20190195
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 9, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

Lakeview Excavating, Inc.,	)	**SUPREME COURT NO. 20190195**
	)	
Plaintiffs/Appellant,	)	Civil No. 11-2017-CV-00035
	)	
vs.	)	
	)	
Dickey County and German Township,	)	
	)	
Defendants/Appellees.	)	

ON APPEAL FROM CONCLUSIONS OF LAW AND
ORDER FOR JUDGMENT DATED MARCH 25, 2019,
ORDER FOR JUDGMENT DATED APRIL 25, 2019, AND
JUDGMENT DATED APRIL 25, 2019
STATE OF NORTH DAKOTA
DICKEY COUNTY
THE HONORABLE DANIEL D. NARUM

BRIEF OF APPELLEES

Scott K. Porsborg (ND Bar ID # 04904)
sporsborg@smithporsborg.com
Dickey County Special Assistant State's Attorney
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for Defendants/Appellees
German Township and Dickey County

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Paragraph Number

STATUTES:

OTHER:

STATEMENT OF THE ISSUES

1. The District Court Correctly Determined Lakeview's Tort Claims were Barred by the Statute of Limitations.

2. The District Court Correctly Determined Lakeview's Breach of Contract Claim was Barred due to no Dispute of Material Fact.

3. The District Court Correctly Determined Summary Judgment was Appropriate Because Lakeview Breached its Contract with the Township and County.

I. STATEMENT OF THE CASE

[¶1] The claims at issue arise out of three separate but identical contracts between the parties pursuant to a FEMA roadway improvement project. App. 354. In the spring of 2012, German Township opened bidding for these projects, with contractors required to bid based on material amounts set by FEMA. App. 354-55. These amounts were inaccurate. App. 355. Lakeview was awarded the bid for the projects. App 355.

[¶2] In November 2016, Lakeview served its complaint, alleging breach of contract (liquidated damages clause), actual fraud and intentional misrepresentation, negligent misrepresentation, and unlawful interference with business. App. 11-19. The County and Township answered on November 29, 2016, and filed an amended answer on June 5, 2017, asserting a counterclaim against Lakeview for breach of contract. App. 30-36. Lakeview answered the counterclaim on June 8, 2017. App. 37-39.

[¶3] On September 13, 2018, the County and Township filed a motion for summary judgment, arguing Lakeview's tort claims were barred by the statute of limitations, Lakeview could not meet its burden on its breach of contract or interference with business claims, and that Lakeview breached the contracts by not fulfilling its contractual duties. App. 231-48. On October 1, 2018, Lakeview filed a competing motion for summary judgment, arguing the County and Township's failure to obtain the requisite bonds caused the damages alleged, and that the County and Township failed to mitigate damages. App. 308-19.

[¶4] Oral argument was heard on both motions on November 21, 2018. App. 9. On March 25, 2019, the Court issued an order granting the Township and County's motion for summary judgment, and denying Lakeview's motion. App. 354-60. Judgment

in the amount of $249,600.64 was entered against Lakeview. App. 361-62. On June 21, 2019, Lakeview appealed.

II. STATEMENT OF THE FACTS

[¶5] In early 2012, German Township (hereinafter "the Township"), located in Dickey County (hereinafter "the County"), opened bidding for a number of road-grade raising projects to repair township roads that had been washed out and inundated by water. App. 354. These projects consisted of three separate jobs, and three identical contracts for these jobs. App. 354. These were FEMA-funded projects, with the scope, including the allotments of materials such as clay and rocks, set by FEMA. App. 233, 277 (21:1-5). It was undisputed that in a FEMA-funded project, FEMA, and not the County or Township, provides the material quantities for the project. App. 233, 277 (21:1-5).

[¶6] In April of 2012, Brian Welken (hereinafter "Welken"), principal for Lakeview, observed the sites prior to submitting Lakeview's bids for the projects. App. 280 (34:8-9). The bids were made based on material amounts provided by FEMA, and contractors would have the opportunity to request change orders for additional materials as necessary. App 233, 250. Lakeview submitted bids based on the material amounts provided by FEMA, and was awarded the contracts for the three projects. App. 250. It is undisputed that the bid documents for the German Township / Dickey County project required a successful bidder to furnish contract, performance, and payment bonds in the full amount of the contract. App. 250, 282 (43:3-12). Despite this, Lakeview did not obtain a performance bond for the project. App. 250, 282 (43:20-22).

[¶7] In the spring of 2012, Lakeview also bid on and was awarded a contract for a road raise project in Benson County, funded by the state DOT. App. 355. The

DOT's only concern for this project was that it was completed by the agreed upon end date, allowing Lakeview to set its own schedule for the Benson County project. App. 277-78 (24:21-25, 25:1-9), 355.

[¶8] As Lakeview worked on the Dickey County projects, it became clear that the amounts provided by FEMA, and utilized by the County and Township, were incorrect. On approximately May 7, 2012, Welken contacted Charlie Russell of the County, to discuss the deficiencies in FEMA's quantities. App. 233-34. It was at this point that Welken, and thus Lakeview, became aware that the Township and the County were also aware that the quantities utilized in the bid documents were incorrect:

> Q. Okay. So in 2012 you became aware that the county knew that the quantities were inaccurate on the bid documents that you bid off of, correct?
> A. Correct.

App. 281-82 (40:23-25, 41:1).

[¶9] It was at this point that Welken, and by extension Lakeview, had reason to believe the Township and County knew the quantities were incorrect when the released the documents. App. 357.

> Q. And what I'm trying to understand is was – on or about the week of May 7, 2012, you had that conversation with Charlie Russell, correct, --
> A. Yes.
> Q. – that, "The bid documents, yeah, they're way off, --
> A. Yes.
> Q. – but we'll get you paid by finding money elsewhere," right?
> A. That was – that was the extent of the conversation with Charlie, yes.
> Q. And that conversation occurred prior to – or during the week of May 7, 2012.
> A. Yes, that's when it was.
> Q. And during that conversation or before that you became aware that Charlie Russell and the County and German Township knew that the quantities were off on the bid documents, right?

A. Not prior. It was after that because after project 7-11 – I'd have to read through which order we went to and we got into the next one and we ran into another big problem. And so I went into the county office, and – I had called and asked to meet with Charlie so I stopped in and started going over some of this. I said "Charlie, these are way off. I mean this isn't – these aren't little numbers. I mean this is, you know, two, three times what the scope of the project was."

App. 281 (38:22-25, 39:1-23).

Q. Okay. And did Charlie Russell tell you during that conversation that, "Yeah, we know the quantities are off."?
A. he did reference that, yes, they knew the quantities were off . . . .

App. 281 (37:10-14).

[¶10] Lakeview also had difficulties obtaining material for the projects. Lakeview, as contractor, was responsible for obtaining materials such as borrow and riprap, and locating the sources. App. 355. Responsibility for negotiations with landowners for amounts and prices of material lay solely with Lakeview. App. 215, 250. While removing materials from a permitted property, Lakeview employees mistakenly trespassed and removed materials from property owned by the Taszareks, who had not given Lakeview permission to obtain material from their land. App. 355.

[¶11] Taszarek brought suit against Lakeview, the County and the Township. The case against the County and the Township was dismissed, and on February 17-19, 2015, a jury rendered a verdict against Lakeview Excavating and Brian Welken. AA. 9-11. The jury found Lakeview was the alter ego of Welken, and that Lakeview was guilty of trespass and conversion. AA. 9-11. Judgment was then entered against Lakeview and Welken in the amount of $115,974.72. AA 12. Welken appealed, and this Court reversed and remanded, finding the alter ego instruction was insufficient. A bench trial was then

held on May 27-29, 2018, with the Court once again finding that Lakeview was the alter ego of Welken. AA 8.

[¶12] Lakeview alleges the Township and County caused delays in its work with Benson County, but Lakeview set its own schedule for the Benson County project. App. 355. Lakeview began the project late based in the schedule it set for itself, and weather delayed the project as well. App. 355. Lakeview requested authorization from the Township and County to abandon work at the Dickey County projects and reallocate labor and resources to the Benson County projects. App. 294 (91:1-13). The Township and County warned if Lakeview reallocated labor and resources without finishing the Projects, there would be liquidated damages and other potential penalties as allowed by the contracts. App. 294 (91:9-13). The NDDOT ultimately suspended the project, instructing Lakeview to put down temporary asphalt until the project could be finished the following year. App. 355. Lakeview ultimately completed the Benson County project after the scheduled completion date, and was fined liquidated damages for that project. App. 355.

[¶13] On December 9, 2016, Dickey County received a letter from FEMA, finding the work on the projects to be non-compliant with historical and environmental surveys, as well as with federal environmental and procedural regulations, stating:

> FEMA has reviewed the information and documentation submitted for the PW 1919 LPC. It has been determined that the scope of work is non-compliant with Federal environmental regulations. The Applicant's contractor not only obtained the source material illegally, the contractor failed to ensure the environmental surveys were completed. The contractor did not allow FEMA the opportunity to consult with the North Dakota State Historic Preservation Office for the source material and did not provide the Applicant the opportunity to identify alternate providers for the surface gravel and rip rap.

AA 5-6. Because of this finding, the County was now responsible for refunding the entire cost of Lakeview's project in the amount of $248,949.14 to the North Dakota Department of Emergency Services. AA 7.

[¶14] The County appealed, and FEMA denied it, because the "applicant had not complied with the terms of the PA grant," explaining its finding:

> It is the Applicant's responsibility to ensure all grant terms are met in order to receive PA funding. The Applicant and its contractor must legally obtain all material used in completing project work. In addition, all procurement and EHP [environmental planning and historic preservation] laws and regulations must be met. The Applicant has not provided documentation to show that all material for the project was from a SHPO-approved source, that a contract bond was in place prior to beginning work, that it provided FEMA the opportunity to determine compliance with EHP laws and regulations prior to work being performed, or that a Class III Cultural Survey was performed on the private land prior to material excavation.

App. 262.

[¶15] On October 11, 2017, the County appealed for the second and final time. App. 264, 355. FEMA denied this appeal on December 19, 2017, again citing the contractor's failure to obtain material from a site approved by SHPO (State Historical Preservation Office) as the primary reason. App. 268.

III. LAW AND ARGUMENT

A. Standard of Review

[¶16] North Dakota's standard of review for summary judgment is well established:

> In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the

> moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Pennington v. Cont'l Res., Inc., 2019 ND 228, ¶ 6, 932 N.W.2d 897.

B. The District Court Correctly Determined Lakeview's Tort Claims (Actual Fraud and Intentional Misrepresentation, Negligent Misrepresentation, and Unlawful Interference with Business) Were Barred by the Statute of Limitations and Discovery Rule

[¶17] The District Court found both the Township and County are governmental subdivisions, and thus N.D.C.C. ch. 32-12.1 governs this suit. App. 357. Therefore N.D.C.C. § 32-12.1-10 governs the statute of limitations for these tort claims. N.D.C.C. § 32-12.1-10 states "an action brought under this chapter must be commenced within three years after the claim for relief has accrued." The statute of limitations is subject to the discovery rule, postponing the accrual of a claim until the plaintiff knew, or with the exercise of reasonable diligence should have known, of the wrongful act and its resulting injury. App 357.

[¶18] The District Court found:

> It is indisputable from the deposition of Brian Welken that Lakeview learned the Defendants were aware the quantities were incorrect on May 7, 2012. At that moment, Lakeview was on notice that the Defendants were aware the quantities were incorrect. **Lakeview had the responsibility to investigate and find out what legal ramifications may resulted [sic] from that fact.** As a result, the statute of limitations accrued in May 2012, and expired in May 2015.

App. 357. (emphasis added).

[¶19] Lakeview argues that "it was not until October 21, 2014 that [it] first became aware that the County and Township had full knowledge that the material quantities identified within the bid documentation were insufficient to complete the Project, and that the County and Township knowing utilized said quantities in soliciting

bids for the Project." Appellant Br. ¶ 18. Lakeview's argument ignores the fact that the discovery rule does not require "explicit knowledge" of the wrongful act or injury. The discovery rule triggers when Lakeview knew *or with the exercise of reasonable diligence should have known* of the wrongful act and its resulting injury. Wells v. First Am. Bank W., 1999 ND 170, ¶ 10, 598 N.W.2d 834 (emphasis added).

> The discovery rule is an exception to the limitations, and, if applicable, **determines when the claim accrues for the purpose of computing limitations.** The discovery rule postpones a claim's accrual, until the plaintiff knew, **or with the exercise of reasonable diligence should have known**, of the wrongful act and its resulting injury.

Id. (emphasis added).

> The focus is upon whether the plaintiff is aware of facts that would **place a reasonable person on notice a potential claim exists,** without regard to the plaintiff's subjective beliefs.

Id. (emphasis added) (internal citations omitted).

[¶20] Lakeview acknowledges in its own briefing that the discovery rule triggers accrual of the claim when the plaintiff, with the exercise of reasonable diligence should have known of the wrongful act or injury. Appellant Br. ¶19. Lakeview argues that the District Court erred in finding there was no genuine issue of material fact, alleging there is a difference between knowing the materials for a portion of the project were incorrect, and knowing the materials for the entire project were incorrect. Appellant Br. ¶ 20. Lakeview argues:

> It was not until Charlie Russell's deposition conducted on October 21, 2014, that Lakeview became aware that the County and/or Township had knowledge, at the time the bids were solicited, that the material quantities stated in the bid packages were wrong for the *entire* Project *at the time bids were solicited.*

Id.

[¶21] Lakeview also cites correspondence from May 2012, regarding shortages of materials in multiple project sites, requesting change orders, arguing "If, as of May 7, 2012, Lakeview was aware that the county and Township had knowingly disseminated bid documents containing incorrect material quantities, there would have been no need for Lakeview to advise the Township Supervisors as to the material shortages for each specific project." Id.

[¶22] Lakeview argues the fact that it was aware of material deficiencies for multiple project sites in July 2012 is irrelevant. Id. at ¶ 22. But the District Court correctly found that Lakeview's interpretation of the discovery rule was wrong. The discovery rule postpones the accrual of a claim until the plaintiff knew, **or with the exercise of reasonable diligence should have known,** of the wrongful act and its resulting injury. Wells, 1999 ND 170 ¶10 (emphasis added). The claim accrues when a reasonable person is put on notice of a potential claim. Id.

[¶23] Lakeview admitted before the District Court, and admits again in its brief before this Court, that it had knowledge in the summer of 2012 that the material quantities of several projects were incorrect. App. 357, Appellant Br. ¶ 22. It is undisputed, that Brian Welken was aware that the County and Township knew these material quantities were incorrect on May 7, 2012. App. 357. The District Court found:

> At that moment, Lakeview was on notice that the Defendants were aware the quantities were incorrect. Lakeview had the responsibility to investigate and find out what legal ramifications may resulted [sic] from the fact. As a result, the statute of limitations accrued in May 2012, and expired in May 2015.

App. 357.

[¶24] The District Court correctly applied the discovery rule to the statute of limitations in this case. Lakeview's argument does not explain why it did not investigate, as a reasonable person in its position would, when it became aware that the County and Township knew the quantities were incorrect, and knew there were deficiencies on multiple projects. At that point, in the May/June 2012, Lakeview became aware that (1) the deficiencies were a wide-spread, and not an isolated issue, and (2) the County and Township had knowledge. A reasonable person would have investigated, and become aware of the alleged wrongful act and injury at that time.

[¶25] The District Court correctly applied the discovery rule and determined the statute of limitations bars Lakeview's tort claims. Thus, the District Court's grant of summary judgment should be affirmed.

C. The District Court Correctly Determined There was no Dispute of Material Fact Regarding Lakeview's Breach of Contract Claim

[¶26] The District Court granted summary judgment in favor of the Township and County on Lakeview's breach of contract claim, finding:

> The contracts between the parties lack any clause or provision which required the Defendants to allow reasonable accommodations for Lakeview's work on other projects. Further, any alleged breach due to the incorrect quantities cannot be a breach because the contracts do not guarantee a specific quantity or even a correct quantity. Lakeview claims there is a genuine dispute of fact as to whether the Defendants' alleged utilization of incorrect quantities is a breach of contract; however, there is no contractual provision that would have been breached by such. Accordingly, there is no genuine dispute of fact and Lakeview's claim for breach of contract cannot be successful.

App. 358.

[¶27] Lakeview's breach of contract claim alleges liquidated damages. App. 15. It appears "liquidated damages" refers to the damages Lakeview was assessed in the Benson County project, a contract that neither the County nor the Township were a party

to. The District Court correctly found there was no provision in the contracts between the parties allowing for liquidated damages for Lakeview. App. 358. Lakeview cannot hold the County and Township responsible for liquidated damages in a contract they were not a party to.

[¶28] Lakeview now maintains its argument from the District Court, alleging that it relied upon the bid documents and material quantity numbers provided by the County when bidding the project. Appellant Br. ¶ 24. Lakeview admits the contracts did not contain any reference to the material quantities, but argues they were premised on the information supplied by the County. Id. at ¶ 25.

[¶29] The elements of a prima facie case of breach of contract are: (1) the existence of a contract; (2) breach of the contract; and (3) damages which flow from the breach. Service Oil, Inc. v. Gjestvang, 2015 ND 77, ¶ 15, 861 N.W.2d 490.

[¶30] It is undisputed that the three contracts did not contain a guarantee as to the material amounts. App. 358. It is undisputed that the Township and County utilized FEMA's quantities in the bid documents because it was required of them for the FEMA-funded projects. App. 250. It is undisputed that Charlie Russell, the representative for the Township and County, was incredibly helpful in assisting Lakeview with change orders when it became clear they were needed. App 182. The Township and County did everything they could to ensure the projects were completed, as required by the contracts. The undisputed facts show no breach of contract, making summary judgment appropriate.

[¶31] Further, the undisputed facts do not show damages flowing from the alleged breach. "No damages can be recovered for a breach of contract if they are not clearly ascertainable in both their nature and origin." N.D.C.C. § 32-03-09. It is

undisputed the projects were profitable for Lakeview App. 282 (41:18-21). It is undisputed that Lakeview's damages arise from delays in the Benson County project, not from the contracted projects. App. 277. It is undisputed Lakeview chose to bid and accept both projects in Spring of 2012, knowing the Benson County project was a large project. App. 277. It is undisputed the project schedules were set by Lakeview. App. 277-78 (24:21-25, 25:1-9), 355. It is undisputed there were weather delays in the Benson County projects. App. 285 (53:10-18), 291 (79:8-14).. The undisputed facts do not show the damages are clearly ascertained from the alleged breach.

[¶32] The District Court correctly found there was no dispute of material fact regarding Lakeview's breach of contract claim. Therefore, its finding of summary judgment in favor of the Township and County should be affirmed.

D. The District Court Correctly Found No Issue of Material Fact Existed Regarding the Township and County's Breach of Contract Counterclaim

[¶33] The Township and County's counterclaim alleges Lakeview breached its contract when it did not provide the proper paperwork, to satisfy the FEMA requirements, as well as any additional surveys or permits required by FEMA. App. 35. The District Court found:

> Again, it is undisputed that the parties are subject to three identical contracts related to the FEMA projects. The Defendants claim that Lakeview breached the provisions stating "[t]he Contractor will be responsible for any documentation and paperwork required to satisfy the FEMA requirements" and "[a]ny additional surveys or permits required shall be the responsibility of the Contractor." FEMA denied funding to the projects because the documentation and paperwork in the form of bonds were not met, as well as the use of materials (from the Taszarek property) which had not been properly sourced. The contracts clearly state that these were the duties of Lakeview, not the Defendants. There is no genuine dispute of fact that those duties were not met.

App. 358-59.

[¶34] Lakeview alleges FEMA would have denied reimbursement solely based upon the lack of the requisite bonds, and that the County accepted full responsibility for ensuring the required bonds were obtained, making summary judgment inappropriate. Appellant Br. ¶ 28.

1. FEMA Denied Reimbursement Due to Lakeview's Breach of Contract, Making Summary Judgment Appropriate.

[¶35] The language of the contracts is clear and unambiguous. It is Lakeview, and not the County or Township's responsibility, to obtain all documentation required by FEMA. App. 20-22, 359. Thus, it does not matter if FEMA denied reimbursement due to the lack of environmental survey, the lack of historical survey, or the lack of requisite bond. Lakeview, per the contracts, is responsible for ensuring that these documents were procured. App. 20-22.

[¶36] When Lakeview failed to obtain the required environmental surveys, it breached the contract. When Lakeview failed to ensure the required historical surveys were performed, it breached the contract. And when Lakeview failed to obtain the required bond, it breached the contract. Lakeview is clearly in breach when it failed to obtain the required documentation. These undisputed facts satisfy the second element of breach of contract.

[¶37] Further, the District Court correctly found that the undisputed facts show clear damages arising from Lakeview's breach. FEMA denied reimbursement due to Lakeview's breach of contract. App. 359.

[¶38] Lakeview's argument regarding concurrent or separate causes of recovery, and reliance on Northern Pac. Ry. Co. v. Morton Cty., 131 N.W.2d 557 (N.D. 1964) is irrelevant. In Northern Pac. Ry. Co. there was conflicting evidence as to the cause of a

landslide. 131 N.W.2d at 561. One party argued the landslide was caused by the other party, the other party argued it was the cause of natural displacement of earth. Id. at 561-62. In this case, both parties agree that Lakeview's breach of contract caused the damage. The County and Township are arguing FEMA denied reimbursement because of the lack of bond, and lack of historical and cultural surveys, all of which are Lakeview's responsibilities under the Contract. Lakeview is arguing FEMA denied reimbursement because of the bond, which is Lakeview's responsibility under the contract.

[¶39] Viewing the evidence in a light most favorable to Lakeview does not alter or change the contract's language. Lakeview argues that the County and Township did not request a bond, so Lakeview was not required to provide one. Appellant Br. ¶ 32. But the contract requires the bond, and makes it Lakeview's responsibility to obtain. The undisputed facts indicate summary judgment is appropriate.

2. The County's Later Admissions are Irrelevant and Inadmissible.

[¶40] Lakeview alleges that statements made by Charlie Russell to FEMA during the County's appeal, and statements made in Charlie Russell's deposition in the Taszarek case, show the County, and not Lakeview, was responsible for obtaining the required bond. Appellant Br. ¶ 33.

[¶41] If a contract is clear and unambiguous, there can be no explanatory evidence allowed to explain intent or contractual terms. Atlas Ready-Mix of Minot v. White Properties, Inc., 306 N.W.2d 212, 220 (N.D. 1981). "The question of whether or not a contract or the terms of a contract are clear and unambiguous is a question of law." Id. "If ambiguity exists in a contract, parol evidence is admissible to explain existing terms or to show the intent of the parties." Id.

[¶42] The District Court correctly found no ambiguity in the contract. The terms are clear – Lakeview is responsible for all documentation required by FEMA. That includes the bond documents. What Mr. Russell said afterwards in an attempt to appeal to FEMA, is irrelevant and inadmissible in a contractual dispute.

[¶43] Further, Lakeview's reliance on N.D.C.C. § 48-01.2-10 is misplaced, and does not support its argument. N.D.C.C. § 48-01.2-10 states:

> Unless otherwise provided under this chapter, a governing body authorized to enter a contract for the construction of a public improvement in excess of two hundred thousand dollars **shall take from the contractor a bond** before permitting any work to be done on the contract. The bond must be for an amount equal at least to the price stated in the contract. . . ..

N.D.C.C. § 48-01.2-10 (emphasis added).

[¶44] The language clearly states the contractor is to obtain a bond and the governing body is to take it from them. Under this statute, it is Lakeview's responsibility to obtain a bond. Further, N.D.C.C. §48-01.2-01 defines the meaning of the terms "public improvement" and "construction" as used in N.D.C.C. § 48-01.2-10. Per subpart 4 of N.D.C.C. §48-01.2-01:

> "Construction" means the process of building, altering, repairing, improving, or demolishing any **public structure or building** or other improvement to any public property. The term **does not include the routine operation or maintenance** of existing facilities, structures, buildings, or real property or demolition projects costing less than the threshold established under section 48-01.2-02.1.

N.D.C.C. § 48-01.2-01(4) (emphasis added).

[¶45] And, per subpart 21 of N.D.C.C. §48-01.2-01:

> "Public improvement" means any improvement undertaken by a governing body for the good of the public and which is paid for with any public funds, including public loans, bonds, leases, or alternative funding, and is constructed on public land or within an existing or new public building or any other public infrastructure or facility if the result of the

> improvement will be operated and maintained by the governing body. **The term does not include a county road construction and maintenance**, state highway, or public service commission project governed by title 11, 24, or 38.

N.D.C.C. § 48-01.2-01(21) (emphasis added).

[¶46] N.D.C.C. § 48-01.2-10 clearly requires the contractor to obtain a bond and provide it to the County for "the construction of a public improvement" in excess of $200,000. But the maintenance of county roads is not considered a "public improvement" within the meaning of N.D.C.C. Ch. 48-01.2 Thus, Lakeview's argument is improper, as it does not apply, and if this Court were to find the projects were "public improvements" would merely reinforce the Township and County's argument that it was Lakeview's duty to obtain a bond.

[¶47] Lakeview's reliance on Thompson Yards v. Kingsley, 54 N.D. 49, 208 N.W. 949, 949 (1926) is also misplaced. Thompson Yards analyzes Sections 6832 and 6833 of the Compiled Laws for 1913. 54 N.D. 49, 208 N.W. 949, 949 (1926). At the time Thompson Yards was decided, Section 6832 of the Compiled Laws for 1913 contained language that roughly paralleled N.D.C.C. § 48-01.2-10. Id. at 950. Section 6833 of the codified law provided language allowing government officials and political subdivisions liable for failure to take a bond from a contractor. Id. at 951.

[¶48] After Thompson Yards, the legislature repealed Section 6833 and there has been no statute holding either government officials or political subdivisions liable for failure to take a bond from a contractor since 1929. See S.L. 1929, ch. 195; S.L. 1995 ch. 443, § 29; S.L. 2007 ch. 403. Notably, Chapter 48-01.2 is completely void of any statute authorizing a direct cause of action against a political subdivision for failure to take a bond from a contractor. If the legislature intended for political subdivisions to be liable

for failure to take a bond from a contractor, it would state as much. See Estate of Christeson v. Gilstad, 2013 ND 50, ¶ 14, 829 N.W.2d 453 (holding the court "must presume the legislature . . . said all it intended to say . . . we will not correct an alleged legislative 'oversight' by rewriting unambiguous statutes to cover the situation at hand.")

[¶49] Thus, neither N.D.C.C. § 48-01.2-10 nor Thompson Yards is applicable to this case, and Lakeview's argument should be dismissed.

3. The Township and County Made Every Attempt to Mitigate Their Damages.

[¶50] The County and Township appealed FEMA's decision multiple times, and made every effort to obtain even a portion of the promised reimbursement, if not reimbursement in its entirety. Lakeview alleges that the County and Township did not provide a response to FEMA proving that the material was obtained "legally," that environmental requirements were met, and a contract bond was in place prior to the beginning of construction. Appellant Br. ¶ 37. These were all Lakeview's responsibilities, and as outlined extensively above, and found by the District Court, the undisputed facts show Lakeview did not obtain the materials legally, Lakeview did not meet the environmental requirements, and Lakeview did not obtain the required bond. The Township and County cannot provide what does not exist. The Township and County did everything in their power to mitigate the damages that arose from Lakeview's undisputed breach of contract.

IV. CONCLUSION

[¶51] The District Court did not err in granting summary judgment in favor of German Township and Dickey County. The undisputed facts show the discovery rule tolled in May 2012, when a reasonable person in Lakeview's position would have

investigated, and found the alleged harm and injuries. Lakeview did not. Thus, the District Court correctly found the statute of limitations applied to Lakeview's tort claims.

[¶52] The undisputed facts further show that the Township and County did not breach the contract, because there are no contractual provisions that guarantee a specific quantity.

[¶53] Finally, the undisputed facts show the clear and unambiguous language in the contracts require Lakeview to provide all documentation required by FEMA, and this includes the required bond. The undisputed facts are clear – Lakeview did not obtain the required documentation, breaching the contract, and as a result, the Township and County were damaged when FEMA refused to reimburse for the projects.

[¶54] For the aforementioned reasons, Appellees Dickey County and German Township respectfully request that this Court affirm the District Courts ruling.

Dated this 9th day of October, 2019.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By */s/ Scott K. Porsborg*
Scott K. Porsborg (ND Bar ID # 04904)
sporsborg@smithporsborg.com
Dickey County Special Assistant State's Attorney
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for Defendants/Appellees
German Township and Dickey County

CERTIFICATE OF COMPLIANCE

[¶55] The undersigned certifies the above brief is in compliance with N.D.R.App. P. 32(e) and the total number of pages of the brief is 22 pages.

Dated this 9th day of October, 2019.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By */s/ Scott K. Porsborg*
Scott K. Porsborg (ND Bar ID # 04904)
sporsborg@smithporsborg.com
Dickey County Special Assistant State's Attorney
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for Defendants/Appellees
German Township and Dickey County

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

Lakeview Excavating, Inc.,	)	**SUPREME COURT NO. 20190195**
	)	
Plaintiff/Appellant,	)	Civil No. 11-2017-CV-00035
	)	
vs.	)	
	)	
Dickey County and German Township,	)	
	)	
Defendants/Appellees.	)	

ON APPEAL FROM CONCLUSIONS OF LAW AND
ORDER FOR JUDGMENT DATED MARCH 25, 2019,
ORDER FOR JUDGMENT DATED APRIL 25, 2019, AND
JUDGMENT DATED APRIL 25, 2019
STATE OF NORTH DAKOTA
DICKEY COUNTY
THE HONORABLE DANIEL D. NARUM

CERTIFICATE OF SERVICE

[¶1] I hereby certify that on the 9th day of October, 2019, a true and correct copy of the foregoing:

1. **Brief of Appellees; and**

2. **Appendix of Appellees;**

was filed electronically via Electronic Filing, and a Service Notification e-mail will be sent to the following:

Jon R. Brakke — jbrakke@vogellaw.com
James M. Cailao — jcailao@vogellaw.com
Attorney at Law
P.O. Box 1389
Fargo, ND 58107-1389

Dated this 9th day of October, 2019.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By */s/ Scott K. Porsborg*

Scott K. Porsborg (ND Bar ID # 04904)
sporsborg@smithporsborg.com
Dickey County Special Assistant State's Attorney
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for Defendants/Appellees
German Township and Dickey County