

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.	)	

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**APPEAL FROM THE ORDER GRANTING  
MOTION FOR PREJUDGMENT INTEREST  
DATED SEPTEMBER 13, 2017  
THE HONORABLE BENJAMIN J. JOHNSON, PRESIDING  
NORTHWEST JUDICIAL DISTRICT  
  
SUPPLEMENTAL BRIEF OF APPELLANT**

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Respectfully submitted by:

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## **STATEMENT OF THE ISSUES**

1. Did the district court err by granting the Plaintiff Agri Industries post-trial motion for prejudgment interest while also issuing a jury instruction providing the law of the case that the jury had discretion to either award or not award interest?

## 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). Hess Corporation was dismissed from the action by summary judgment prior to trial.

¶4 A two-day trial commenced on this matter on July 25, 2017 with the remaining parties, Plaintiff Agri Industries and Defendant Francis Franson. Agri Industries requested a jury instruction to award damages, specifically “If you return a verdict awarding damages to the Plaintiff, you may award interest at a rate no greater than six and one-half (6.5%) per annum from the date of the wrongful act. (Supp. App.

pg. 1). This requested instruction of Agri Industries was given as a final Preliminary Jury Instruction to the Jury, as Preliminary Jury Instruction No. 26, Interest on Damages.

(Supp. App. pg. 2)

¶5 After trial of the matter, the jury returned a verdict in favor of the Agri Industries, awarding damages in the amount of \$77,924.85. The amount of \$77,924.85 was the exact amount of damages sought by Agri Industries. (Supp. App. pg. 3).

Although there is no way to know what the jury was thinking, this award would certainly support that the Jury did not feel an award of interest was warranted. It is also unclear from the record whether or not the amount awarded by the jury included an award of interest.

¶6 After the Jury verdict was awarded, Agri Industries moved for prejudgment interest. After hearing the matter, the district court granted Agri Industries motion. Francis Franson appeals the September 13, 2017 Order Granting Motion for Prejudgment Interest. Francis Franson's position is that its reversible error to award Agri Industries interest after the jury has declined to do so.

## STATEMENT OF THE FACTS

¶7 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).

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¶9 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). Hess Corporation was dismissed from the action by summary judgment prior to trial.

¶10 A two-day trial commenced on this matter on July 25, 2017 with the remaining parties, Plaintiff Agri Industries and Defendant Francis Franson. Agri Industries requested a jury instruction to award damages, specifically “If you return a verdict awarding damages to the Plaintiff, you may award interest at a rate no greater than six and one-half (6.5%) per annum from the date of the wrongful act. (Supp. App.

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Although there is no way to know what the jury was thinking, this award would certainly support that the jury did not feel an award of interest was warranted. It is also unclear from the record whether or not the amount awarded by the jury included an award of interest.

¶12 After the jury verdict was awarded, Agri Industries moved for prejudgment interest. After hearing the matter, the district court granted Agri Industries motion. Francis Franson appeals the September 13, 2017 Order Granting Motion for Prejudgment Interest. Francis Franson's position is that its reversible error to award Agri Industries interest after the jury has declined to do so.



## LAW AND ARGUMENT

### A. Standard of Review

¶13 The interpretation and application of a statute is a question of law, which is fully reviewable on appeal. In re Estate of Samuelson, 2008 ND 190, ¶ 11, 757 N.W.2d 44. Determining a party's intent and whether a mistake of fact or law exists are questions of fact, which are subject to the clearly erroneous standard of review. See Agnes M. Gassmann Revocable Living Trust v. Reichert, 2011 ND 169, ¶ 14, 802 N.W.2d 889. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, "there is no evidence to support it, or when, although there is some evidence to support it, the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been made." American Bank Center v. Wiest, 2010 ND 251, ¶ 13, 793 N.W.2d 172 (quoting Sargent Cnty. Bank v. Wentworth, 500 N.W.2d 862, 874 (N.D. 1993)).

### B. The district court erred by granting Agri Industries prejudgment interest after the Jury declined to award it interest.

¶14 The jury instruction requested by Agri Industries to either award interest or not award interest is fatal and contrary to law for the district court to then grant a post-trial motion to award interest. Agri Industries certainly believes the jury failed to award it interest in its verdict. In this case, is no way to know whether the jury awarded interest as part of its damages to Agri Industries, or if it declined to award any interest at all. Based on the fact that the jury awarded \$77,924.85, the exact amount of damages requested by Agri Industries, it is most plausible that the jury did not intend to award Agri Industries interest. However, there is no way to know the basis or makeup of these

awarded damages, because it also could be an award of \$30,000 of damages, and \$47,924.85 of interest, or some other combination.

¶15 The Plaintiff Agri Industries specifically requested the following jury instruction for Interest on Damages:

**INSTRUCTION NO. 21  
INTEREST ON DAMAGES**

If you return a verdict awarding damages to the Plaintiff, you may award interest at a rate no greater than six and one-half percent (6.5%) per annum from the date of the wrongful act.

(Supp. App. pg.1)

This jury instruction was then given to the jury in the Preliminary Jury Instructions to the Jury as Instruction No. 26, page 12 (Supp. App. pg. 2). As the Jury was given this law of the case, they might have already awarded Agri Industries interest on its damages or they simply decided not to award any interest at all. The district court award of interest after the jury declined to award interest is clearly erroneous.

¶16 In the September 13, 2017 Order from the district court, it is clear that the district court failed to consider the law of the case given to the jury, specifically the jury instruction permitting them discretion to award or not to award damages. Once the jury decides not to award interest, the district court cannot go back and award interest. The Order from the district court essentially goes through a legal analysis as to whether or not awarding interest on a breach of contract case is permissible under the law. This Order fails to provide any analysis or reasoning as to how the Jury Instruction No. 26, Interest on Damages, impacts an award. Further, it fails to cite any legal support for the district court deciding an issue that it gave to the jury to decide.

¶17 In the Order Granting Motion for Prejudgment Interest, the district court specifically states “the amount of damages award[ed] by the jury was \$77,924.85. This amount was taken directly from Agri’s invoices for service provided, filed as Plaintiffs Exhibit#1”. (Supp. App. pg. 6). Although there is no way to know, it certainly could be argued that the Jury made the decision NOT to award interest to Agri Industries, and instead only awarded them the damages under the contract. The law of the case given to the jury certainly gave them the discretion to not award interest on the damages.

¶18 There is no way to know whether the jury awarded interest or not, or to what extent interest played a determination as to the amount awarded to Agri Industries. Francis Franson argued that the quality of water the well produces, as well as the dry holes Agri Industries drilled, should be considered in reducing any award of damages. It would be improper to award Agri Industries interest if the jury made the decision not to award interest based on poor water quality or driving up its costs with dry water wells. The determination of damages, including the Jury Instruction Interest on Damages was given to the jury to decide. After the jury failed to award interest to Agri Industries, it is reversible error for the district court to award interest damages.

(THIS SPACE INTENTIONALLY LEFT BLANK)

CONCLUSION

¶19 Based on the aforementioned law and reasoning, Appellant Francis Franson respectfully requests the Supreme Court reverse the district court Order Granting Motion for Prejudgment Interest.

Respectfully submitted this 22<sup>nd</sup> day of January, 2018.

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**Certificate of Service**

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The undersigned certifies, pursuant to Rule 5 (f) of the North Dakota Rules of Civil Procedure, that on January 22, 2018, a true and correct copy of the following document(s):

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

was served, via email transmission, upon the following:

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