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Case No.: 20010273
District Court No. 01-C-00015
IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JAN 25 2002

JERRY L. MEIDE, INDIVIDUALLY
AND MEIDE & SON, INCORPORATED,
A NORTH DAKOTA CORPORATION,
Appellants,

STATE OF NORTH DAKOTA

v.

WAYNE STENEHJEM, ATTORNEY
GENERAL, EX REL., STATE OF
NORTH DAKOTA, STATE HEALTH
DEPARTMENT, AND ENVIRONMENTAL
ABATEMENT SERVICES, INC.,
Appellees.

APPEAL FROM THE JUDGMENT OF THE RICHLAND COUNTY
DISTRICT COURT DATED AUGUST 23, 2001
THE HONORABLE RICHARD W. GROSZ

BRIEF OF THE APPELLANTS

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STATEMENT OF THE ISSUES

ISSUE NO. 1: Factual issues preclude summary judgment.

ISSUE NO. 2: Meide's Complaint is not precluded by the doctrine of res judicata or collateral estoppel.

ISSUE NO. 3: Meide's cause of action is not barred by the doctrine of judicial estoppel.

Statement of the Case

This action is the Declaratory Judgment action which was commenced by the Plaintiffs Jerry L. Meide and Meide & Son, Incorporated (Meide) by Summons & Complaint dated January 17, 2001 as filed with the Clerk of District Court January 18, 2001. Appendix p. 4-9. The cause of action seeks to determine the fair and reasonable amount which Meide owes Environmental Abatement Services, Inc. (Abatement). Appendix p. 5-9. At the time of the commencement of this action, Meide obtained the order of this Court depositing the amount in controversy with the Clerk in an interest bearing account. Appendix p. 10.

Abatement made a motion to the District Court for an Order granting it summary judgment for the reason that this matter was previously decided in Heidi Heitkamp, Attorney General et al vs. Meide & Son Incorporated et al, Civil No. 99-C-0028. Clerk Docket #11. The District Court granted Abatement's Motion for Summary Judgment by Order dated August 22, 2001 and Judgment was entered on August 23, 2001. Notice of Entry of Judgment was served by mail on August 31, 2002. Clerk Docket #31. Meide made a Motion for Reconsideration of Order & Judgment filed September 17, 2001. Clerk Docket #37. The Court denied the Motion by Order dated September 28, 2001 which Order was served by facsimile on October 5, 2001. Clerk Docket #45. Meide filed its Notice of Appeal with the Clerk of District Court on October 1, 2001. Appendix p. 141.

Statement of Facts

In January of 1998, Meide was in the process of remodeling certain buildings downtown Wahpeton, North Dakota. Appendix p. 32. paragraph 2. The buildings were owned by the Opera House Limited Partnership and 400 Block Limited Partnership. Appendix p. 32. paragraph 3. RRABB, Inc. was the general partner of said partnerships. Appendix p. 32, paragraph 4. During the process of said remodeling, employees of Meide & Son Incorporated and Jerry L. Meide improperly removed items of waste containing asbestos from the premises. Appendix p. 32, paragraph 5. The North Dakota State Health Department stepped in and ordered an assessment and clean up of the project. Appendix p. 33, paragraph 6. Meide retained the services of Nova Environmental Services, Inc. (Nova) to conduct an assessment of the project. Appendix p. 33, paragraph 6. After the assessment was completed Nova submitted written specifications for clean up of the project. Appendix p. 33, paragraph 6. After the specification was received and approved by the State of North Dakota and Meide Nova requested proposals for the completion of the project. Appendix p. 33. paragraph 7. Prior to the commencement of any work Mr. Tom Gentzkow of Nova met with Meide and advised him that Abatement would clean up the building for an estimated \$12,000.00 to \$15,000.00. Appendix p. 33, paragraph 9.

When the initial statement for services was received from Nova Meide contacted Tom Gentzkow, supervisor for NOVA, and disputed the amount of the bill. Appendix p. 33, paragraph 9.

Later, when additional work was ordered by the State of North Dakota, Nova and Mr. Gentzkow were again contacted by Meide. Appendix p. 33-34, paragraph 10-11. Meide was advised by Gentzkow that neither Nova nor Abatement would undertake work until their prior bills were paid. Meide reminded Gentzkow that he thought the bill was

excessive and advised Gentzkow that he would contact Abatement directly to discuss this matter. Appendix p. 34, paragraph 11.

Meide agreed to pay the sum of \$10,000 to show good faith until such time as the amount of the actual bill could be negotiated. Appendix page 34, page 12. With that understanding both Nova and Abatement undertook to complete the work. Appendix p. 34, paragraph 13. At the time the final bill was received and thereafter, Meide attempted to negotiate a resolution of the bills, however, was unsuccessful. Appendix 34, paragraph 14.

In January of 1999, the State of North Dakota commenced a civil action for violation against Meide for violation of the various pollution control and hazardous waste acts. Appendix p. 34, paragraph 15. A Consent Agreement between Meide and the State of North Dakota was signed on January 11, 1999, Appendix p. 42, and Richland County District Court entered Judgment pursuant to the agreement on January 25, 1999. Appendix p. 37. The Consent Agreement with regard to the payment of Abatement's fees provides as follows:

XX.

1. Jerry L. Meide and/or Meide & Son, Incorporated shall satisfy any monetary obligation owing to Nova Environmental Services Incorporated the environmental consultant, and Environmental Abatement Services of N.D., the environmental re-mediation contractor who performed the asbestos clean up on the identified buildings in Wahpeton, North Dakota within two years of the date of entry of Judgment herein. The contractors shall retain the right to seek compensation from Defendant prior to the two-year period. Appendix p. 52, paragraph XX(1).

The Consent Agreement did not order an amount due Abatement, but left the amount to be determined by negotiation or future litigation. Appendix p. 52, paragraph

XX (1). Appendix p. 35, paragraph 15.¹ Meide was unable to negotiate a Settlement Agreement with Abatement. Appendix p. 35, paragraph 18. Thereafter on January 19, 2001 this action was commenced to determine the amount Meide owes Abatement. Appendix p.35, paragraph 18. The amount Abatement claimed due was deposited with the Clerk of Court pursuant to Order dated January 19, 2001.

Argument

The standard of review on a motion for summary judgment is clear:

Under Rule 56, N.D.R.Civ.P., a summary judgment should be granted only if it appears that there are no issues of material fact or any conflicting inferences which may be drawn from those facts. The party seeking summary judgment has the burden to clearly demonstrate that there is no genuine issue of material fact. In considering a motion for summary judgment, the court may examine the pleadings, depositions, admissions, affidavits, interrogatories, and inferences to be drawn from the evidence to determine whether summary judgment is appropriate. The court must view the evidence in a 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 evidence. Courts must also consider the substantive standard of proof at trial when ruling on a motion for summary judgment. Ellingson v. Knudson, 498 N.W.2d 814, 817 (N.D. 1993) (citations omitted).

Kukowski v. Simonson Farm, Inc., 507 N.W.2d 68, 71 (N.D. 1993)

ISSUE 1: Factual issues preclude summary judgment.

In this case the facts and circumstances will establish that there is clearly a number of factual disputes which preclude summary judgment in this matter including:

¹ This point was explained by attorney RET Smith in his Affidavit. Appendix p. 135 - 136.

* The contract specifications consist of a document prepared by Nova. Appendix p. 55-119. The specifications called for a fixed price contract with change orders being issued for any additional work or changes in the contract amount. Appendix p. 33, paragraph 6; p. 61; p. 107. The specifications also called for the contractor making application for payments on a specified form. Appendix p. 108. Prior to any final payment being made, the contract documents called for submission of a number of documents, including:

- (a) transmittal of the required project construction records to the owner;
- (b) landfill receipts for all asbestos containing material;
- (c) visitor release forms;
- (d) worker release forms;
- (e) work inspection forms; and
- (f) daily logs. Appendix p. 74 and 103-112.

It is clear from the absence of any of these documents in the record that the documents were not prepared or submitted. Simply the invoices of Abatement and Environmental Abatement Services of North Dakota, Inc. Appendix p. 24 and 26.

* The bid proposal of Abatement was for:

Worker. \$55.00 per hour working 10 hours per day
for 7 days per week.

Supervisor, \$70.00 per hour working 10 hours per day 7 days per week.

The price "included all material, disposal and per diem. Appendix p. 23. The initial invoice dated 3/17/98 billed some worker time at \$55.00 per hour, some at \$75.00 per hour, and some supervisor time at \$70.00 per hour and additional time at \$90.00 per hour. There was a bill disposal and miscellaneous expense in addition to the quoted hourly rate. Appendix p. 24.

- * This certainly is an inconsistency between the "quoted hourly rate" as claimed accepted by David Anklam on behalf of Abatement versus the rate at which the disputed bill was presented.
- * The second invoice came from Environmental Abatement Services of North Dakota, Inc., a separate corporation. Appendix p. 26. This billing contained the same discrepancies as was pointed out on the prior invoice.
- * The invoices in question provide for one in the amount of \$58,160.00 and one in the amount of \$42,675.00. Of that amount Meide has paid \$40,000.00. Appendix p. 20 21, 25, 27, and 28.
- * Meide at all times relevant, disputed the amount due Abatement. Appendix p. 33-36.

- * No amount was determined by the Consent Agreement (Appendix p. 42-54) or the Judgment (Appendix p. 37-41) to be due Abatement.

Whether a contract exists is a question of fact. See Stout v. Fisher Indus. Inc., 1999 ND 218 ¶ 11. 603 NW2d 52; Jones v. Pringle & Herigstad, P.C., 546 NW2d 837, 842 (ND 1996). Likewise, "whether a contract is intended to be complete, final, and binding agreement" is also a question of fact. Jones at 842.

It is undisputed that the Consent Agreement intended to permit Meide to either negotiate or contest the amount claimed due by Abatement. Appendix p. 35. 52. The Consent Agreement made it clear that Meide was to satisfy Nova. which agreement was negotiated and "Environmental Abatement Services of ND." No amount was set nor was any mention made of "Environmental Abatement Services, Inc." in the Consent Agreement or Judgment. Clearly, when the court views the evidence in a light most favorably to Meide and Meide is given the benefit of all favorable inferences which can reasonably be drawn from the evidence. summary judgment is precluded by material issues of fact.

ISSUE 2: Meide's Complaint is not precluded by the doctrine of res judicata or collateral estoppel.

The North Dakota Supreme Court in Hofsommer v. Hofsommer Excavating, Inc., 488 NW2d 380 (ND 1992) states as follows with regard to whether a claim was subject to the doctrine of res judicata or collateral estoppel:

Although collateral estoppel is a branch of the broader law or res judicata the doctrines are not the same. Res judicata, or claim preclusion, is the more sweeping doctrine that

prohibits the relitigation of claims or issues that were raised or could have been raised in a prior action between the same parties or their privies and which was resolved by final judgment in a court of competent jurisdiction. E.g., Byron's Construction v. Department of Transportation, 463 NW 2d 660, 662-663 (ND 1990);...

Four tests must be met before collateral estoppel will bar relitigation of a fact or issue involved in an earlier lawsuit: (1) Was the issue decided in the prior adjudication identical to the one presented in the action in question?: (2) Was there a final judgment on the merits?: (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?: and (4) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue? *Armstrong supra*.

In general, privity exists if a person is "so identified in interest with another that he represents the same legal right." 46 Am. Jur. 2d Judgments §532 at p. 683 (1969). In *Stetson, supra* we said:

The strict rule that a judgment is operative, under the doctrine of res judicata, only in regard to parties and privities, is sometimes expanded to include as parties, or privities, a person who is not technically a party to a judgment, or in privity with him, but who is, nevertheless, connected with it by his interest in the prior litigation and by his right to participate therein, at least where such right is actively exercised by prosecution of the action, employment of counsel, control of the defense, filing of an answer, payment of expenses or costs of the action, the taking of an appeal, or the doing of such other acts are generally done by parties. [Quoting 46 Am.Jur.2d, supra, §535 at pp. 688-690.]...

As a general rule, when a particular fact is established not by judicial resolution but by stipulation of the parties, the fact has not been "actually litigated" for purposes of collateral estoppel unless the parties to the stipulation

manifest an intent to be bound in a subsequent action. Id at 383, 384.

Clearly the doctrine of res judicata does not prevent litigation of the amount in controversy between Meide and Abatement.

In this case Abatement was not a party to the civil enforcement proceeding commenced by the State of North Dakota. As a result, when there was a controversy regarding the amount owed Abatement, the Court did not make a determination as to the balance, if any owed Abatement. The issue that was decided in Heitkamp was whether Meide violated certain Environmental Laws and the appropriate civil punishment for those violations. The issue in this case is the amount, if any, which Meide owes Abatement.

In Heitkamp there was no final Judgment on the merits of the Abatement claim. Because the issue was not before the Court, the Consent Agreement and the Judgment simply required that any monetary obligations owed Abatement be satisfied. This Judgment certainly does not consist of adjudication on the merits of the amount of the Abatement's claim against Meide.

Abatement was not a party in privity with the State of North Dakota in the prior litigation, in that Abatement was not connected to the State of North Dakota by its interests in the prior litigation, nor did Abatement have any right to participate therein. The action was simply one to enforce a violation of Environmental Laws and Hazardous Waste Disposal Laws as to opposed to dealing with the specific claim of Abatement. Further, it is clear that Abatement did not employ counsel, control the action, pay any

costs or disbursements in the action. take an appeal or any other acts that are generally done by the party to a proceeding. The only connection between the State of North Dakota and Abatement in a prior litigation was that the State of North Dakota was aware that Abatement had performed services on the property, and that Abatement claimed that an amount was due and owing for performing those services.

This court must clearly deny Abatement's claim that the doctrine of res judicata and/or collateral estoppel bars Meide's lawsuit.

ISSUE NO. 3: Meide's cause of action is not barred by the doctrine of judicial estoppel.

The District Court found that in the alternative, Meide's claim was barred by the doctrine of judicial estoppel. The court relied on New Hampshire v. Maine, 121 S.Ct 1801, 1815, 149 L.Ed.2d. 968, 978 (2001) which set forth the following factors:

- a. Whether or not the parties' later position is clearly inconsistent with its earlier position.
- b. Whether the party has succeeded in persuading the Court to accept that party's earlier position.
- c. Whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair judgment on the opposing party.

as well as Watertown Concrete Products, Inc. v. Foster, 630 NW2d 108 (SD 2001) where the Court stated as follows:

Judicial estoppel cannot be reduced to an equation, but courts will generally consider the following elements in deciding whether to apply the doctrine: the later position must be clearly inconsistent with the earlier one; the earlier position was judicially accepted, creating the risk of inconsistent legal determinations; and the party taking the inconsistent position

would derive an unfair advantage or impose an unfair detriment to the opponent if not estopped. New Hampshire, 532 U.S. at ___ 121 S. Ct. at 1815, 149 L.Ed. 2d 968 at ___; see also Gesinger v. Gesinger, 531 NW2d 17, 21 (SD 1995); see also State v. St. Cloud, 465 NW 2d 177 (SD 1991). The core question here is whether Watertown Concrete took inconsistent positions. See New Hampshire, 532 U.S. at ___ 121 S. Ct. at 1815, 149 L.Ed. 2d 968 at ___; State v. St. Cloud, 465 NW 2d 177 at 179. Id at p. 112.

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In this case none of the New Hampshire v. Maine factors or Watertown Concrete factors are present:

- a. Meide made it clear to the state of North Dakota at the time the Consent Agreement was signed that there was a dispute as to the amount owed. Appendix p. 33-36; p. 34-35 paragraph 11, paragraph 14, paragraph 18.
- b. The Court was not misled as to the claim of Environmental Abatement Services, Inc. as the language is ambiguous as the amount due Environmental Abatement Services, Inc. was not set forth in the Court's earlier decree. As a result, there is no risk of an inconsistent determination. Appendix p. 40, paragraph IV(1); p. 52, paragraph XX(1); and p. 54.

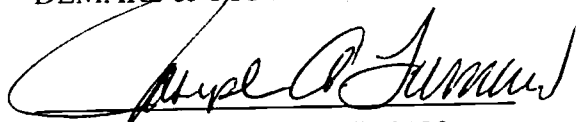
The foregoing make it clear that the doctrine of judicial estoppel may not be imposed as a matter of fact and law to preclude Meide's cause of action.

Conclusion

Jerry L. Meide and Meide & Son Incorporated, Appellants in this matter, respectfully request this Court to determine that genuine issues of material fact exist as to the amount owed Environmental Abatement Services, Inc. The Judgment of the District Court should be reversed and this case remanded for trial on its merits.

Dated this 25th day of January, 2002.

DEMARS & TURMAN, LTD.

A handwritten signature in black ink, appearing to read "Joseph A. Turman", written over a horizontal line.

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) ss.
COUNTY OF CASS)

AFFIDAVIT OF SERVICE BY
MAIL

JANELLE ALBRECHT, being first duly sworn upon oath, deposes and says that on January 31, 2002, she served the attached:

APPELLANT'S AMENDED BRIEF PAGES ii AND 11

RE: Jerry L. Meide et al v. Wayne Stenehjem ex rel et al
Civil No.: 01-C-00015
Appellate Court No. 20010273
Our File No.: 5554.2

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Upon the following person(s):

STATE OF NORTH DAKOTA

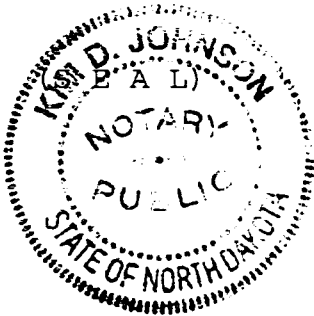
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Subscribed and sworn to before me on January 31, 2002.



Kim D. Johnson

Notary Public
My Commission Expires: 4/13/07