20170319 & 20170412
FILED
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MARCH 23, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Agri-Industries, Inc.,	)	
	)	Supreme Court Case No.:
Plaintiff,	)	20170319 & 20170412
	)	
v.	)	District Court Case No.:
	)	53-2013-CV-01320
Francis Franson,	)	
	)	
Defendant and Third Party Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
Hess Corporation,	)	
	)	
Third Party Defendant-Appellee.	)	

APPEAL FROM THE ORDER GRANTING SUMMARY JUDGMENT
DATED JUNE 23, 2017
THE HONORABLE BENJAMIN J. JOHNSON, PRESIDING
NORTHWEST JUDICIAL DISTRICT

BRIEF OF CROSS-APPELLEE FRANCIS FRANSON

Respectfully submitted by:

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STATEMENT OF THE ISSUES

[¶1] Was the district court correct in finding the Franson third party complaint against Hess was not barred by the applicable statute of limitations?

[¶2] Whether the district court was correct in finding Franson's third party complaint complied with N.D.R.Civ.P. Rules 8 and 14?

STATEMENT OF THE CASE

[¶3] On March 14, 2017, Hess Corporation filed a motion for summary judgment, which included several theories for why they should be granted summary judgment. (App. pg. 18). One theory of Hess Corporation advanced was that under N.D.C.C. § 38-11.1-06, it could not be held responsible as the mineral developer because Francis Franson failed to conduct a certified water quality test within one year before seismic testing on his property. (Id.) By way of its June 23, 2017 Order, the district granted Hess Corporations motion for summary judgment by finding that N.D.C.C. § 38-11.1-06 requires a certified water quality test to be conducted and that Francis Franson did not conduct a certified water. (Id.) Francis Franson has appealed the June 23, 2017 Order that granted Hess Corporation summary judgment.

[¶4] Hess Corporation has filed a cross-appeal regarding portions of the District Court's order granting summary. Although granted summary judgement pursuant to this first issue, Hess Corporation was denied summary judgment for its argument that (1) the statute of limitations had expired; and (2) further denied that Franson's third party complaint failed to meet the pleading requirements of Rule 8 and 14 of the North Dakota Rules of Civil Procedure.

STATEMENT OF THE FACTS

[¶5] Francis Franson, the cross-appellee, served the third-party complaint on Hess Corporation on December 26, 2014. Hess Supp. App. 8; Franson App. 13. The Franson deposition contains testimony that varies in time as to when Franson first discovered damage to his well. The District Court interpreted the facts most favorable to Franson, and relied on the following deposition testimony of Franson to find he complied with the applicable statute of limitation:

> Q: At some point after the testing was conducted, you noticed a change in the old water well; is that right?
>
> A: Correct. Mm-hmm (nodding affirmatively).
>
> Q: How long after the testing was conducted did you notice that change?
>
> A: Hmm, after Christmas.
>
> Q: You noticed a – you noticed a change in the water well after Christmas?
>
> A: Yeah.
>
> Q: So the – water well was working okay from the day that they took the testing until sometime after Christmas?
>
> A: Yes.
>
> Q: And was it out I – how long after Christmas was it that you noticed the – the water well – some change in the water well?
>
> A: Hmm, four days, something like that.
>
> Q: So right around the New Year?
>
> A: Mm-hmm (nodding affirmatively). Yes.

Hess Supp. App. 17-18, Franson Depo. pp. 39-40.

LAW AND ARGUMENT

A. Standard of Review

[¶6] Under N.D.R.Civ.P. 56, summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. *Hasper v. Center Mut. Ins. Co.*, 2006 ND 220, P5, 723 N.W.2d 409. The party moving for summary judgment must show there are no genuine issues of material fact and the case is appropriate for judgment as a matter of law. *Trinity Hosps. v. Mattson*, 2006 ND 231, P10, 723 N.W.2d 684. A district court's decision on a motion for summary judgment is a question of law that we review de novo on the record. *Id.* In determining whether summary judgment was appropriately granted, we view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences which can reasonably be drawn from the record. *Hasper*, at P5. *Erickson v. Brown*, 2008 ND 57, 747 N.W.2d 34.

B. In viewing the evidence most favorable to Franson (the responding party), the applicable statute of limitation had not expired.

[¶ 7] As stated by the district court, "In considering a motion for summary judgment, the court must view the evidence in the light most favorable to the party opposing the motion, and that party must be given the benefit of all favorable inferences which can reasonably be drawn from the evidence." *Heng v. Rotech Med. Corp.*, 2004 ND 204, ¶ 9, 688 N.W.2d 389.

[¶ 8] The district court reviewed the deposition transcript of Franson, in which he indicated that he noticed the change in the water well after Christmas, about four days after Christmas. While there was other deposition testimony to the contrary, the district

court concluded Franson had actual knowledge of the injury when he noticed the sudden change after Christmas in 2008 and, as such, has complied with the applicable statute of limitations. The deposition testimony listed below certainly creates a factual issue as to when Franson discovered an issue with his water well.

> Q: At some point after the testing was conducted, you noticed a change in the old water well; is that right?
>
> A: Correct. Mm-hmm (nodding affirmatively).
>
> Q: How long after the testing was conducted did you notice that change?
>
> A: Hmm, after Christmas.
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> Q: You noticed a – you noticed a change in the water well after Christmas?
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> A: Yeah.
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> Q: So the – water well was working okay from the day that they took the testing until sometime after Christmas?
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> A: Yes.
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> Q: And was it out I – how long after Christmas was it that you noticed the – the water well – some change in the water well?
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> A: Hmm, four days, something like that.
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> Q: So right around the New Year?
>
> A: Mm-hmm (nodding affirmatively). Yes.

Hess Supp. App. 17-18, Franson Depo. pp. 39-40.

[¶ 9] The reasonable date of discovery for Franson occurred in January of 2009 after Agri-Industries came to the Franson property to see if the water pump was the problem with getting water. Franson testified that he called Agri-Industries in January of 2015 and they believed that something was wrong with the water pump (as opposed to well

damage from Hess seismic activity). Agri-Industries came out to his property in January of 2009 to pull the well pump and see if it was the reason the water stopped working.

> Q: I'm not sure I understood that. I'm sorry.
>
> A: There were going to try to – no, it wasn't getting any water. So they decided there was something wrong with the pump. They were going to pull it. And when they pulled it, there said there was no water there.
>
> Q: And when you say "pull it," what do you mean?
>
> A: Pull the pump out. They were going to pull the pump out of there.
>
> Q: And who pulled the pump out for you?
>
> A: Agri-Industries guys, the well driller.

Hess Supp. App. 18, Franson Depo. pp. 42-43.

[¶10] "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." *Snortland v. State*, 2000 ND 162, ¶ 11, 615 N.W.2d. 574. It is certainly supported from the Franson deposition testimony, that first time Franson knew or should have known what was wrong with the water well was ***after*** Agri-Industries came to his property to check if the pump was not working in January of 2009. In a January of 2009 phone call, Agri-Industries told Franson what they thought the problem was, specifically that something was wrong with the water well pump. After Agri-Industries determined the pump was not the problem, they told him he needed a new water well. The date of the discovery was in January of 2009 at the earliest, meaning service of process of the third party complaint on December 26, 2014 was prior to the six (6) year statute of limitation expiring.

Q: So do you remember when you called Agri-Industries to – to come fix the problem? At – at what point did you first give them a call, if you remember?

A: Hmm. Well, in – in January when it wasn't getting any water, you know.

Q: So you – you called -- you called them in early January. First half of January?

A: Oh, yeah. Oh, yeah.

Q: And they came out at some point in January?

A: Yeah. Right away.

Q: And what was the first thing that they did?

A: There were going to pull the pump and see if there was something wrong with the pump. Well, there wasn't nothing wrong with the pump. There was no water.

Q: That's what Agri-Industries told you?

A: Yeah.

Q: And what did they suggest that you do at that point?

A: Well, they told me I had to drill a new well.

Hess Supp. App. 18-19, Franson Depo. pp. 43-44.

[¶11] The summons and complaint was served on December 26, 2014. In viewing the facts most favorable to Franson and giving him all favorable inferences that can be drawn from the record, the first time he knew or reasonable could have known that the seismic activity from Hess / Geokinetics destroyed his water well was in January of 2009 after Agri-Industries told Franson he needed a new water well. Franson served his third party complaint on Hess Corporation within the six (6) year statute of limitations by serving it on December 26, 2014.

C. Franson's third party complaint states a claim under North Dakota Rules of Civil Procedure Rules 8 and 14.

[¶12] N.D.R.Civ.P. Rule 8 provides that a third party claim must contain a short and plain statement of the claim showing the pleader is entitled to relief; and a demand for the relief sought. The complaint is not required to allege particular laws or theories under which recover is sought, it merely requires the complaint apprise the defendant of the nature of the plaintiff's claim. *Gowin v. Hazen Mem'l Hosp. Ass'n.*, 311 N.W.2d 554, 556 (N.D. 1981). The third party complaint of Franson complies with Rule 8.

[¶13] The Franson third party complaint also complies with N.D.R.Civ.P. Rule 14, as the complaint against Hess arises out of the same transaction or occurrence as the subject matter of Agri-Industries claim against Franson. Quite simply, Franson believed that Geokinetics (the seismographic company hired by Hess Corporation) had agreed to pay Agri-Industries for its drilling of the new water well.

Q: And did you ask them to do that?

A: I asked them in February, I think it was, to drill a new one – new one. Try to. In February or March. I forget now which date it was – that was.

Q: Did you personally talk with the gentleman from Geokinetics at any time in January of 2009?

A: Oh, yeah, Ted Bright. Yeah. I talked to him many times, and he just laughed at me. Said that they'll fix it.

Q: Ted Bright told you that who would fix it?

A: They would – they would – they would drill me a new well.

Q: He told you that Geokinetics was going to drill you a new well?

A: Mm-hmm. (nodding affirmatively).

Hess Supp. App.19, Franson Depo. pp. 44-45.

[¶14] The Franson deposition (continuing on pages 45-46) indicates that Franson was told by Ted Bright of Geokinetics that he spoke with Ben Anderson of Agri-Industries for the purpose of drilling Franson a new water well. Franson brought the third party complaint against Hess Corporation as they are the mineral developer responsible for the actions of Geokinetics. At all times, Franson believed that either Geokinetics or Hess had agreed to pay for the water well drilling activities of Agri-Industries.

[¶15] N.D.R.Civ.P. Rule 14(a)(4) also provides Hess corporation with the ability to file a motion to sever or try the third-party claim separately. Hess did not file a motion to severe the third party complaint. As Franson believed that an agreement existed between Geokinetics / Hess to pay for Agri-Industries water well drilling, it was appropriate for the district court to grant Franson's motion to allow for the third party complaint against Hess Corporation.

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CONCLUSION

[¶16] Based on the aforementioned law and reasoning, Cross-Appellee Francis Franson respectfully requests the Supreme Court deny the Hess Corporation Cross-Appeal.

Respectfully submitted this 23rd day of March, 2018.

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Certificate of Service

The undersigned certifies, pursuant to Rule 5 (f) of the North Dakota Rules of Civil Procedure, that on March 23, 2018, a true and correct copy of the following document(s):

1. Brief of Cross-Appellee Francis Franson, and
2. Certificate of Service.

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