himself was aware of and about which he testified, including vac trucks, torches, running a new water line (particularly given that the line at issue was, at most, only 1,000 feet long), and breaking the water pipe down and removing ice in sections. (App. at 1351, 1352, 1356, 1357, 1367, 1378, 1480.) As the expert on water transfer services, Devore made the decision not to pursue these options.

[55] Nor could Barony's alleged instruction to pig the line have been construed as a mandate, because Devore and his crewmembers had "stop work" authority. Had Barony ordered them to conduct water transfer practices Devore believed were unsafe, Devore had absolutely authority to refuse or stop work at any time. Moreover, Devore, who had seen a pressurized line whip around wildly after an ice obstruction was dislodged, knew that hitting the line with a sledgehammer could be unsafe. Nevertheless, it was Devore and his

crew's ultimate decision to bang on the pressurized, frozen water line with a sledgehammer, and it was Devore's decision to stand next to the water line while another crewmember pounded on the line.

iii. The Undisputed Facts Do Not Establish That Kind of Control.

[56] In arguing that IPT and Barony retained control over his work at the pond, Devore relies primarily on testimony that Barony acted as the "company man" at the Haugen wellsite and was above him in the "chain of command." (Devore Br. ¶¶ 12, 34.) Devore points to his own testimony to show that Barony was responsible for making decisions as to the timing of the frac and ensuring the necessary equipment was available for FBS's water transfer work. (*Id*. ¶ 34.)

[57] Even accepting Devore's characterization of Barony as a "company man," this allegation is not sufficient to establish a duty of care. *See, e.g*., *Duplantis v. Shell Offshore, Inc*., 948 F.2d 187, 193 (5th Cir. 1991) ("[T]he mere fact that Shell maintained a 'company man' on the drilling rig does not demonstrate that it retained control of the project.") (citation omitted). To show that IPT and Barony retained "control over the method, manner and operative detail of [his] work," *Fleck*, 522 N.W.2d at 448, Devore must demonstrate that Barony had "direct supervision over the step-by-step process of completing the work." *Barton*, 2012 WL 6082716, at *4.

[58] Even assuming Barony made decisions about whether to delay the frac,[8] Devore has made no showing that Barony controlled the "step-by-step process" of completing

[8] The record citation Devore provides for this allegation, App. 1399, does not support the proposition that Barony made decisions "about whether to delay the frac (or not)." (Devore Br. ¶ 34.)

Devore's water transfer work. *See id*. Devore's other contention—that Barony, as the "company man," was responsible for providing the necessary equipment for FBS's water transfer work[9]—is likewise unavailing. (Devore Br. ¶ 34.) This Court has specifically held that "merely providing equipment is not the kind of control that creates a duty." *Kristianson*, 553 N.W.2d at 190. Moreover, it is undisputed that American Eagle contracted with a separate contractor, Hamm & Phillips, to provide heater trucks and ensure their operation. (App. at 248, 411.) Devore has provided no evidence that IPT or Barony controlled the method, manner, or operative detail of Hamm & Phillips' work, and thus, he has not established a fact issue that IPT or Barony owed him a duty of care to provide him equipment.

[59] At most, Devore has alleged that Barony exercised general supervisory authority, but that type of authority is not sufficient to satisfy the "retained control" exception. *Schlenk*, 329 N.W.2d at 613 (holding "mere retention of supervisory controls" is not sufficient to establish duty of care).

iv. Devore's Arguments to the Contrary Are Unavailing.

[60] In direct contravention of the undisputed facts and North Dakota law, Devore claims that IPT and Barony owed him a duty of care because (1) IPT and Barony were generally responsible for monitoring the safety at the Haugen wellsite, and (2) IPT had to sign field tickets for FBS's work. (Devore Br. ¶ 17.) First, it is undisputed that FBS had its own safety policies, and American Eagle expected it to provide its own safety

[9] Devore maintains that the absence of a working heater truck to thaw the frozen water line on the day of the Incident caused Devore's injuries. (Devore Br. ¶¶ 20, 24, 31, 32, 34.) As explained in Section II below, Devore, not IPT or Barony, created the dangerous condition that caused his injuries by standing next to a frozen water line as his crewmember hit the line with a sledgehammer.

procedures in performing its duties for American Eagle. Moreover, this Court's precedent establishes no duty of care in cases where the defendant-employer was even more involved in instituting safety procedures than Devore alleges IPT and Barony were. *Cf Rogstad*, 2001 ND 54, ¶¶ 25–33, 623 N.W.2d at 387–89 (affirming summary judgment for employing entity even though it required the contractor's employees to review and acknowledge receipt of extensive safety manuals and videos provided by the employing entity); *Pechtl*, 1997 ND 161, ¶¶ 13, 17, 567 N.W.2d at 817 (holding that employing entity's active participation in safety is not sufficient to establish a duty of care).

[61] Second, as the district court noted, it is "inconsequential" that IPT and Barony were allegedly responsible for signing field tickets, since this type of authority is typically reserved by employers of independent contractors. (App. at 1590–91); *see also Pechtl*, 1997 ND 161, ¶ 16, 567 N.W.2d at 817 (holding that retained control must "exceed the general rights usually reserved to employers of independent contractors").

[62] Devore fails to establish that the "retained control" exception applies in the absence of a contractual relationship, but even assuming that it does, Devore has not raised a fact issue that IPT and Barony had authority to control the method, manner, and operative detail of FBS's work. Accordingly, the district court correctly granted IPT and Barony's summary judgment motion.

B. IPT and Barony Did Not Proximately Cause Devore's Injuries.

[63] In addition to failing for lack of a duty, Devore's claims fail because he has not shown IPT or Barony proximately caused his injuries. "A proximate cause is a cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred." *Krueger v. Grand Forks Cty*., 2014 ND 170, ¶ 38, 852

N.W.2d 354, 365 (citation omitted). To establish proximate cause, the injury must have been "a *probable* result of the [defendant's] conduct." *Jones*, 489 N.W.2d at 581 (emphasis added). The causal link between the alleged breach of duty and the plaintiff's injury must be "unbroken by any controlling intervening cause." *Id*. An intervening cause is one that is both independent and unforeseeable, thereby severing the connection of cause and effect between the alleged negligent act and the injury. *Loper v. Adams*, 2011 ND 68, ¶ 20, 795 N.W.2d 899, 905.

[64] For instance, in *Moum v. Maercklein*, a defendant-employer instructed its employee to report to a jobsite approximately seventy miles from the employee's home in less than two hours during a blizzard that created white-out conditions on the road. 201 N.W.2d 399, 401 (N.D. 1972). The employee caused a car accident after he negligently attempted to pass a car on the highway and struck an oncoming vehicle in which the plaintiff was a passenger. *Id*. at 401. This Court reversed a verdict against the defendant-employer, holding that the employee's negligence was an intervening cause of the plaintiff's injuries. *Id*. at 404.

[65] Here, the undisputed facts show that neither IPT nor Barony proximately caused Devore's injury. Neither IPT nor Barony were authorized to control the method, manner, or operative detail of how FBS chose to clear a frozen obstruction from a water line. Even if it was IPT and Barony's duty to prevent water lines from freezing (which it was not), a frozen water line, by itself, is not dangerous. As the district court correctly found, "the frozen [water line] on the ground was just that—a frozen stick without any danger associated with it." (App. at 1571.) Instead of exercising one of the many alternative options available for dealing with the frozen line, Devore created the dangerous condition

that caused his injuries by standing next to a frozen water line as his crewmember banged on the line with a sledgehammer.

[66] Devore disavows responsibility for the Incident by arguing that Barony allegedly asked Devore to "pig the line" and "pigging the line" entails hitting a pressurized, frozen water line with a sledgehammer. (Devore Br. ¶ 34.) Even assuming this to be true, Devore and his crew, as the experts hired to provide water transfer services, controlled the method by which they chose to remedy the frozen line. Their decision to pound on the frozen water line with a sledgehammer was unforeseeable and the intervening cause to Devore's injuries.

[67] Moreover, Devore chose to stand immediately adjacent to the water line while Juan, his fellow crewmember, struck the frozen waterline with a sledgehammer, despite the fact that Devore knew of the risks involved in striking a pressurized, frozen water line, having watched multiple videos demonstrating this risk and even advising his own crewmembers to stand back to avoid being struck by the line. Like the plaintiff in *Moum*, Devore's negligent decision was unforeseeable and the intervening cause to his injuries. Unlike *Moum*, however, it is far more foreseeable that an employee would attempt to pass another driver on the highway while running late for work than it is for Devore to inexplicably choose to stand next to a pressurized, frozen water line while his fellow crewmember pounded on the line.

[68] Devore failed to raise a genuine issue of material fact that IPT or Barony proximately caused his injuries. Accordingly, the district court correctly granted IPT and Barony's summary judgment motion.

CONCLUSION

[69] The district court's order granting summary judgment in IPT and Barony's favor and dismissing this case should be affirmed.

DATED this 27th day of September, 2019.

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CERTIFICATE OF COMPLIANCE

I, Shannon Wells Stevenson, one of the attorneys of the law firm of Davis Graham & Stubbs LLC, hereby certify that the foregoing brief complies with the page limitation in N.D.R.App.P. 32(a)(8), as it is less than 38 pages.

CERTIFICATE OF SERVICE

I, Kathleen Pritchard, one of the attorneys of the law firm Davis Graham & Stubbs LLP, hereby certify that on this 27th day of September, 2019, a true and correct copy of the foregoing **BRIEF OF APPELLEES INTEGRATED PETROLEUM TECHNOLOGIES, INC. AND BRIAN BARONY** was served by email:

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