

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

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

**BRIEF OF APPELLANT**

Respectfully submitted by:

Scott A. Hager  
Attorney for Appellee  
N.D. License #: 05913  
PAGEL WEIKUM, PLLP  
1715 Burnt Boat Drive, Madison Suite  
Bismarck, ND 58503  
shager@pagelweikum.com  
Phone: (701) 250-1369  
Fax: (701) 250-1368

TABLE OF CONTENTS

TABLE OF CONTENTS .....	1
TABLE OF AUTHORITIES .....	2
STATEMENT OF THE ISSUES .....	3
STATEMENT OF THE CASE.....	¶1
STATEMENT OF THE FACTS.....	¶8
LAW AND ARGUMENT.....	¶9
A.    Standard of Review.....	¶9
B.    A certified water quality test under N.D.C.C. § 38-11.1-06 is only one way to show evidence of damages, as opposed to exclusive bar to any recovery as held by the district court .....	¶12
CONCLUSION.....	¶17

**TABLE OF AUTHORITIES**

**Cases**

<u>Erickson v. Brown, 2008 ND 57, 747 N.W.2d 34</u> .....	¶11
<u>Hasper v. Center Mut. Ins. Co., 2006 ND 220, P5, 723 N.W.2d 409</u> .....	¶11
<u>Trinity Hosps. v. Mattson, 2006 ND 231, P10, 723 N.W.2d 684</u> .....	¶11

**Statutes and Other Authorities**

N.D.R.Civ. P. Rule 56 .....	¶11
N.D.C.C. 38-11.1-06 .....	¶4, 5, 9, 10, 12, 13, 14, 15
NDCC § 38-11.1-01 .....	¶16
NDCC § 38-11.1-02.....	¶16

## **STATEMENT OF THE ISSUES**

1. Did the district court err by granting the Third Party Defendant Hess Corporation's motion for summary judgement by misinterpreting N.D.C.C. § 38-11.1-06 and dismissing Defendant and Third-Party Plaintiff Francis Franson's complaint with prejudice?

## STATEMENT OF THE CASE

¶1 Francis Franson, the Appellant, resides in rural Williams County where he is self-employed as a rancher. (App. pg. 7). Franson was contacted by third party defendant Hess Corporation for the purpose of oil exploration / development on his land. (App. pg. 13). In 2009 the water well on his ranch was damaged / destroyed by the actions of a seismograph contractor working for Hess Corporation, which stopped all flow to his water well. (Id.)(Tr. pg. 10, lines 16-18).

¶2 Agri Industries, Inc., was contacted by Francis Franson to drill him a new water well on his property. (App. pg. 7). Francis Franson believed that Hess Corporation should pay for the new water well. (App. pg. 13). Hess Corporation believed the independent contractor Geokinetics should pay for the damage to the water well. (App. pg. 15).

¶3 Agri Industries commenced litigation against Francis Franson for breach of contract, seeking damages it incurred for drilling him a new water well. (App. pg. 7). Francis Franson filed a third-party complaint adding Hess Corporation to the litigation and asking them to be responsible for the damages is seismographer caused to his water well. (App. pg. 13).

¶4 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.)

¶5 Francis Franson appeals the June 23, 2017 Order granting Hess Corporation summary judgment. Francis Franson's position is that N.D.C.C. § 38-11.1-06 does not require a certified water quality test to hold the mineral developer responsible for the actions of any drilling operations conducted by its seismographer Geokinetics.

## STATEMENT OF THE FACTS

¶6 Francis Franson, the Appellant, resides in rural Williams County where he is self-employed as a rancher. Franson was contracted by third party defendant Appellee Hess Corporation for the purpose of oil exploration / development on his land. In 2009 the water well on his ranch was damaged / destroyed by the actions of a seismograph contractor working for Hess Corporation, which stopped all flow to his water well.

¶7 Agri Industries, Inc., was contacted by Francis Franson to drill him a new water well on his property. Francis Franson believed that Hess Corporation should pay for the new water well. Hess Corporation believed the independent contractor Geokinetics should pay for the damage to the water well.

¶8 Agri Industries commenced litigation against Francis Franson for breach of contract, seeking damages it incurred for drilling him a new water well. Francis Franson filed a third-party complaint adding Hess Corporation to the litigation and asking them to be responsible for the damages is seismographer caused to his water well.

¶9 On March 14, 2017, Hess Corporation filed a motion for summary judgment, which included several theories for why they should be granted summary judgment. 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. 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.

¶10 Francis Franson appeals the June 23, 2017 Order granting Hess Corporation summary judgment. Francis Franson's position is that N.D.C.C. § 38-11.1-06 does not require a certified water quality test to hold the mineral developer responsible for the actions of any drilling operations conducted by its seismographer Geokinetics.

### **LAW AND ARGUMENT**

A. Standard of Review

¶11 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. A certified water quality test under N.D.C.C. § 38-11.1-06 is only one way to show evidence of damages, as opposed to exclusive bar to any recovery as held by the district court.

¶12 In this case, the district court stated that N.D.C.C. § 38-11.1-06 requires



that the surface owner complete a “certified water quality or quantity test....within one year preceding the commencement of drilling operations.” The district court further found that the completion of a certified water quality or quantity test is an essential element of N.D.C.C. § 38-11.1-06, and that as it was uncontested that Franson did not complete a certified water quality or quantity test, he is therefore barred from the relief provided by N.D.C.C. § 38-11.1-06.

¶13 In this case, the district court failed to consider the second part of paragraph one of N.D.C.C. § 38-11.1-06 which states as follows:

“Prima facie evidence of injury under this section may be established by a showing that the mineral developer’s drilling operations penetrated or disrupted an aquifer in such a manner as to cause a diminution in water quality or quantity within the distance limits imposed by this section.”

¶14 This district courts’ requirement of a certified water test under N.D.C.C. § 38-11.1-06 would potentially eliminate was wide number of claims where a certified water test could not be completed. This example is very close to the facts of what happened to Francis Franson. After Hess Corporation conducted seismic testing, the quantity of water Franson’s well was producing dropped off. Within approximately one month of Hess’ seismic testing, the Franson water well stopped producing water all together. Certainly under N.D.C.C. § 38-11.1-06 this would be “prima facie evidence” that the water well of Francis Franson was destroyed. A certified water test would not provide any useful information when the issue a mineral developer created is a complete lack of any water flowing from the well.

¶15 If the issue of this case was a matter of quality or particulate in the water, a certified water quality test might be an appropriate requirement so one could measure the damages comparing water before and after drilling operations. In the case involving

Francis Franson, the well was damaged to the point where it was completely inoperable, which required Agri Industries to be hired to drill a new water well. Certainly the fact that Francis Franson's well stopped producing water altogether is "prima facie evidence of injury" under N.D.C.C. § 38-11.1-06 that would make Appellee Hess Corporation responsible as the mineral developer.

¶16 The legislative intent of Chapter § 38-11.1 should be considered in interpreting the statute. NDCC § 38-11.1-01 states that "owners of the surface estate and other persons should be justly compensated for injury to their persons or property and interference with the use of their property occasioned by oil and gas development." NDCC § 38-11.1-02 also states that "it is the purpose of this chapter to provide the maximum amount of constitutionally permissible protection to surface owners and other persons from the undesirable effects of development of minerals."

#### CONCLUSION

¶17 Based on the aforementioned law and reasoning, Appellant respectfully requests the Supreme Court reverse the district court Order granting Appellee Hess Corporation summary judgment.

Respectfully submitted this 20<sup>th</sup> day of November, 2017.

Scott A. Hager  
PAGEL WEIKUM, PLLP  
1715 Burnt Boat Drive  
Madison Suite  
Bismarck, ND 58503  
(701) 250-1369  
shager@pagelweikum.com

By: /s/ Scott A. Hager  
Scott A. Hager  
Lic. No.: 05913  
ATTORNEYS FOR APPELLANT

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

---

**Certificate of Service**

---

The undersigned certifies, pursuant to Rule 5 (f) of the North Dakota Rules of Civil Procedure, that on November 20, 2017, a true and correct copy of the following document(s):

1. Appellant’s Brief,
2. Appendix of Appellant, and
3. Certificate of Service.

was served, via email transmission, upon the following:

Jack Patrick Dwyer  
 DWYER LAW OFFICE, PLLC  
 3330 Fiechtner Drive  
 Suite 102  
 Fargo, ND 58103  
 jack@ndwaterlaw.com

John W. Morrison  
 Crowley Fleck PLLP  
 100 West Broadway Ave, Suite 250  
 P.O. Box 2798  
 Bismarck, ND 58502-2798  
 jmorrison@crowleyfleck.com

Paul Jonathan Forster  
Crowley Fleck PLLP  
100 West Broadway Ave, Suite 250  
P.O. Box 2798  
Bismarck, ND 58502-2798  
pforster@crowleyfleck.com

Lynn M. Mesteth  
DWYER LAW OFFICE, PLLC  
3330 Fiechtner Drive  
Suite 102  
Fargo, ND 58103  
lynn@ndlaw.com

Respectfully submitted this 20<sup>th</sup> day of November, 2017.

Scott A. Hager  
PAGEL WEIKUM, PLLP  
1715 Burnt Boat Drive  
Madison Suite  
Bismarck, ND 58503  
(701) 250-1369  
[shager@pagelweikum.com](mailto:shager@pagelweikum.com)

By:           /s/ Scott A. Hager            
Scott A. Hager  
Lic. No.: 05913

ATTORNEYS FOR APPELLANT