IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

JEFF LOCKER and RHONDA LOCKER, Husband and Wife,

Plaintiffs,

v.

ENCANA OIL & GAS (USA) INC., a Delaware corporation,

Defendant.

Case No. 14–CV–131–J

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (ECF NO. 31)

This matter is before the Court on *Defendant Encana Oil & Gas (USA) Inc.'s Motion for Summary Judgment* (ECF No. 31) (the "Motion"). The Court, having carefully considered the Motion, *Plaintiffs' Brief in Opposition to Defendant Encana Oil and Gas, Inc.'s Motion for Summary Judgment* (ECF No. 45), oral arguments conducted on February 23, 2016 (ECF No. 63) and being fully advised in premises, for the following reasons, Defendant's Motion is **DENIED.**

BACKGROUND

This case arises out of Jeff and Rhonda Locker's ("Plaintiffs") claims that Encana Oil & Gas (USA) Inc. ("Defendant") (1) negligently contaminated their ground water in Pavillion, Wyoming, (2) intentionally mad misrepresentations during a settlement agreement in 2003, (3) fraudulently convinced Plaintiffs to consume unsafe water, (4) persuaded Plaintiffs to resume consuming contaminated ground water, and (5) concealed and prevented investigation of the Plaintiffs' contaminated ground water. Compl. This purported conduct allegedly caused Plaintiffs significant damage and serious health problems. *Id.* at ¶ 31. In their Complaint, Plaintiffs assert causes of action for negligence, nuisance, strict liability, medical monitoring, and fraud. In response to Plaintiffs' allegations, Defendant denies any wrongful conduct. Def's. Answer.

a) The Gas Wells

Between 1973 and 2005, owners and operators drilled and reworked the five natural gas wells involved in this lawsuit. Summary of Oil and Gas Wells Within 1/2 Mile of Locker #1, Compl. Ex. D. The five gas wells are labeled as 42x-11, 22-12, 13-12, 23-12, and 12-12. These gas wells were owned and operated by Shell from 1973 to 1986, by Tom Brown, Inc. ("TBI") from 1986 to 2004, and by Defendant Encana from 2004 to present. ECF No. 32 p.4. The owners and operators performed the following actions on each well over the years.

- 42x-11: spudded[1] in 1973, produced in 1974, and reworked[2] in 2001;
- 22-12: spudded in 1979, produced in 1981, and reworked in 1982 and 1993;
- 13-12: spudded in 2000 and produced in 2001;
- 23-12: spudded in 2001 and produced in 2001 and;
- 12-12: spudded in 2005 and produced in 2005.

Id.

b) The Lockers

In 1984, Jeff and Rhonda Locker ("Plaintiffs") purchased their farm in Pavillion, Wyoming. Compl. ¶ 4, ECF No. 2. In 1988, Plaintiffs applied for a loan from the state farm loan board, which required Plaintiffs to obtain a water sample from their domestic water well ("Locker #1"). *Id.* The 1988 water potability test showed various levels of substances, but confirmed their water was clean. Locker Water Well Test, Jan. 20, 1988, ECF No. 45-1. In 1992, TBI reworked the 22-12 gas well. J. Locker Depo. p. 9 ECF No. 32-1. Plaintiffs claim their water subsequently turned black and flooded portions of their home. *Id.* Plaintiffs had another test performed on Locker #1, which determined that the water's sulfate and total dissolved solids levels significantly increased. Standard Potable Water Report, June 17, 1992, ECF No. 45-3.

Plaintiffs and TBI communicated about these water issues, and in 1997, TBI had water tested, either from its 22-12 well's produced water or Locker #1. Water Quality Report and Invoice, Feb. 7, 1997, ECF No. 45-4. Defendant contends that this test was of Locker #1. ECF No. 32 p. 4. Plaintiffs contend this test was of 22-12's produced water

[1] Spud: To start the well drilling process by removing rock, dirt and other sedimentary material with the drill bit.
[2] Rework: To restore production from an existing formation when it has fallen off substantially or ceased altogether.

which would indicate there was communication between Locker #1 and the 22-12 well. B. Gimmeson Depo. pp. 10-11 ECF No. 45-6.

In late 2001, TBI's Environmental Health and Safety Manager, Brant Gimmeson, ordered a test of Plaintiffs water. Eviro-Test Fast Faxed Analysis Report, Dec. 20, 2001, ECF No. 45-7.). The test indicated the presence of Toluene, a component of BTEX[3]. *Id.* Mr. Gimmeson and TBI did not disclose these water test results to Plaintiffs, who only discovered the test results after they filed their claims. J. Locker Depo. pp. 84-85 ECF No. 45-2.

In spring of 2002, Mr. Gimmeson hired Paul Taucher, a professional geologist, to collect water samples from a few local water wells, including Plaintiffs, and Defendants produced water from the 22-12 well. P. Taucher Aff. p. 2, ECF No. 45-8. Mr. Taucher determined that communication was occurring between Locker #1 and a neighboring water well. *Id.* at p. 4. Mr. Taucher was not asked to perform an investigation of whether there was communication between the 22-12 and local water wells. *Id.* at pp. 3–4.

c) The Settlement Agreement

While Mr. Taucher performed the aforementioned water collection, Mr. Gimmeson and Steve Mansur worked with Plaintiffs on the terms of a settlement agreement. B. Gimmeson Depo., ECF No. 45-6; S. Mansur Aff., ECF No. 45-10. The Settlement Agreement and Release ("Settlement Agreement") was signed on April 11, 2003, between Plaintiffs and TBI to address Plaintiffs complaints surrounding the water quality of Locker #1. Settlement Agreement, ECF No. 45-13. Plaintiffs released TBI, and

[3] BTEX: Benzene, Toluene, Ethylbenzene, and Xylenes

their successors, from all claims related to "22-12 well in addition to the operation of other wells located on or in the vicinity of the Premises..." which would also include 13-12, 23-12, and 42x-11. *Id.* at ¶ 3, 8.

Before Plaintiffs would sign the Settlement Agreement, they sought assurances from TBI on four key issues:

> (1) that there would tests on our property to rule out unnatural, toxic, or drilling-associated compounds, (2) that there were no unnatural compounds or drilling-associated compunds in our water, (3) that there were tests to evaluate whether or not the nearby gas wells had, or could, leak or "communicate" chemicals through the ground into our water, and (4) that communication had been ruled out by those tests.

J. Locker Aff. ¶ 14, ECF No. 45-12. These four assurances which Plaintiffs sought were included in the Settlment Agreement with the following language: "WHEREAS, TBI has reviewed the hydrology in the area and conducted tests in respect of its Operations and has determined there are no petroleum by-products in the Lockers' water and no communications in the formations between wells operated by TBI and the Lockers' water wells." Settlement Agreement, ¶ 4 ECF No. 45-13.

TBI agreed to pay Plaintiffs $21,500.00 as "full, complete and final payment in satisfaction of all claims and causes of action they had, now have, or may have against TBI with respect to the Operations and Allegations." *Id.* at ¶¶ 7-8. The parties anticipated the money would be used for a reverse osmosis water treatment unit for Locker #1. S. Mansur Aff. ¶ 6, ECF No. 45-10.

d) Post-Settlement Agreement

Plaintiffs installed the reverse osmosis system in the spring of 2004 and shortly after, Mrs. Locker became ill in September of 2004. J. Locker Aff. ¶ 17, ECF No 45-12. Believing the water from Locker #1 was causing the illness, Mrs. Locker stopped consuming the water, but would occasionally drink from Locker #1 to test her "hypothesis" that it was the water making her sick. R. Locker Depo. pp. 97-99, ECF No. 32-1.

In October of 2007, Rhonda attended a public meeting held in Pavillion concerning water issues in the area, and Plaintiffs began to wonder if glycol was in their water. R. Locker Depo. pp. 109-112 ECF No. 32-1. Mrs. Locker also expressed concern that the reverse osmosis machine would not remove the glycol from the water. Dustin Bleizeffer, *Looking for answers: Ranchers Suspect Gas Activity Polluted Drinking Water,* CASPER STAR TRIB., Nov. 10, 2007 ECF No. 32-2. In January of 2008, Plaintiffs sent a letter to the Wyoming Department of Environmental Quality discussing their concern that local drilling had contaminated their water. Letter from Jeff and Rhonda Locker to Leroy Feusner, Administrator, Solid and Hazardous Waste Division, Wyoming Department of Environmental Quality (Jan. 3, 2008), ECF No. 32-2.

On May 19, 2008, Mr. Locker attended a meeting with the United States Environmental Protection Agency ("EPA") in Denver, Colorado, regarding potential water contamination from oil and gas activity in the Pavillion Field.

> Jeff Locker of the Pavillion area spoke about his experience. He and his wife Rhonda bought their home in the mid-1980's. Their water had been "sweet" and now has turned black with what may be high TDS, sulfate.

> However, exact contamination has not been established. The water can not be used for people or livestock…Jeff and Rhonda have quit drinking the water from their well.

EPA Meeting Minutes, May 19, 2008, at P2515, ECF No. 32-2.

During the time Plaintiffs had their beliefs as to what was causing Mrs. Locker's illness, Plaintiffs were actively searching for a cause to Mrs. Locker's deteriorating health and even received a report against the possibility of contaminated water from Dr. Waksman who concluded that, "it is unlikely her symptoms are related to drinking contaminated water, as there is no evidence her water is contaminated. Her symptoms are not consistent with a chronic oral exposure to expected contaminants from natural gas wells." Dr. Waksman's Progress Notes, Oct. 21, 2009, at p.6, ECF No. 45-20.

On August 26, 2010, Plaintiffs received a letter from the EPA regarding their groundwater stating, "Your well has certain compounds which either exceed the [Agency for Toxic Substances and Disease Registry] ("ATSDR") comparison value and/or ATSDR has concerns about the compound impacting the quality of your drinking water…ATSDR recommends using an alternate water supply for drinking water or treating your drinking water." Letter from Rob Parker, Site Assessment Manager, ATSDR, U.S. EPA Region 8 to Jeff and Rhonda Locker (Aug. 26, 2010). Plaintiffs contend that this is the first time they received information about the particular compounds in Locker #1 and the first time they were advised to use an alternative source of water or treat it. ECF No. 45 p. 7.

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute of fact is genuine if a reasonable juror could resolve the disputed fact in favor of either side. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of fact is material if under the substantive law it is essential to the proper disposition of the claim. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). When the Court considers the evidence presented by the parties, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor." *Anderson*, 477 U.S. at 255.

The party moving for summary judgment has the burden of establishing the nonexistence of a genuine dispute of material fact. *Lynch v. Barrett*, 703 F.3d 1153, 1158 (10th Cir. 2013). The moving party can satisfy this burden by either (1) offering affirmative evidence that negates an essential element of the nonmoving party's claim, or (2) demonstrating that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *See* Fed. R. Civ. P. 56(c)(1)(A)–(B).

Once the moving party satisfies this initial burden, the nonmoving party must support its contention that a genuine dispute of material fact exists either by (1) citing to particular materials in the record, or (2) showing that the materials cited by the moving party do not establish the absence of a genuine dispute. *See id.* The nonmoving party must "do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather,

to survive a summary judgment motion, the nonmoving party must "make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Further, when opposing summary judgment, the nonmoving party cannot rest on allegations or denials in the pleadings but must set forth specific facts showing that there is a genuine dispute of material fact for trial. *See Travis v. Park City Mun. Corp.*, 565 F.3d 1252, 1258 (10th Cir. 2009).

When considering a motion for summary judgment, the court's role is not to weigh the evidence and decide the truth of the matter, but rather to determine whether a genuine dispute of material fact exists for trial. *Anderson*, 477 U.S. at 249. Credibility determinations are the province of the fact-finder, not the court. *Id.* at 255.

DISCUSSION

This case arises out of Plaintiffs' claims that Defendant (1) negligently contaminated their ground water in Pavillion, Wyoming, (2) intentionally made misrepresentations during a settlement agreement in 2003, (3) fraudulently convinced Plaintiffs to consume unsafe water, (4) persuaded Plaintiffs to resume consuming contaminated ground water, and (5) concealed and prevented investigation of the Plaintiffs' contaminated ground water. Compl. In their Complaint, Plaintiffs assert causes of action for negligence, nuisance, strict liability, medical monitoring, and fraud. Compl.

Plaintiffs filed these claims in the Ninth Judicial District Court of Fremont County, Wyoming on May 21, 2014. Compl., ECF No. 2. Defendant petitioned the Court

for removal of the case pursuant to 28 U.S.C. § 1332 because the Court has diversity jurisdiction over the action and the amount in controversy exceeds the minimum requirement. *Petition and Notice of Removal*, ECF No. 1. Jurisdiction over the parties and subject matter for the case was deemed removed to this Court upon the filing of the notice of removal with the clerk of the district court. *Order on Removal*, ECF No. 6.

Defendant filed the instant motion, *Defendant Encana Oil & Gas (USA) Inc.'s Motion for Summary Judgment* (ECF No. 31), on October 23, 2015. In their motion Defendant raises the following issues: (1) Whether the Lockers' claims for negligence, nuisance, and strict liability as to four of the five subject wells were released in the settlement agreement; and (2) Whether the Lockers' claims for negligence, nuisance, strict liability, and fraud as to all subject wells are time barred. The Court will take these issues in turn.

a) Issues of disputed fact remain as to whether the Lockers were fraudulently induced to enter into the settlement agreement.

To maintain a claim of fraudulent inducement, Plaintiffs must establish by clear and convincing evidence that "(1) the defendant made a false representation intending to induce action by the plaintiff; (2) the plaintiff reasonably believed the representation to be true; and (3) the plaintiff suffered damages in relying on the false representation." *Positive Progressions, LLC v. Landerman*, 2015 WY 138, ¶ 23, 360 P.3d 1006 (Wyo. 2015) (quoting *Claman v. Popp,* 2012 WY 92, ¶ 43, 279 P.3d 1003, 1016 (Wyo.2012)) *See* also Restatement, Second, Torts § 525. "Clear and convincing evidence is the 'kind

of proof which would persuade a trier of fact that the truth of the contention is highly probable.' " *Alexander v. Meduna,* 2002 WY 83, ¶ 29, 47 P.3d 206, 216 (Wyo.2002) (quoting *MacGuire v. Harriscope Broadcasting Co.,* 612 P.2d 830, 839 (Wyo.1980)).

Defendant contends that Plaintiffs' claims for negligence, nuisance, and strict liability as to four of the five wells are barred by the Settlement Agreement. ECF No. 32 p.10. The Settlement Agreement lists three wells: 13-12, 22-12, and 23-12. *Id.* Defendant claims the fourth well, 42x-11, is covered under the Settlement Agreement by being in "operation" at the time of the agreement. *Id.* at p.11 n.7. Defendant argues the Settlement Agreement's language is "clear, unambiguous, and expresses the intent" of the parties to discharge Encana, as TBI's successor, from all claims associated with the four wells. *Id.* at p.12.

Plaintiffs in response argue "material issues of fact exist as to whether [Defendant] made material misrepresentations to the [Plaintiffs] upon which they reasonably relied in executing the [Settlement] Agreement…" *Id.* at p.9. Plaintiffs further argue against Defendant's contention that the claim of fraud does not impact the validity of the Settlement Agreement. ECF No. 45 p.13. Plaintiffs contend that the initial fraud on behalf of Defendant renders the Settlement Agreement void *ab initio. Id.* at p.14.

On April 11, 2003, Plaintiffs entered into a confidential Settlement Agreement and Release with TBI to address Plaintiffs complaints surrounding the water quality of their water well. Settlement Agreement, ECF No. 45-13. Plaintiffs released TBI, and their successors, from all claims related to "22-12 well in addition to the operation of other wells located on or in the vicinity of the Premises..." which would also include 13-12, 23-

12, and 42x-11. *Id.* at ¶ 3, 8. "A release discharges another from an existing or asserted duty, claim or obligation, and it bars recovery thereon." *Kelliher v. Herman,* 701 P.2d 1157, 1159 (Wyo.1985) (quoting *M & A Const. Corp. v. Akzo Nobel Coatings, Inc.,* 936 P.2d 451, 456 (Wyo. 1997)). "If the contract is in writing and the language is clear and unambiguous, the intention is to be secured from the words of the contract." *Carlson v. Water Unlimited, Inc.,* 822 P.2d 1278, 1281 (Wyo.1991).

Defendant included the following representation within the Settlement Agreement: "WHEREAS, TBI has reviewed the geology in the area and conducted tests in respect of its operations and has determined there are no petroleum by-products in the Lockers' water and no communication in the formations between wells operated by TBI and the Lockers' water wells;" Settlement Agreement ¶ 4, ECF No. 45-13. Plaintiffs had stated they would not sign a settlement unless the foregoing assurances were made by Defendant. Locker Aff. ¶ 14, ECF No. 45-12.

Defendant has not provided the Court with evidence that the tests referred to in the Settlement Agreement ever took place. Plaintiffs have presented evidence showing Paul Taucher never tested for communication between Encana's gas wells and the groundwater feeding their wells and he did not rule out the presence of petroleum by-products in Plaintiffs well water. Taucher Aff., ECF No. 45-8. Mr. Gimmeson had been in possession of a water test showing the presence of Toluene in Plaintiffs water as early as December 2001. Locker Aff. ¶ 21, ECF No. 45-12; Enviro. Test Chemical Analysis Report, ECF No. 45-7. Plaintiffs first learned of this after they had brought their claims. *Id.*

"Because we are especially conscious of parties' freedom to contract, we do not disregard the written contract lightly." *Positive Progressions, LLC v. Landerman*, 2015 WY 138, ¶ 40, 360 P.3d 1006, 1019 (Wyo. 2015).

> "[f]raud in the inducement is always admissible to show that representations by one party were a material part of the bargain." "[A]greements and communications prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish fraud." Fraud vitiates the specific terms of the agreement and can provide a basis for demonstrating that the parties agreed to something apart from or in addition to the written documents.

Id. (quoting *Aspiazu v. Mortimer,* 139 Idaho 548, 82 P.3d 830, 833 (Idaho 2003)).

Viewing the evidence in favor of the non-movant, and all justifiable inferences drawn in the non-movant's favor, if Plaintiffs would not sign the Settlement Agreement without the assurances in paragraph four and Defendant made a false representation in the Settlement Agreement, it stands to reason Defendant made the representation in order to induce Plaintiffs into the agreement. Since "fraud vitiates all contracts" and a party is not bound if it was fraudulently obtained, *Snyder v. Lovercheck*, 992 P.2d 1079, 1084 (Wyo. 1999), the Settlement Agreement would be void *ab initio* if found to be fraudulently induced. Accordingly, summary judgment is denied.

b) Issues of disputed fact remain as to when the Lockers knew or had reason to know of the existence of these causes of action.

As both Plaintiffs and Defendant have noted, Wyoming's four year statute of limitations applies to the claims in this case. ECF Nos. 45, p.14, 32, p.13; *see* also Wyo.

Stat. § 1-3-105(a)(iv); *Ogle v. Caterpillar Tractor Co.,* 716 P.2d 334, 345 (Wyo. 1986). Wyoming is a "discovery" state for purposes of statutes of limitations,

> which means that a statute of limitation is triggered when a plaintiff knows or has reason to know of the existence of a cause of action. In other words, the discovery rule triggers a statute of limitation "when a reasonable person should have been placed on notice of his claim."

Robert L. Kroenlein Trust ex. rel. Alden v. Kirchhefer, 2015 WY 127 ¶ 16 (Wyo. 2015) (quoting *Moats v. Prof'l Assistance, LLC,* 2014 WY 6, ¶ 17, 319 P.3d 892, 896 (Wyo.2014)).

Defendant argues that Plaintiffs missed the applicable four-year statute of limitations for filing their claims, because they knew or should have known about these causes of action in 2004 and—at the latest—in 2008. ECF No. 32, p.14. Defendant points to the Plaintiffs depositions in which they expressed their belief Defendant had wronged them and misrepresented themselves after Mrs. Locker got sick in 2004. *See* R. Locker Depo., pp. 97-100, 105,-06, 202-03, ECF No. 32-1; J. Locker Depo., p.28, ECF No. 32-1. Defendant claims Plaintiffs should have known about their claims at least in 2008 after Mrs. Locker attended a public meeting in 2007 where detection of glycol in the drinking water was discussed, R. Locker Depo., pp. 111-12, ECF No. 32-1, and Mr. Locker attended a meeting with the EPA where he expressed his concerns for his drinking water and stated he and Mrs. Locker had stopped drinking the water from their well. EPA Meeting Minutes, May 19, 2008, at P2515, ECF No. 32-2.

Plaintiffs argue that the issue of when a reasonable person would or should have known all the elements of Plaintiffs claims is a factual dispute for the jury. ECF No. 45,

p.23. Plaintiffs contend they "discovered" these particular causes of action on August 26, 2010, in a letter from the EPA. *Id.* at p.17. Plaintiffs argue that even though they may have had their beliefs, this does not equate to knowledge. *Id.* at p.15. During the time Plaintiffs had their beliefs about Defendant's role in the water quality, Plaintiffs received conclusions from a medical doctor that Mrs. Lockers deteriorating health was unlikely caused by drinking contaminated water. Dr. Waksman's Progress Notes, Oct. 21, 2009, at p.6, ECF No. 45-20. Plaintiffs were also receiving assurances from Defendant that oil and gas operations in the area were not connected to the water quality problems. *See* J. Locker Depo. p.92, ECF No. 54-2; J. Locker Aff. ¶ 4, 5, 9, 11-14, ECF No. 45-12; Settlement Agreement ¶ 4, ECF No. 45-13; Letter from Encana to Pavillion resident (Aug. 28, 2009), ECF No. 60-13.

If material facts are in dispute, a discovery rule question is a mixed question of law and fact, "making it a difficult candidate for summary judgment… '[C]onsequently, the entry of summary judgment on the issue of when a statute of limitations commences to run is typically inappropriate.'" *Robert L. Kroenlein Trust ex rel. Alden,* 2015 WY 127, ¶ 31, (quoting *Moats,* ¶ 21, 319 P.3d at 897).

Plaintiffs filed this instant case in the District Court for Fremont County, Wyoming on May 21, 2014. Compl. As both Plaintiffs and Defendant have noted, Wyoming's four year statute of limitations applies to the claims in this case. ECF Nos. 45, p.14, 32, p.13; *see* also Wyo. Stat. § 1-3-105(a)(iv); *Ogle* 716 P.2d at 345. For the Court to grant summary judgment on this matter therefore, it must conclude no reasonable juror could

come to the conclusion that the statute of limitations period started to run before May 21, 2010.

The Plaintiffs began experiencing water quality issues as early as 1992 after TBI reworked the 22-12 well. Standard Potable Water Report, June 17, 1992, ECF No. 45-3. Over the course of the next several years and several water quality tests, Defendant made assurances to Plaintiffs that the water quality issues were unrelated to drilling activities in the area. *See* J. Locker Depo. p.92, ECF No. 54-2; J. Locker Aff. ¶ 4, 5, 9, 11-14, ECF No. 45-12; Settlement Agreement ¶ 4, ECF No. 45-13; Letter from Encana to Pavillion resident (Aug. 28, 2009), ECF No. 60-13. Mrs. Locker got sick in the fall of 2004, had concerns about the water quality, and was worried that Defendant's operation was impacting the water quality and her health. R. Locker Depo., pp. 105-06, ECF No. 32-1.

> Q....By the end of October of '04, after you had done—you were sick, you were in pain, you'd had your two little tests of water, those went badly and you felt worse, did you feel Encana had wronged you?
> A. Yes
> Q. By the end of October of '04, you felt they had lied to you?
> A. Yes.

Id. at 202-03.

On May 19, 2008, Mr. Locker attended a meeting with the EPA in Denver, Colorado, regarding potential water contamination from oil and gas activity in the Pavillion Field.

> Jeff Locker of the Pavillion area spoke about his experience. He and his wife Rhonda bought their home in the mid-1980's. Their water had been "sweet" and now has turned black with what may be high TDS, sulfate. However, exact contamination has not been established. The water can not be used for people or livestock...Jeff and Rhonda have quit drinking the water from their well.

EPA Meeting Minutes, May 19, 2008, at P2515, ECF No. 32-2.

During the time Plaintiffs had their beliefs, Plaintiffs were actively searching for a cause to Mrs. Locker's deteriorating health and even received a report against the possibility of contaminated water from Dr. Waksman who concluded that, "it is unlikely her symptoms are related to drinking contaminated water, as there is no evidence her water is contaminated. Her symptoms are not consistent with a chronic oral exposure to expected contaminants from natural gas wells." Dr. Waksman's Progress Notes, Oct. 21, 2009, at p.6, ECF No. 45-20.

Plaintiffs were also receiving assurances from Defendant that the water quality issues they were experiencing were unrelated to oil and gas operations in the Pavillion Field, first in 1993,

> Q. Okay. When this first happened in 1993, when they were—had the rig on the 22-12, did you contact the operator and complain?
> A. Yes, I did.
> Q. And who did you talk to?
> A. Perry Arima.
> Q. And what did Perry Arima say in response to your complaint?
> A. His response was there's no way it could have been anything that they done, that they were not producing water into their pits or anything. And he was pretty adamant that it wasn't anything that they were responsible for.
> Q. Did you believe him?
> A. Yes, I did.

J. Locker Depo. p.92, ECF No. 45-2. Plaintiffs received these assurances again in a Settlement Agreement with Defendant when Plaintiffs insisted Defendant include the following clause: "WHEREAS, TBI has reviewed the hydrology in the area and conducted tests in respect of its Operations and has determined there are no petroleum

by-products in the Lockers' water and no communication in the formations between wells operated by TBI and the Lockers' water wells…" Settlement Agreement, ECF No. 45-13.

There appears to be a dispute of material facts as to what a reasonable person in Plaintiffs position would or should have known. When material facts are in dispute, a discovery rule question is a mixed question of law and fact, "making it a difficult candidate for summary judgment… '[C]onsequently, the entry of summary judgment on the issue of when a statute of limitations commences to run is typically inappropriate.'" *Robert L. Kroenlein Trust ex rel. Alden,* 2015 WY 127, ¶ 31, (quoting *Moats,* ¶ 21, 319 P.3d at 897). While it is true Mrs. Locker was sick in 2004 and Mr. Locker was voicing his concern to the EPA in 2008, Plaintiffs received an opinion from Dr. Waksman stating the unlikelihood of contaminated water being linked to Mrs. Locker's condition. Plaintiffs were also receiving assurances from Defendant that the water quality issues were unrelated to drilling activities in the area. While Plaintiffs had their "beliefs" as early as 2004 regarding the claims of this case, this does not equate to knowledge, and a reasonable juror may conclude Plaintiffs knew or had reason to know of their claims after May 21, 2010, when they received the letter from the EPA. Accordingly, summary judgment is denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that *Defendant Encana Oil & Gas (USA) Inc.'s Motion for Summary Judgment* (ECF No. 31) is **DENIED**.

Dated this 21st day of December, 2016.

Alan B. Johnson
United States District Judge