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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Dylan Devore, Plaintiff - Appellant, v. American Eagle Energy Corp., et al., Defendants – Appellees.	)	Supreme Court Case No.: 20190117 District Court Case No.: 12-2015-CV-00003

APPEAL FROM ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

THE HONORABLE JOSHUA B. RUSTAD, PRESIDING NORTHWEST JUDICIAL DISTRICT

REPLY BRIEF OF APPELLANT

Respectfully Submitted by:

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ORAL ARGUMENT REQUESTED

Appellant requests oral argument because the evidence fully describing the job location is complex, and thus may require in-person explanation.

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STATEMENT OF FACTS

¶1 There are many facts that are undisputed. There are many facts that are in dispute. Routinely (in their briefing), American Eagle and IPT/Barony contradict each others' version of the facts (both disputed and undisputed facts). With this appeal, all facts must be considered in the light most favorable to Devore (per North Dakota law).

¶2 IPT/Barony argue that "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."[1] The facts (especially when viewed in the light most favorable to Devore) are contrary to IPT's/Barony's argument. American Eagle's representative (Pershall) agreed under oath that one of IPT's/Barony's "responsibilities is to make sure that all **equipment** that is needed is on location"[2] (FBS was not charged with providing **equipment** (much less was such **equipment** within FBS's "**exclusive control**")). Pershall also put **safety** as IPT's/Barony responsibility ("[i]f there was a **safety** concern for the fracking operation, the frac consultant was responsible for addressing it")[3] – contrary to IPT's/Barony's assertion that "**safety procedures**" were within the "**exclusive control**" of FBS. American Eagle's brief even lists as an 'undisputed fact' that IPT/Barony were "in charge of making sure the fracking operation being conducted at the Well was efficient, **safe,** and according to plan"[4] (not FBS/Devore). In further contradiction to IPT's/Barony's briefing, even Barony has testified that procuring proper "**equipment**" for the work location was a "joint decision" (as between IPT/Barony, and American Eagle).[5]

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[1] See IPT's/Barony's brief, at paragraph 4 (emphasis added).
[2] See deposition of Richard Pershall, App. 01295 at p. 41.
[3] See American Eagle's brief, at paragraph 2 (19).
[4] See American Eagle's brief, at paragraph 2(15)(such brief cites to evidence relied upon in the record).
[5] See deposition of Brian Barony, App. 01218 at p. 296:18-24.

¶3 IPT's/Barony's brief continues their assault upon the evidentiary record by arguing that "IPT . . . was not authorized to control the manner and means of FBS's work . . . ."[6] These Defendants' brief ignores Devore's testimony that safer **methods** (manner/means) for restoring water service to the location were offered to IPT/Barony – but rejected by IPT / Barony.

> A. I asked him [Barony] of the possibility of using a flatbed semi along with a forklift to go over to one of our other locations and to remove some of the reeled-up hose and bring it over to our location. His response to that was that there was – everybody was tied up with trying to set up the new location and I was – he didn't have any equipment for me to use. Again, we asked about the heater trucks and stuff. The heater trucks were unavailable because they had multiple issues and they were pulled away to try and heat the AST tank on location. I said, 'What do you want me to do?' And that's where we get back into the – he wanted me to pig the line [using the compressor and sledgehammer to dislodge the ice].[7] Or he said, can you pig the line? I said, of course we can, but I thought we weren't supposed to. That's' when he told me to just go ahead and pig the line because our compressor was running and it was just going to be the fastest – it was going to be the fastest way to get water moving.[8]

IPT/Barony were offered safer **methods** for FBS's restoration of water transfer services (e.g., lay another lay-flat hose to be retrieved from another location, or use heater trucks to thaw the frozen line), but these other (safer) **methods** were rejected by IPT/Barony. IPT/Barony knew exactly

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[6] See IPT's / Barony's brief, at paragraph 4.

[7] The bracketed words are added to highlight a distinction that Appellees (IPT and Barony) are trying to twist in their brief. In their brief, Appellees are trying to suggest that Barony's instruction to 'pig the line' did not suggest use of a compressor and related sledgehammer technique. Nothing could be further from the truth. Barony DEFINITELY knew exactly what his instruction meant given that the only way to 'pig a line' that is frozen is with a compressor (applying air pressure) and a sledgehammer (and the facts are undisputed that Barony knew the line was frozen). Moreover, both Devore and Barony definitely knew Barony's instruction required use of the compressor and sledgehammer technique – or else there would have been no reason for Devore to say: "I thought we weren't supposed to."

[8] See deposition of Dylan Devore (March 30, 2017), App. 01399 at p. 261:7-23. Interestingly, IPT's / Barony's brief concedes there were several methods that could have been employed to restore water transfer services. IPT's / Barony's brief states: "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.)." Of course, IPT / Barony knew of all of these options (or **methods**), too; and yet directed Devore to use the **method** known to all to be unsafe (see sworn testimony of Devore, at paragraph 4, above).

the dangers created by IPT's/Barony's instructions to Devore, yet IPT/Barony were willing to put Devore in harms way to "just keep fighting the good fight . . . ."[9]

¶4 IPT's / Barony's disregard of the applicable legal standard (i.e., 'to view the evidence in the light most favorable') is further revealed by their 'chain of command' diagram.[10] IPT's/ Barony's diagram is an effort to demonstrate that FBS/Devore reported directly to American Eagle (not to IPT/Barony). The evidence directly contradicts IPT's/Barony's view of reality (especially if viewed in the 'most favorable' light). For example, Pershall testified that IPT should know that IPT is the "supervision authority" for FBS, and that the FBS contractor reports to the IPT consultant (Barony) on the location.[11] In other testimony, Pershall testified:

> Q. And do you agree that IPT's consultant was the highest ranking person in the chain of command on the job site or on the well site?
> A. Yes, he was. [12]

Barony even conceded his duty to oversee frac operations (including water transfers by FBS).[13] Devore certainly made it clear that he (Devore) reported to IPT/Barony.[14] Other evidence makes clear that IPT/Barony were FBS/Devore supervisors.[15] IPT's/Barony's diagram misrepresents the sworn testimony (especially if 'view in the light most favorable' to Devore).

¶5 Defendants' briefing even goes so far as to say that "FBS also represented to American Eagle that it could ensure American Eagle received the water it needed by preventing its water

[9] See deposition of Brian Barony, App. 01218 at p. 296:18-24.
[10] See IPT'/Barony's brief, at paragraph 5.
[11] See deposition of Richard Pershall, App. 01291 – 01292, at pp. 27-29.
[12] See deposition of Richard Pershall, App. 01291 – 01292, at pp. 27-29.
[13] See deposition of Brian Barony, App. 01178 at p. 136:7-15.
[14] See deposition of Dylan Devore (March 30, 2017), App. 01390 at pp. 224-225 (American Eagle personnel told Devore that IPT / Barony / Glidewell were in charge).
[15] See deposition of Richard Pershall, App. 01298 – 01300 at pp. 53-61 (FBS not paid unless IPT approved tickets). See deposition of Dylan Devore (March 30, 2017), App. 01397 – 01398 at pp. 254-256; App. 01397 at pp. 254-255; App. 01397 – 01399 at pp. 255-260. Testimony of Dylan Devore confirmed his phone call – on date of injury – to Barony to confirm arrival at the job location, confirmed his in-person conversation with Barony at about 8am, and confirmed his in-person conversation with Barony at about noon.

lines from freezing in the middle of North Dakota winters."[16] Of course, there is no cite to any evidence in support of this assertion. How could anyone ever "ensure" that water will not freeze at minus 40–60 degrees Fahrenheit? (no one did). And what a strange thing for IPT/Barony to emphasize given that all parties agree that – if left alone – a frozen lay-flat water line poses no danger[17] (it only becomes dangerous when IPT/Barony instructed Devore to 'pig' the line (apply compressed air and a sledgehammer to dislodge the ice in the frozen line)).

¶6 The evidence, if viewed in the light most favorable to Devore, reveals that American Eagle, IPT, and Barony were the joint decision-makers for the location.

> Q. What about the water heater, was that a – the need for repair or replacement of water heaters, was – are those decisions being made by you and/or Glidewell for IPT or are those decisions being made in March of 2014 by American Eagle? . . .
> A. **American Eagle.** American Eagle was working on getting in touch with possibly another one [heater truck company] – so we were kind of told you know, **just keep fighting the good fight** . . .
> 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 [American Eagle], yes**. . . .
> we would consult with them and then we would, you know, more or less **put our heads together** to find, you know, the safest and best way to do it.
> Q. And so that would – if I understood. If you ran into issues that were going to be a problem, you would keep American Eagle informed?
> A. Correct.
> Q. And **work together to reach a resolution**?
> A. Yes.[18] (emphasis added)

American Eagle and IPT/Barony were definitely communicating about the need for more heater trucks on the location, "put [their] heads together," did "work together to reach . . . resolution," would make a "joint decision" while IPT/Barony were to "just keep fighting the good fight."

[16] See IPT's / Barony's brief, at paragraph 3; see also paragraph 6 (. . . "FBS's assurances that it would not allow its water lines to freeze . . .); see also paragraph 17 (. . . "FBS represented to American Eagle that is would prevent its water lines from freezing); see also paragraph 26 (FBS's assurances that it did not allow its water lines to freeze).
[17] See IPT's / Barony's brief, at paragraph 65.
[18] See deposition of Brian Barony, App. 01218 at p. 296:18-24.

Even if taken alone – this evidence revealing how American Eagle, IPT, and Barony were decision-makers for the location (thereby retaining control) is persuasive. There is no evidence that FBS or Devore were decision-makers.

¶7 Of course, water freezes at sub-zero temperatures – especially when two (2) of the three (3) work site heaters are not working.[19] Devore was injured when he (Devore) and his FBS crew 'pigged' a frozen lay-flat water line (the **method** required of him (Devore) by IPT/Barony).[20] As noted in IPT's/Barony's brief: "The crewmember's pounding soon dislodged the ice and caused the line to whip back and strike Devore's leg (referred to as the "Incident"). All of this was captured on video by another crewmember."[21] The ***cause*** of Devore's injury is not in dispute. The question is whether Appellees' acts and/or omissions (or lack of working equipment) were the ***cause*** of the **method** employed to restore water transfer services (and they were).

¶8 Again, the Defendants' arguments ignore so much of the evidence of record – and Defendants' arguments disregard the legal standard requiring that the "evidence [be] reviewed in a light most favorable to the party opposing the motion . . . ."[22]

SUMMARY JUDGMENT STANDARD (the Law)

¶9 Appellees' briefs routinely cite to evidence that is only favorable to their (Appellees') version of the incident. As such, Appellees are not abiding by North Dakota law. Simply put: "evidence [should be] reviewed in a light most favorable to the party opposing the motion, and

[19] See deposition of Richard Pershall, App. 01305 – 01306 at pp. 81:1-84:24 (confirming that no heater trucks were servicing the pond just prior to the injury incident); see also deposition of Dylan Devore (March 30, 2017), App. 01380 at pp. 185:24-186:10; App. 01380 at p. 187:5-11; see also deposition of Dylan Devore (September 26, 2017), App. 01475 at p. 345:11-13; App. 01475 at p. 345:20-21 (whole weekend was without heater truck at pond); and App. 01475 – 01476 at pp. 345:14-346:13. Further, see deposition of Richard Pershall, App. 01306 at pp. 86:19-87:1.

[20] See deposition of Dylan Devore (March 30, 2017), App. 01399 at p. 261:7-23

[21] See IPT's / Barony's brief, at paragraph 6.

[22] *Trinity Health v. North Central Emergency Services*, 2003 ND 86, ¶ 15, 662 N.W.2d 280; see also *Wishnatsky v. Bergquist,* 550 N.W.2d 394, 397 (N.D.1996); *American State Bank v. Sorenson,* 539 N.W.2d 59, 61 (N.D.1995); see also *Kristianson v. Flying J Oil & Gas, Inc*., 553 N.W.2d 186, 188 (N.D. 1996).

that party receives the benefit of all inferences that can reasonably be drawn from the evidence".[23] Also noteworthy: "[t]he 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.[24] Summary relief is not appropriate if the party resisting the motion – Appellant herein – raises an issue of material fact. A full discussion of Appellant's briefing on the correct legal standard is set forth in Appellant's brief.

ARGUMENT

¶10 There is certainly evidence sufficient to allow a reasonable juror to conclude that American Eagle, IPT, and Barony made the "joint decision" to have FBS execute a known, unsafe **method** (i.e., to 'pig' a frozen lay-flat water line) for restoration of water transfer services – and that applying such **method** was the ***cause*** of Dylan Devore's injury.[25]

¶11 Appellees and Devore knew of several **methods** to restore water transfer services (in the event of a frozen water line). IPT's/Barony's brief confirms several appropriate **methods**. Devore specifically testified that he offered two (2) safer, alternative **methods** (discussed above).

¶12 Appellees and Devore knew that 'pigging' (applying air pressure and a sledgehammer) a frozen lay-flat water line was dangerous.

¶13 Barony testified that it was his practice to keep American Eagle informed of all matters relating to the location. The daily completion reports also confirm American Eagles' knowledge.

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[23] *Trinity Health v. North Central Emergency Services*, 2003 ND 86, ¶ 15, 662 N.W.2d 280; see also *Wishnatsky v. Bergquist,* 550 N.W.2d 394, 397 (N.D.1996); *American State Bank v. Sorenson,* 539 N.W.2d 59, 61 (N.D.1995); see also *Kristianson v. Flying J Oil & Gas, Inc*., 553 N.W.2d 186, 188 (N.D. 1996).

[24] See *Kristianson v. Flying J Oil & Gas, Inc*., 553 N.W.2d 186, 188 (N.D. 1996); Fleck; Zimprich v. Broekel, 519 N.W.2d 588 (N.D. 1994).

[25] In the interest of space, many footnotes are omitted from this section of this reply. Footnotes to the same evidence have been provided earlier in this reply, or in Appellant's brief.

¶14 Barony (on behalf of IPT and after conferring with American Eagle) rejected the safer methods for restoring water transfer services, and opted to 'pig' the frozen line.

¶15 Appellees (not Devore) were the joint decision-makers for the location. There is evidence in the record – when reviewed in the light most favorable to Devore – to support a jury's determination that all Appellees were making 'joint decisions' for the location.

¶16 Devore followed Barony's instruction to 'pig' the frozen lay-flat water line (i.e., FBS was not granted use of a truck and forklift, and FBS was not allowed to wait for working heaters).

¶17 Devore was not free to make his own decision about how to restore water transfer services. To the contrary, Barony denied Devore's request to employ either of the recommended safer **methods,** and instructed Devore to 'pig' the frozen lay-flat water line. As such, Barony controlled the step-by-step method for restoration of water transfer services: (1) hook up an air compressor to the frozen lay-flat water line; (2) apply compressed air (pressure) to it; (3) use a sledgehammer to fracture (dislodge) the ice in it; (4) allow the air pressure to push the fractured / dislodged ice from it; and (5) thereby restore water transfer services.

¶18 The **method** employed by Devore at Appellees' instruction was quite specific. Appellant appreciates that the "retained control" doctrine requires "direct supervision over the step-by-step process of completing the work."[26] IPT/Barony were Devore's immediate and direct supervision on the location, and Devore was following the step-by-step **method** required directly of him by IPT/Barony (after his consultation with American Eagle).

¶19 The evidence demonstrates that American Eagle was the party responsible for contracting a sufficient number of heater trucks for the location; and other evidence suggests that it was IPT's/Barony's job responsibility to assure that the location had sufficient (and working)

[26] *Barton v. Pioneer Drilling Services, 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)).

equipment. The only reason that Appellees required the 'pigging' of the frozen lay-flat water line was because of the lack of working equipment (i.e., no truck or forklift, and too few heater trucks). Appellees' failures to provide the equipment necessary falls upon Appellees (not FBS).

¶20 The judicial opinions from the North Dakota Supreme Court discussed in previous briefing may now be more readily applied:

1. There was "such a retention [by Appellees] of a right of supervision that the contractor [FBS] is [was] not entirely free to do the work in [it's / FBS's] own way." [27] Devore wanted to go retrieve a lay-flat water line from another location, but Appellees refused this effort. Devore wanted to use a heater truck to thaw the line, but Appellees refused to timely provide such equipment. Devore's immediate supervisor (Barony) told him (Devore) what to do, and Devore did it.
2. North Dakota law makes clear: ". . . [I]t is not enough that the employer merely retains the right to inspect the work or to make suggestions which need not to be followed."[28] American Eagle/IPT/Barony did more than simply inspect the work or make suggestions. American Eagle/IPT/Barony were actively engaged with the location (charged with the responsibility to assure all equipment), and were the decision-makers that denied the use of certain equipment (flat-bed, forklift, heater trucks), and were the decision-makers who said 'pig' the line.[29] American Eagle/IPT/Barony made the 'joint decisions' (with their retained control) that were the ***cause*** of Devore's injuries.

CONCLUSION

¶21 By denying Devore's requests to pursue safer methods and simultaneously insisting that the lay-flat water line be 'pigged,' all Appellees (as 'joint decision-makers') exercised their

[27] See *Pechtl,* at p. 816
[28] See *Pechtl,* at p. 816; see also *Kristianson,* at p. 189; *Fleck,* at p. 448
[29] See deposition of Dylan Devore (September 26, 2017), App. 01480 at pp. 364:5-365:19

supervision and control of the equipment and job location in such a manner that required FBS (Devore) to follow an unsafe step-by-step **method** for restoring water transfer services: (1) hook up an air compressor; (2) apply air pressure to the frozen line; (3) dislodge (sledgehammer) the ice from the line; (4) allow the air pressure to push the ice from the line; and (5) thereby restore water transfer services (but at the risk of causing serious injury). American Eagle's/ IPT's/Barony's 'joint decisions' created the risk/danger, and thus caused Dylan Devore's injury.

CERTIFICATE OF COMPLIANCE

¶22 This brief complies with the limitations of N.D.R.Civ.P.32(a)(8)(A) because it contains 12 pages.

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Dated this 11th day of October, 2019.

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CERTIFICATE OF SERVICE

¶1 The undersigned certifies, pursuant to Rule 5 (f) of the North Dakota Rules of Civil Procedure, that on October 11, 2019, a true and correct copy of the following document(s):

1) Reply Brief of Appellant; and
2) Certificate of Service.

was served, via email transmission and electronic filing, upon the following:

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