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STATE OF NORTH DAKOTA

IN SUPREME COURT

STATE OF NORTH DAKOTA

SKAW ND PRECAST LLC, PLAINTIFF/APPELLEE, VS. OIL CAPITAL READY MIX, LLC, AGAPE HOLDINGS, LLP, SCOTT DYK AND SAMUEL DYK, DEFENDANTS/APPELLANTS.	)	Supreme Court Case No.: 20190138 District Court Case No.: 53-2017-CV-01410 **ORAL ARGUMENT REQUESTED**

ON APPEAL FROM THE JUDGMENT (DOC #115) ENTERED IN THIS ACTION ON THE 4TH DAY OF MARCH, 2019, IN DISTRICT COURT, COUNTY OF WILLIAMS, CASE NO.: 53-2017-CV-01410, BY THE HONORABLE PAUL JACOBSON

APPELLEE BRIEF

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STATEMENT OF THE ISSUES

[¶ 1.] Whether the Defendants wrongfully converted the Skaw assets.

[¶ 2.] Whether the Skaw – Tioga Lease Agreement was a lease or a license.

[¶ 3.] Whether the Skaw – Tioga Agreement was orally amended.

[¶ 4.] Whether the Plaintiff's were wrongfully evicted from the leased premises.

[¶ 5.] Whether Skaw abandoned its concrete pads and blocks.

[¶ 6.] Whether the District Court properly awarded fair compensation to Skaw for time and money properly expended in pursuit of the wrongfully converted Skaw property.

STANDARD OF REVIEW

[¶ 7.] This is an appeal of findings of fact made and entered by the lower court in a bench trial. The standard of review in this appeal is the clearly erroneous standard.

[¶ 8.] "We have held that the trial court's determination about whether a conversion has been committed is a finding of fact which will not be overturned on appeal unless it is clearly erroneous." Burt v. Ramsey, 2005 ND 65, ¶ 13, 693 N.W. 2d 619 (quoting Paxton v. Wiebe, 1998 ND 169, ¶ 29, 584 N.W. 2d 72). "A finding of fact is clearly erroneous when, although there is some evidence to support it, the reviewing court is left with a definite and firm conviction a mistake has been made." Id.

[¶ 9.] "The appropriate standard of review in an appeal challenging a trial court's award of damages in a bench trial is whether the trial court's findings of fact on damages are clearly erroneous." Buri, 2005 ND 65 ¶ 17 693 N.W. 2d 619. "Under N.D.R.Civ.P 52(a), a finding of fact is clearly erroneous if there is no evidence to support it, if it is clear to the reviewing court that a mistake has been made, or if the finding is inducted by an erroneous view of the law." Id.

A. STATEMENT OF FACTS

[¶ 10.] By document dated March 11, 2013, Skaw ND Precast, LLC ["Skaw"], a company specializing in the manufacturing and sale of per-cast concrete items, and Tioga Ready Mix ["Tioga"] entered into a lease agreement concerning a two-acre commercial tract of land located in Tioga, North Dakota, which two acre tract was part of a larger twenty-eight acre tract owned by Tioga and operated as a concrete ready-mix batch plant. TT. p. 8, Lines 13-17 [Appellee Appx. p. 4]; See, Plaintiff's Exhibit "1"; Appx. pp. 36 - 41. The two-acre tract was off to the side of and was separated from the balance of the Tioga owned 28 acre site. TT. p. 17, Lines 10 – 18 [Appellee Appx. p. 10]. The Lease provided Skaw with a location to set up its concrete construction plant and to construct precast concrete septic tanks, blocks and pads at an agreed upon maximum rental rate of $700 per month. Pursuant to the terms of the Lease, Tioga agreed to sell concrete ready-mix product to Skaw at a stated price with the $700 monthly rental rate being reduced in the event Skaw purchased predetermined quantities of ready-mix concrete product from Tioga. The Lease Agreement provided for a seven (7) month construction season during which seven 97) month season rent would be payable by Skaw to Tioga. Skaw did not pay rent during the five (5) month "off season" winter months when Tioga shut down for the winter and was not making ready mix product. TT. p. 13, Lines 11 – 25 [Appellee Appx. p. 8]; TT. p. 95, Lines 13-25, p. 96, Lines 1-6 [Appellee Appx. pp. 95-96]. The Lease term was for five consecutive construction seasons and ran through December 31, 2018. The Lease Agreement and was not subject to unilateral termination by either party. Skaw testified that the five (5) year lease term was an essential element of the lease as Skaw's business operation required continuity and because the financial costs associated with and the labor necessary to relocate the Skaw concrete plant were very high. TT. p. 10, Lines

2-10; p. 11, Lines 10 – 14, 24 – 25; p. 12, Lines 2 – 11 [Appellee Appx. pp. 5-7]; TT p. 93, Lines 1-25; p. 94, Lines 1-6 [Appellee Appx. pp. 29-30].

[¶ 11.] During years 2013 and 2014, Skaw operated from the leased site without incident and without disputes or issues between Tioga and Skaw. TT. p. 12, Lines 24 – 25; p. 13, Lines 1 and 2 [Appellee Appx. pp. 7-8]; TT. p. 95, Lines 10-14 [Appellee Appx. p. 31]. Skaw testified that, because Skaw purchased sufficient quantities of concrete ready mix from Tioga, Skaw was not required to and in fact did not pay the $700 monthly rent to Tioga. TT. P. 12, Lines 15 – 23 [Appellee Appx. p. 7].

[¶ 12.] During the spring of 2015, Skaw learned that Tioga had made arrangements to sell the Tioga company assets, including the Tioga 28-acre ready-mix plant site which included the real property leased by Skaw, by way of a public auction sale. TT. p. 16, Lines 18 – 25 [Appellee Appx. p. 9]; TT p. 97, Lines 11-16 [Appellee Appx. p. 33]. A copy of a document itemizing the assets to be sold at the auction sale is found at Plaintiff's Exhibit "2" [Appx. pp. 42 - 47]. The sale bill did not include any concrete tanks, pads or blocks.

[¶ 13.] Jack Skaw and Michael Skaw, representatives of Skaw, testified that they attended the May 19, 2015 Tioga auction sale and that, during the auction, the auction service notified all persons present, on at least 2 or 3 occasions before the commencement sale, that the Skaw assets were not part of the sale, that there was a five (5) year lease in place between Skaw and Tioga and that the Skaw/Tioga lease went with the land. TT. p. 20, Lines 22 – 25; p. 21, Lines 1 – 9 [Appellee Appx. pp. 11-12]; TT. p. 97, Lines 1-19 [Appellee Appx. p. 33].

[¶ 14.] The successful bidder at the Tioga auction sale was Triple Aggregate, LLC ["Triple Aggregate"], an entity owned and/or controlled by Defendant Scott Dyk. See, Plaintiff's Exhibit "3"; [Appx. pp. 48 – 51]. See also, TT. p. 21, Lines 17 – 25 [Appellee Appx. p. 12]. The purchase

price for the Tioga property was $450,000 with the sale memorialized by a COMMERCIAL PURCHASE AGREEMENT [Purchase Agreement"] dated May 19, 2015. See, Plaintiff's Exhibit "3" [Appx. pp. 48 - 51]. Lines 10, 11 and 12 of the Purchase Agreement identified and itemize the property acquired by Triple Aggregate at the auction sale. The Commercial Purchase Agreement did not suggest or infer that Triple Aggregate acquired any concrete pads, blocks or tanks from Tioga and that Triple Aggregate did not purchase any Skaw product inventory or equipment.

[¶ 15.] Directly following the auction, Jack Skaw and Michael Skaw introduced themselves to Scott Dyk and notified Dyk that Skaw was the tenant on the property. TT. p. 22, Lines 6 – 12 [Appellee Appx. p. 13].

[¶ 16.] Following the auction, testimony revealed that it took a period of time for Triple Aggregate to get the newly acquired ready mix plant up and running. TT. p. 22, Lines 13 – 22 [Appellee Appx. p. 13]. During that time period, Skaw purchased concrete ready mix from a third-party supplier at a higher cost than the rate provided in the Skaw-Tioga Lease Agreement. TT. p. 22, Lines 13 – 22 [Appellee Appx. p. 13]. Eventually the Defendants were able to get the plant up and running and Skaw began purchasing concrete ready mix from the Defendants. TT. p. 23, Lines 6 – 10 [Appellee Appx. p.14].

[¶ 17.] On July 24, 2015, because Tioga was having difficulty in closing the Tioga/Triple Aggregate transaction, an Escrow Agreement was executed by and between Triple Aggregate and Tioga. See, Plaintiff's Exhibit "7" [Appx. pp. 65 - 69]. The Escrow Agreement a) did not convey title to the Tioga property to Triple Aggregate; b) did not suggest or infer that the Skaw leasehold rights were terminated, c) did not state that the Escrow Agreement was to the exclusion of Skaw's rights; and d) did not state who was entitled to receive the Skaw lease payments.

[¶ 18.] During August of 2016, Dyke requested and was provided with a copy of the Skaw-Tioga lease agreement. TT. p. 197, Lines 13-19 [Appellee Appx. p. 49].

[¶ 19.] By e-mail dated August 20, 2015, Attorney Daniel Frisk notified Fred Bannister, an owner of Skaw, as follows:

> "This morning, Fred took the time to have a quick discussion with me regarding the situation in Tioga.
>
> After our call, I spoke with Sam and he indicated that he previously sent you a lease. For discussion purposes only, I have included a copy below.
> I understand your concern and reluctancy given your previous arrangement with Tioga Ready Mix. Unfortunately, that previous arrangement is no longer capable of being performed by either Skaw or Tioga Ready Mix. Therefore, we need to come to terms.
>
> . . .
>
> Again, what ever the agreement between Skaw and Tioga Ready Mix "was" it is no longer capable of being performed. You are not paying Tioga Ready Mix nor are you paying my client. That cannot go on for the next 60 to 90 days".

See, Plaintiff's Exhibit "5" [Appx. pp. 61]. Attorney Frisk provided no legal or factual support for his position that the Skaw/Tioga Lease was no longer capable of being performed or that Dyk had authority to terminate, alter or affect the Skaw/Tioga lease agreement. It appeared that Triple Aggregate simply desired to re-negotiate the terms of the Skaw/Tioga Lease.

[¶ 20.] By e-mail dated August 25, 2015, Fred Bannister stated that Skaw would agree to increase the monthly rental rate to $750 per month… ". See, Plaintiff's Exhibit "8:8; [Appx. pp. 70]. Skaw did in fact make the $750 monthly rental payments to Triple Aggregate, who accepted the payments, without reservation of rights. TT. p. 164, Lines 6-9 Appellee Appx. p. 46] .

[¶ 21.] By e-mail dated September 22, 2015, Skaw Attorney James Martins notified Attorney Dan Frisk as follows:

> "Dr. Bannister reiterated Skaw ND Precast is **planning** to relocate at year's end **if everything works out as planned**. Were winter to hit and weather create problems in removing and relocating any precast concrete products stored on the site, I presume this is something that could be worked out among the parties on site if, for

> instance Skaw were unable to move some things out until spring". [Emphasis added].

See, Plaintiff's Exhibit "11" [Appx. p. 76].

[¶ 22.] On September 15, 2015 Attorney Martens forwarded an e-mail to Attorney Frisk indicating that:

> "…. Scott Dyk confronted Skaw's people on site yesterday, demanding they be off the property by November 20, 2015.
>
> . . .
>
> We agreed that in the instance Skaw was unable to have everything out by spring **or changed their mind and wanted to stay** on the premises we would re-visit a formal lease agreement next spring". [emphasis added].

See, Plaintiff's Exhibit "12" [Appx. p. 77]. Attorney Martens made it clear that there was a possibility that Skaw would not vacate the premises by the spring of 2016 and that Skaw intended but did not promise or agree to remove its equipment inventory from the site. Nothing in the Martin's e-mail suggested or reflected an intent by Skaw to amend the Skaw-Tioga Lease agreement or to abandon the lease or Skaw's personal property.

[¶ 23.] On September 23, 2016, Samuel Dyk authored and delivered a NOTICE OF NON-RENEWAL OF LEASE document to Skaw which Notice stated in part, as follows:

> "… the **lease under which you hold possession of the above-described property** … will terminate **pursuant to its own terms on November 22, 2015 and will not be renewed** for a new term, nor be allowed to convert to a month-to-month tenancy. **Please do not tender any money that will pay rent beyond the end of the term. Please further be advised that any money tendered, if accepted, will have been accepted in error and will be returned**."

LANDLORD RESERVES ALL THE RIGHTS AND REMEDIES PROVIDED UNDER THE **RENTAL AGREEMENT**…INCLUDING DAMAGES FOR UNPAID **RENT**…". [emphasis added].

See, Plaintiff's Exhibit "13" [Appx. p. 48]. First, Dyk admitted the existence of a lease and admitted that Skaw had possession of portions of the Tioga Ready-Mix plant site. Dyke expressly reserved all rights under the "rental agreement" including damages for "unpaid rent". There is no question the agreement between Skaw and Tioga was a lease. Second, the Tioga/Skaw Lease stated the lease term ran through December 31, 2018. Dyk's suggestion that the Skaw/Tioga lease expired on November 22, 2015 "pursuant to its own terms" and that the lease required renewal was without support in fact or law and was without merit. Finally, as of September 23, 2016, The Triple Aggregate land sale transaction had not closed and Triple Aggregate's right to possess the Tioga land was solely and only by virtue of the terms of the Escrow Agreement. The Defendants did not own the Tioga real property as of September 23, 2015. See, Plaintiff's Exhibit "7" [Appx. pp. 65 - 69]. A question which begs an answer from the Defendants is what was the source of the Defendants' authority and power to cancel or amend the Skaw-Tioga lease agreement when the Defendants did not then hold title to nor own the Tioga real property?

[¶ 24.] During the late fall of 2016, as temperatures cooled, and had also occurred during 2013 and 2014, Tioga and Skaw ceased operations for the season. TT. p 30, Lines 10-25 [Appellee Appx. p. 15].

[¶ 25.] On March 7, 2016, Fred Bannister, as president of Skaw, issued correspondence to Scott and Sam Dyk offering to "… move the [Skaw] present inventory to a location on the [Dyk] property that must have access for trucks but would be out of your way if you have plans for the present location. Or: **We** [Skaw] will load the remaining inventory on our site at the TRM property

on your trucks and you will bring them to our new permanent located at …. Blaisdell, ND…". See, Plaintiff's Exhibit "16" [Appx. pp. 83]. Bannister indicated that "…. Upon completion of this task we will sign off any rights we have to the property on the TRM [Tioga Ready Mix] property in Tioga, ND". Bannister's e-mail made it clear that Skaw was no intention of abandoning any of its inventory or other assets. Neither Dyk's nor Triple Aggregate responded to the offer.

[¶ 26.] By correspondence dated March 16, 2016, Attorney Frisk notified Attorney Marten, Skaw's Attorney, that the "temporary **rental agreement**" was abandoned by Skaw in December. See, Plaintiff's Exhibit "17" [Appx. pp. 44 - 45]. Frisk admitted to the existence of a lease. Attorney Frisk's March 16, 2016 correspondence further provided as follows:

> **"At this point, Skaw, Mr. Bannister, their employees, agents, officers and owners are NOT permitted on the premises. *I have instructed my client to contact law enforcement if there are any attempts to breach the peace or trespass*. We will pursue any and all legal means to keep the peace and prevent trespass, including obtaining a restraining order."** [emphasis added].

Attorney Frisk's March 16, 2016 correspondence, which included a threat of criminal prosecution, effected a wrongful, self-help eviction which excluded Skaw from the leased premises, without legal process. The Defendants effectively prevented Skaw from accessing the leased premises and from accessing and removing Skaw's equipment and inventory. Nothing in the e-mail suggested that Skaw could retrieve its assets from the site. The Defendants effectively changed the "locks on the door" and prevented Skaw from entering the leased premises and from accessing and gaining possession Skaw's personal property, all in violation of North Dakota law.

[¶ 27.] On March 23, 2016, Attorney Chad Anderson, Skaw's successor attorney, notified Attorney Frisk that the March 11, 2013 Lease was and remained valid and effective and that the Lease would remain in effect until December 31, 2018. See, Plaintiff's Exhibit "20" [Appx. p. 89]. Attorney Anderson notified Attorney Frisk that "… **Skaw ND Precast, LLC has not abandoned**

the lease or the property and are planning on returning to the area to continue operations". [emphasis added]. Any suggestion by the Defendants that Skaw intended to abandon the Lease or the Skaw personal property and equipment is without merit.

[¶ 28.] During March of 2016, Skaw returned to its two-acre leased site to begin operations for the 2016 construction season. TT. p. 33, Lines 2-14 [Appellee Appx. p. 16]. At that time Skaw learned that a tall earthen berm had been constructed around the Skaw plant, equipment, cement tanks and vehicles and that Skaw's inventory of concrete pads and blocks had been moved to an area directly adjacent to the Triple Aggregate offices. TT. p. 33, Lines 15-25; p. 34, Lines 1-6 [Appellee Appx. pp. 16-17]. See also, Plaintiff's Exhibits '50" and "51" [Appx. pp. 167-168].

[¶ 29.] On March 28, 2016, Attorney Anderson notified Attorney Frisk that an earthen barrier had been erected around the leased property "…. which makes it impossible for my client's [sic] to conduct their business on the property. As such your clients are interfering with my client's enjoyment of the property in violation of N.D.C.C. 47-16-08." See, Plaintiff's Exhibit "21" [Appx. p. 90]. Attorney Anderson notified Attorney Frisk that Skaw "… does not intend to enter into new lease agreement as they currently have a lease agreement but we will direct payment to your client if they are the true owner of the property." [Emphasis added].

[¶ 30.] On March 28, 2016, Attorney Frisk notified Attorney Anderson that, in Frisk's opinion, the March 11, 2013 agreement between Skaw and Tioga Ready Mix was "… not a lease for real property". See, Plaintiff's Exhibit "22" [Appx. pp. 91]. Frisk argued that "my client purchased the property at public auction. **Any agreement is between Tioga Ready Mix and your client, not mine. We are not honoring it.** Proceed against Tioga Ready Mix if you feel you have damages. Your client has no right to 'quiet enjoyment' to my client's real property". [Emphasis added]. Attorney Frisk reiterated that **"my client does not intend to allow access on or across their**

property" [Emphasis added]. Triple Aggregate did not own the Tioga property as of March 28, 2016. Triple Aggregate's interest in the property was solely by virtue of and was limited to the interests set forth in the Escrow Agreement. The Defendants, with full notice knowledge of the Skaw/Tioga lease and being fully aware that Skaw was in possession of the leased property at the time of the auction sale, argue that they were not bound by the terms of the Skaw/Tioga lease and denied Plaintiffs access to the leased property, threatening criminal prosecution if Skaw entered the premises. See, TT. p. 38, Lines 6-12 [Appellee Appx. p. 19]. Without justification, the Defendants effected a wrongful eviction of Skaw from the leased property, by self-help, without authority of law, and prevented Skaw from accessing and removing Skaw's personal property.

[¶ 31.] On April 1, 2016, Defendant Scott Dyk filed a trespassing report with the Williams County Sheriff's office alleging that employees of Skaw had trespassed on the Oil Capital property. See, Plaintiff's Exhibit "23" [Appx. pp. 93 - 96]. The Defendants used the Williams County Sheriff's Department as a tool and device to prevent Skaw from accessing the leased property and from accessing and removing Skaw's inventory and equipment from the leased site. Dyks used the Sheriff to exert and take possession and control over Skaw's assets. See, Plaintiff's Exhibit "24" [Appx. p. 96].

[¶ 32.] By correspondence dated April 4, 2016, Fred Bannister, as president of Skaw, notified the Williams County Sheriff's Department that the Defendants had constructed "… an impenetrable dirt berm 'around the Plaintiff's leased property'". See, Plaintiff's Exhibit "24" [Appx. p. 96]. Bannister also notified the Sheriff that Skaw's manufactured concrete pads and blocks had been removed from the Skaw leased property and transported to an area adjacent to the Defendant's offices. By constructing the dirt berm and by moving the concrete pads and blocks from the leased property to an area adjacent to the Defendant's office, the Defendants effectively and wrongfully

took possession of and exerted dominion and control over the Skaw assets and wrongfully denied Skaw access to the same.

[¶ 33.] On April 7, 2016 Attorney Anderson commenced negotiations with Attorney Frisk concerning Skaw's removal of the Skaw inventory assets from the leased property. See, Plaintiff's Exhibit "26" [Appx. p. 98], In response to Attorney Anderson's e-mail, on April 7, 2016, Attorney Frisk stated as follows: "**If your client is willing to pay** the past amount from either November or December (?) through April, plus $1,000 for the time, trouble and cleaning they have incurred, **they can have until the end of the month to move product and materials** during normal business hours (8-6). [emphasis added]. See, Plaintiff's Exhibit "25" [Appx. pp. 97]. See also, TT. p 179, Lines 11-14 [Appellee Appx. p. 47], wherein Frisk testified "…at every effort we would have given them the block, **but they need to pay** for the agreement to get on the property again…". [emphasis added]. By demanding payment from Skaw as a condition precedent to Skaw gaining access to the Tioga real property and to remove Skaw's personal property, the Defendants effectively asserted a "landlord lien" against Plaintiff's property and exerted dominion and control over the Skaw personal property to the exclusion of Skaw. North Dakota law does not provide for a landlord's lien. Further, at this point, Triple Aggregate still did not own the Tioga real property. Triple Aggregate's only claim to the real property remained by virtue of the Purchase Agreement and the Escrow Agreement. See, Plaintiff's Exhibit "7" [Appx. pp. 65 – 69]. Defendants were holding Plaintiff's personal property hostage while seeking a monetary payment from Plaintiff.

[¶ 34.] As an element of the effort to settle the dispute, on April 12, 2016, Triple Aggregate provided Attorney Frisk with an inventory of Skaw septic tanks, cylinders, covers/lids and hole covers. The list did not include any concrete pads and did not include all of the Skaw concrete blocks. See, Plaintiff's Exhibit "29" [Appx. pp. 104]. Skaw testified that the septic tanks, cylinder,

lids and covers were of first priority as many of those items had been presold and customers were waiting for the products. TT. p.115, Lines 12-25; p. 116, Lines 1-20 [Appellee Appx. pp. 38-39]. Skaw testified that the concrete pads and blocks were not then a priority and that Skaw was concerned that there would likely be a dispute between the parties regarding the pads and blocks. It had taken weeks for Skaw and the Defendants to reach an agreement of the tanks and Skaw would not take the risk of any further delay resulting from a dispute with the Defendants regarding Skaw's blocks and pads. It was Skaw's position that discussions and negotiations regarding the Skaw concrete pads and blocks could occur at a later date. TT. p. 115, Lines 12-25; p. 116, Lines 1-24 [Appellee Appx. pp. 38-39].

[¶ 35.] By Warranty Deed dated **April 13, 2016,** Tioga, as grantor, conveyed the Tioga real property to and Agape Holdings, LLP ["Agape"], apparently another Dyk owned company. See, Plaintiff's Exhibit "30" [Appx. pp. 114-115]. The deed was not recorded until September 21,2016. It was not until April 13, 2016, at the earliest, that Dyk, or a company owned by Dyke, first acquired an ownership interest in the real property. Because Dyk had no ownership interest in the Tioga real property prior to April 23, 2016, Dyke was not in a position to exclude or evict Skaw from the property prior to that date. Further as of April 23, 2016, with certainty, the Defendants, and all of them, had full knowledge of the Skaw/Tioga lease.

[¶ 36.] By e-mail dated April 14, 2016, Attorney Anderson notified Attorney Frisk as follows:

> "Skaw agrees to pay $750 per month from November 2015 until the end of this Agreement in return for access to the area at which their property is located. We have done an initial inventory and it seems that **three tanks are missing or have been removed and all of the pads have been moved and are now located next to the OCRM [Oil Capital Ready Mix] office**. … If OCRM would like to keep any tanks or blocks, we can subtract this from the payment." [emphasis added].

See, Plaintiff's Exhibit "31" [Appx. pp. 116]. The Defendants were duly notified that the Skaw concrete blocks and pads, wrongfully moved by Defendants from the Skaw leased site to the area

adjacent to the Oil Capital offices, were the property of Skaw. The Defendants' testimony and argument that the Defendants did not know who owned the pads and blocks is patently false. Nothing in the e-mail suggested an intention by Skaw to amend the lease or to abandon the pads and blocks.

[¶ 37.] Eventually, a Right-of-Way Access Agreement was entered into by "Oil Capital" and Skaw. See, Plaintiff's Exhibit "37"; [Appx. pp. 138 - 141]. There is no evidence that Oil Capital ever owned an interest in the Tioga real property. Paragraph 3 of the Right of Access Agreement provides as follows:

> "GRANTOR hereby grants to GRANTEE the right to access the PREMISES **for the sole and exclusive purpose of retrieving the items listed on Schedule A, and for no other purpose…"** [Emphasis added].

Schedule "A" specifically identified the assets which were the subject of and governed by the terms of the Access Agreement. Note that the majority of the Skaw concrete blocks and pads, as wrongfully transported by the Defendants from the Skaw lease site to an area adjacent to the Defendants' offices, were not listed on Schedule "A" and were therefore not governed or controlled by the terms of the Access Agreement.

[¶ 38.] Although the Defendants argue that the Defendants had *intended* that the Access Agreement would govern and control any and all Skaw assets, the scope of Agreement, by its own clear and unambiguous terms, is limited to the assets listed on Schedule "A". Because the Defendants have not alleged that the Access Agreement is ambiguous, the intention of the parties must be determined, as a matter of law, from the four corners of the Agreement. See, N.D.Cent.C. §9-07-04. See also, *Production Credit Ass'n v. Foss*, 391 N.W. 2d 622 (N.D. 1986). When a contract is reduced to writing, it is presumed that the entire actual agreement of the parties is contained in the agreement. *Harney v. Wirtz,* 30 ND 292, 152 N.W. 803 (1915). Parole evidence

cannot vary or contradict the terms of a complete, unambiguous written contract. *Jorgensen v. Crow*, 466 N.W. 2d 120 (N.D. 1991). As drafted, the Access Agreement only pertained to those Skaw assets identified on Schedule "A". Testimony regarding the Defendants thoughts, hopes and dream is irrelevant.

[¶ 39.] Skaw did in fact pay the Defendant demanded ransom "back rent" and an additional $1,000 to gain access to the Schedule "A" assets and proceeded to remove those items, as described in Schedule "A", only, from the Defendants property. TT. p. 36, Lines 1 – 21 [Appellee Appx. p. 18]. All Schedule "A" assets were removed by Skaw from the property by the May 20, 2016 deadline. TT. p. 36, Lines 7 -10 [Appellee Appx. p. 18].

[¶ 40.] After the "Schedule 'A'" property had been removed from the premises, Skaw returned to the Tioga site with the intention of removing the remaining Skaw non-Schedule "A" pads and blocks that had been wrongfully removed from the Skaw leased tract and placed at a site adjacent to the Defendant's office. TT. p. 36, Lines 11 – 25 [Appellee Appx. p. 18]. At that time, to avoid a confrontation, Michael Skaw filed a case report with the Williams County Sheriff's Office reflecting that Skaw desired to enter the Oil Capital property to retrieve the balance of its inventory See, Plaintiff's Exhibit "41" [Appx. pp. 146 - 147]. Note that Skaw's complaint as filed with the deputy Sheriff was "Reported At: 05-**18**-16 11:04". The Sheriff's report document reflects that Deputy Alecia Braaten subsequently interviewed Samuel Dyk an May **18,** 2016 and that Dyke acknowledged and admitted to Officer Braaten "… that he was able to understand which blocks and pads belonged to Skaw ND Precast, LLC now and stated that Skaw would be allowed to recover any items left. … Dyke further stated that he would attempt to make a trade for any blocks or pads that are missing." Dyk admitted that Skaw pads and blocks remained on the Defendants' property and that some of Skaw's personal property was missing.

[¶ 41.] Samuel Dyk thereafter took inventory of the pads and blocks that remained on the Dyk property. See, Plaintiff's Exhibit "42" [Appx. p. 148]. Note that Plaintiff's Exhibit "42" was dated May **19**, 2016 at **9:08:47 A.M.** CDT. Subsequently, on May **19**, 2016, at **11:15 A.M.**, or two hours later, Attorney Frisk notified Officer Braaten that the Skaw would have until **6:00 p.m**. on Friday, May **20**, 2016 to remove all of the remaining pads and blocks from the property. See, Plaintiff's Exhibit "43" [Appx. p. 149]. Skaw was therefore granted approximately 36 hours to remove in excess of 113 concrete pads and blocks from the premises, a task which Skaw testified, without challenge, was physically impossible and which could not be completed with the manpower and equipment available to Skaw. TT. p. 85, Lines 20-25 [Appellee Appx p. 87]; p. 118, Lines 23-25; p. 119, Lines 1- 22 [Appellee Appx. pp. 40-41]. Attorney Frisk's e-mail stated as follows: "**Beginning at 6:01 p.m. any one on site will be trespassing. A complaint to Ben Johnson will be made on our behalf should anyone decide to test this**." [emphasis added]. Skaw was threatened with criminal prosecution in the event Skaw entered the defendant's property after 6:00 o'clock p.m. on Friday, May **20**, 2016. Once again, the Defendants' threatened criminal prosecution if the Plaintiff entered the premises to collect Plaintiff's personal property.

[¶ 42.] At the trial, Attorney Frisk testified that attorney Anderson did not call him to discuss and negotiate an extension of the deadline. TT. p. 180, Lines 20-22 [Appellee Appx. p. 48]. It is submitted that Attorney Frisk's May **19**, 2016 e-mail, which e-mail was issued the day after deputy Braaten's report, was Frisk's response to the Complaint file by Skaw with deputy Sheriff Bratten, the response was crystal clear and that Frisk's response did not suggest that the Defendants had any intention of negotiating or for that matter discussing the May **20,** 2016 deadline established by Attorney Frisk. See, Plaintiff's Exhibit "43" [Appx. p. 149]. Attorney Frisk made it perfectly clear that anyone on the premises after 6:00 o'clock p.m. on May 20, 2016 would be deemed as a

trespasser in that a Complaint would be filed "should anyone decide to test this". The Frisk e-mail did not leave the door open for negotiations.

[¶ 43.] It is admitted that Defendants did, a year and a half later, offer to return the pads and blocks to Skaw. See, TT p. 88, Lines 10-15 [Appellee Appx. p. 28]. The offer was not accepted by Skaw.

[¶ 44.] At the trial, Skaw provided documentation reflecting that 138 Skaw owned pads and blocks should have been and remained on the site. TT. p. 38, Line 25; p. 39, Lines 1-2 [Appellee Appx. pp. 19-20]; p. 106, Lines 8-25; p. 107, Lines 1-23 [Appellee Appx. pp. 34-35]; See also, Plaintiff's Exhibit "47" [Appx. pp. 77]. The physical inventory provided by Dyk indicated an actual physical inventory of 113 – 116 blocks and pads. Therefore, 25 blocks and pads were therefore missing. Skaw employee Merrit Super testified that while removing the septic tanks and cylinders from the property, he witnessed Scott Dyk loading Skaw pads and blocks onto a low boy trailer. TT. p. 152, Lines 1-25; p. 153, Lines 1-24 Appellee Appx. pp. 44-45]. Mr. Super provided the Court with a photograph of Skaw pads and blocks loaded on a Dyke low boy trailer and indicated that the loaded trailer left the site for destinations unknown. See, Plaintiff's Exhibit "52" [Appx. pp. 169]. It is noteworthy that the pads and blocks loaded onto the low boy trailer were those some of the same pads and blocks that had been wrongfully moved by the Defendants from the Skaw leased area to the area adjacent to the Defendant's offices. Oil Capital did not deny a) taking possession and control of and moving the Skaw blocks and pads from the Skaw leased premises to the area adjacent to the Defendants' offices; b) subsequently moving and transporting twenty-five (25) or more of the Skaw pads and blocks to destinations unknow; and c) wrongfully taking three of Skaw's concrete tanks. The Defendants did not contest the fact that the Defendants took wrongful possession and control of Skaw's inventory assets.

[¶ 45.] Plaintiff's Exhibit "48" [Appx. pp. 164-165] reflects the value of the pads and blocks that had been wrongfully moved by Dyk from the Skaw leased area to the area around the Dyk offices and wrongfully converted by the Defendants. The total value of the pads and blocks was $47,793. TT. p. 40, Lines 14 – 18 [Appellee Appx. p. 21] ; TT. p.125, Lines 5-25 [Appellee Appx. p. 42]. In addition, Plaintiff's Exhibit "49" [Appx. p. 166] reflects the value of the three (3) missing tanks as being $4,500. See also, TT. p. 125, Lines 20 – 25 [Appellee Appx. p. 42]. The Defendants did not challenge or contest the Plaintiff's inventory count or the Plaintiff's valuations.

[¶ 46.] At the trial, Skaw testified that nearly one-half (1/2) of the Skaw blocks and pads, as wrongfully moved by the Defendants to the area directly adjacent to the Defendants' offices, had been damaged. TT. p. 74, Lines 14 – 25 [Appellee Appx. p. 26]; p. 48, Lines 1 – 25; p. 49, Lines 1 – 7; p. 50, Lines 8 – 11 [Appellee Appx. pp. 23-25]; p. 113, Lines 21-25, p. 114, Lines 1-14 [Appellee Appx. pp. 36-37]. Oil Capital did not contest or challenge the Plaintiff's testimony that approximately one-half (1/2) of the Skaw pads and blocks had been damaged by the Defendants.

[¶ 47.] During the late summer or early fall of 2016, Plaintiff retained Professional Management and Investigations, LLC [PMI] to assist in recovering Skaw's pads and blocks from the Defendants. TT. p. 41, lines 1-14 [Appellee Appx. p. 22]; p. 49, Lines 8 – 17 [Appellee Appx. p. 24]; p. 126, lines 1-25 [Appellee Appx. p. 43]. See also, Plaintiff's Exhibits "62' and "63" [Appx. pp. 212-214] which reflect invoices issued by PMI for services provided by PMI to regain possession of the Skaw assets. The invoices precisely and specifically identify the services/work provided by PMI along with the time accrued by PMI for each service line item. Dyk did not object to the PMI invoice nor did Dyk challenge the contents of the invoice.

[¶ 48.] Skaw testified that, under continuing threat of criminal prosecution, Skaw was prevented from entering the Oil Capital site to collect its assets. TT. p. 38, Lines 2 – 10 [Appellee Appx. p. 19].

LAW AND ARGUMENT

A. THE DEFENDANTS WRONGFULLY CONVERTED THE SKAW PERSONAL PROPERTY.

[¶ 49.] The first and principal issue of this appeal is whether the Defendants converted Skaw's concrete pads and blocks. More specifically, did the Defendants exert dominion and control over Skaw owned personal property assets, to the exclusion of the Skaw?

[¶ 50.] "Conversion is the wrongful exercise of dominion over the personal property of another in a manner inconsistent with, or in defiance of, the owner's rights. … conversion does not require a bad intention on the converter's party; it only requires an intent to exercise control or interfere with an owner's use to an actionable degree. … elements of good faith, wrongful intent or negligence do not play a part in an action based on conversion." *Harwood State Bank v. Charon*, 466 N.W. 2d, 601 (ND 1991). "Conversion consists of a tortious detention or destruction of personal property, or a wrongful exercise of dominion and control over the property inconsistent with or in defiance of the rights of the owner. *Ritter, Labor and Associates, Inc. v. Koch Oil, Inc*, 2004 ND 117, ¶11; 680 N.W. 2d 534. See also, *Paxon v. Weibe*, 1998 ND 169, ¶29, 584 N.W. 2d 72. The trial Court's determination of whether a conversion has occurred is an issue of fact, subject to the clearly erroneous rule. *Paxon* at ¶29; *Harley Miller Const., Inc. v. Russell*, 481 N.W.2d 459, 463 (N.D. 1992).

[¶ 51.] In the arena of Landlord-Tenant law,

> "As a general rule, the refusal, on demand, by a Landlord, who has no lien on or right to the property of the tenant, to surrender or deliver such property to the tenant or to permit him to go on the premises and remove his property, or the retention or use or disposal of tenant's property by the landlord or other exercise of dominium over it to the exclusion of the rights of the tenant, amounts to a conversion of the tenant's property by the landlord..".

49 AmJur 2d, Landlord and Tenant §237.

[¶ 52.] The North Dakota Supreme Court Case entitled *Kipp v. Lipp*,, 495 N.W.2d 56 (1993) is on point. In *Kipp*, as a result of the tenant's failure to pay rent and as a result of damage inflicted upon the leased premises, the Defendant landlord changed the locks on the leased property and denied tenant access to the leased premises and to the tenant's personal property. *Id*. at 57-58. During the self-help eviction process, Landlord inflicted damage upon the Tenant's personal property as located on the leased premises. The tenant sued the landlord seeking damages for conversion and exemplary damages. *Id*.

[¶ 53.] The trial court found that by changing the locks to the leased premises and denying the Tenants access to the leased premises and to the tenants' personal property, the Landlord had wrongfully converted the Tenants' personal property and was guilty of oppression. *Id*. at 58-59.The lower court found and determined that, because of the length of time the Tenants were excluded from their personal property and due to the fact the Landlord had damaged the Tenant's property, Landlord had converted the Tenant's personal property and the Tenants were not obligated or required to take the damaged property back from the Landlord. The lower court findings were affirmed by the North Dakota Supreme Court. Id. at 59.

[¶ 54.] The trial Court's determination regarding whether a conversion has been committed is a finding of fact which will not be overturned on appeal unless it clearly erroneous. *Paxon v. Weibe*, 1998 ND 169, P29, 584 N.W. 2d 72.

[¶ 55.] In the present case, the following facts support the lower Court's determination that the Defendants converted the Skaw personal property:

a. The Defendants' self-help eviction of Skaw from the two-acre tract;
b. The Defendants' construction of an earthen berm around the Skaw assets which prevented Skaw from accessing the same;
c. The Defendants' act of moving Skaw pads and blocks from the leased two-acre site to an area directly adjacent to the Defendants' offices;
d. The Defendants calling the Sheriff on two or three occasions to keep Skaw off the Tioga property when Skaw entered or attempted to enter the premises to retrieve its assets;
e. The damaging of approximately one-half of Skaw's pad and blocks when Defendants moved the same from the Skaw leased two-acre site to the area adjacent to the Defendants' office building;
f. Defendants' act of retaining possession of Skaw assets for one and one-half years despite repeated demands from Skaw, and its agent, PMI, that the assets be returned;
g. The Defendants' act of asserting a Landlord's lien against the Skaw assets to gain payment of alleged delinquent rent and the Defendants' demand for payment of past rents allegedly due as a condition of allowing Skaw access is assets;
h. The Defendants unauthorized loading of twenty-five (25) Skaw owned blocks and pads onto a lowboy trailer and transporting such items to destinations unknown. The Defendants have never offered to pay for or to return the twenty-five (25) pads and blocks to Skaw.

It is submitted that there is ample evidence supporting the lower Court's finding that the Defendants converted the Skaw assets.

[¶ 56.] Finally, the Defendants argue that because Skaw did not contact the Defendant's attorney to negotiate an extension of the May 20, 2016 Frisk imposed deadline, there can be no conversion. The Defendants position is incorrect. This Court, in *Ritter v. Koch Oil, 2004 ND 117,* ¶ 11, stated that:

> "…*if the defendant rightfully came into possession* and there was no wrongful taking of goods, demand and refusal to return may be required for conversion. However, this Court also has said demand and refusal are evidence of conversion but are not necessary to constitute conversion where a demand would be unavailing." [emphasis added].

Id. at ¶ 12. In the present case, the Defendants did not rightfully come into possession of the Skaw assets and attorney Frisk's May 19, 2016 e-mail made it perfectly clear that Attorney Frisk's deadline was not subject to reconsideration or negotiation. *See*, Plaintiff's Exhibit 43 [Appx. 149]. Frisk's e-mail was a take it or leave it proposition. Subsequent demands by Skaw for the return of its pads and blocks and subsequent requests for an extension of time would have been unavailing.

B. WHETHER THE SKAW-TIOGA AGREEMENT WAS A LEASE OR A LICENSE IS IRRELEVANT.

[¶ 57.] An issue raised by the Defendants is whether the Agreement between Skaw and Tioga was a lease. North Dakota Century Code Section 47-16-01 defines a lease as follows:

> Leasing is a contract by which one gives another the temporary possession and use of real property or reward and the latter agrees to return such possession to the former at a future time.

It is the Defendants' possession that the Agreement is actually a license. The Defendants' position and arguments are puzzling in light of the fact that the Defendants and the Defendants' attorney described the Agreement as a lease on numerous occasions during the course of the matter, even having issued and delivered a NOTICE OF NON-RENEWAL OF LEASE document to Skaw and also having demanded a rent increase from $700 per month to $750 per month, which rent increase was agreed to by and paid Skaw and received by the Defendants, without objection or

reservation of rights. Attorney Frisk described a "temporary lease" in his March 16, 2016 e-mail to Attorney Anderson. The lower Court, after having reviewed the Agreement and after having received witness testimony, determined the Agreement was a lease.

[¶ 58.] Now, for the first time on appeal, the Defendants argue the Skaw-Tioga agreement was a license. The Defendants allege and argue that because Skaw did not have exclusive possession of the leased two-acre site, and because Skaw allegedly did not retain all profits generated from activities on such site, the Agreement was actually a license. The Defendants claim is curious in light of the fact that the Defendants did not offer any evidence concerning whether or not Skaw's possession of the leased two acre tract was "exclusive" and no evidence that Skaw did not retain all profits generated from Skaw's use and occupation of the Tioga two acre tract, both of which considerations were deemed relevant by the Supreme Court in *Lee v. North Dakota Park Serv*., 262 N.W. 2d 467, 470 (N.D. 1977), as cited by Defendants in support of their claim that the Agreement is a license.

[¶ 59.] The Defendants' argument is also curious as it is suggested that regardless of whether the Agreement was a lease or a license, the Defendants had no right or authority to terminate the Agreement, no right or authority to self-help evict Skaw from the premises and no right or authority to refuse to allow Skaw to access and remove its assets. As determined by the North Dakota Supreme Court in the case entitled *Hector v. Metro Centers, Inc*., 498 N.W.2d 113, 117 (N. D. 1993) which case was also cited by the Defendants in support of the Defendants' argument, "…[w]here nothing more than a license appears, it is revocable at the will of the licensor, whatever expenditures the licensee may have made, **provided the licensee has had reasonable notice and opportunity to remove his fixtures and improvements**". [emphasis added]. *Id*. at 117. It is to be noted that the *Hector* case concerned an oral consensual license to deposit dirt on neighboring

property. The license did not have a stated or implied termination date and the Court determined the license was terminable at will. *Id*. In the present case, the Skaw-Tioga Agreement provided that the agreement would remain in effect until December 31, 2018 and did not allow for the unilateral termination of the Agreement. Because the Skaw-Tioga agreement had a stated termination date and because the Agreement did not provide for the unilateral modification or termination of the Agreement, the Defendants had no power or authority to unilaterally modify or terminate the Agreement and effect a self-help eviction of Skaw.

[¶ 60.] Regardless, whether the document is a lease or a license, the document was not subject to termination prior to December 31, 2018 and could not be modified in the absence of the mutual agreement of the parties. The Defendants had no right or authority to terminate the lease and no right or authority to self-help evict Skaw from the premises.

C. **THE SKAW-TIOGA LEASE AGREEMENT WAS NOT ORALLY AMENDED**.

[¶ 61.] The Defendants' engaged in mental gymnastics attempting to argue that the Skaw/Tioga Lease Agreement was somehow orally amended by virtue of the unilateral demands of the Defendants. It is submitted that the Defendants argument would appear to be irrelevant for even if the Agreement was amended, which is not conceded by Skaw and was not determined by the lower Court, and even if Skaw was in default of the alleged amended Agreement, the Defendants still had no right to effect a self-help eviction of Skaw. Self-help evictions do not exist in North Dakota law. The provisions of North Dakota Century Code Chapter 47-32 do not provide for self-help evictions. Skaw acknowledges that Skaw did agree to an increase of the rent to $750 per month, which rent increase was paid by Skaw to the Defendants. The balance of the Defendants' argument that the lease was amended is without merit in fact or law. The record is devoid of any agreements by Skaw to terminate the lease or, with the exception of the rent increase, to revise the terms of

the lease. The Defendants failed to identify testimony or documentation which supports the Defendants' position that the Agreement was amended.

D. THE PLAINTIFF'S WERE WRONGFULLY EVICTED FROM THE LEASED PREMISES

[¶ 62.] North Dakota Century Code Chapter 47-32, entitled "EVICTION", provides the framework for eviction actions in North Dakota. Chapter 47-32 does not provide for or allow self-help evictions. Evictions must be by way of a summons and complaint following in certain cases and circumstances, the service of a three days' written notice of intent to evict. There is no evidence the Defendants served a three-day notice on the Plaintiff or that Defendants used the judicial system to effect an eviction of the Plaintiff. The Defendants did not follow the eviction procedures required by North Dakota Century Code Sections 47-32-01, 02 and 03. As a matter of law, the Defendants self-help eviction is both contrary to law and violated the rights of the Plaintiff. In the absence of a breach of the lease, and in the absence of compliance with the provisions of North Dakota Century Code Chapter 47-32, the Defendants had no right to evict the Plaintiff and no right to prevent Plaintiff from accessing Plaintiff's personal property. The Defendant's use of self-help to evict of the Plaintiff and to deny Plaintiff access to Plaintiff's personal property is only one of many factors supporting a finding that the Defendants wrongfully converted Skaw's assets.

E. SKAW DID NOT ABANDON ITS CONCRETE PADS AND BLOCKS

[¶ 63.] The next issue before this Court is whether or not Skaw abandoned its concrete product inventory. Research by your undersigned revealed little to no North Dakota case or statutory law concerning the abandonment of personal property in a commercial lease setting. *1 AmJur 2d*, Abandoned, Lost, etc., Property §1, defines "Abandoned Property" as follows:

> "Abandoned property" is that to which the owner **has voluntarily relinquished all right, title, claim and possession**, **with the intention of terminating his**

> **ownership,** but without vesting ownership in any other person, **and with the intention of not reclaiming any future rights therein**, as by reclaiming future possession or resuming ownership, possession or enjoyment of the property." [emphasis added].

For property to be deemed abandoned, it is therefore necessary that there be a) a voluntary relinquishment of all right, title, claim and possession of the property with the intention of terminating ownership, and b) an intention of not reclaiming any future rights therein. The Defendants hold the burden of proof as abandonment is a defense asserted by the defendants.

[¶ 64.] As applied to the facts of this case, there is abundant documentation, testimony and evidence establishing that Skaw had absolutely no intention of abandoning its concrete pads and blocks. As reflected by the incident report issued by the Williams County Sheriff's Office on **May 18, 2016**, Skaw notified the local sheriff that Skaw desired to reclaim possession of its personal property as wrongfully converted by the Defendants. See, Plaintiff's Exhibit "41" [Appx. 146-147]. Thereafter, following Attorney Anderson's departure from the case, Skaw retained Portfolio Management and Investigations, Inc. in another attempt to regain possession of its property. Skaw's acts reflect Skaw's unwavering desire and intention to regain possession of its assets. Skaw did not abandon its assets.

F. **THE LOWER COURT PROPERLY AWARDED SKAW FAIR COMPENSATION FOR THE TIME AND MONEY EXPENDED BY SKAW IN PURSUIT OF ITS WRONGFULLY CONVERTED PROPERTY**.

[¶ 65.] North Dakota Century Code Section 32-03-23 provides as follows:

> "The detriment caused by the wrongful conversion of personal property is presumed to be:
>
> 1. The value of the property at the time of the conversion, with the interest from that date; or

2. When the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and
3. Fair compensation for the time and money properly expended in pursuit of the property.

A lower court determination and award of damages is subject to the clearly erroneous rule. *Buri v. Ransey*, 2005 ND 65, ¶ 20. Skaw elected to accept the value of the property at the time of conversion, with the interest from that date, as the appropriate measure of damages. N.D.Cent.C. §32-03-23(1). In addition, Skaw claimed and demanded fair compensation for the time and money properly expended by Skaw in pursuit of the property. N.D.Cent.C. §32-03-23(3). The Defendants did not appeal the lower Court's findings regarding the Skaw inventory count or Skaw's asserted value of its concrete pads and blocks, or the lower Court's awarded of damages in the sum of $52,295, plus interest.

[¶ 66.] The Defendants did appeal the lower Court's award to Skaw of $17,000 representing fair compensation to Skaw for the time and money properly expended in pursuit of the wrongfully converted Skaw property. N.D.Cent.C. §32-03-23(1). Plaintiffs testified at the trial that Plaintiff accrued a bill of approximately $17,000 for services performed by Professional Management and Investigations, LLC ("PMI") as "[f]air compensation for the time and money properly expended in pursuit of the property." Skaw testified that the work of PMI was necessary. The extensive and time-consuming investigative work performed by PMI is summarized at Plaintiffs' Exhibits "61", "62" and "63". [Appx. pp. 178-214]. The investigation performed by PMI was thorough, comprehensive, time consuming and reasonably necessary in pursuit of the wrongfully converted property. The Defendants did not challenge the contents of the PMI investigative summary and PMI invoices nor did Defendants contest or challenge the dollar amounts of the PMI invoices. It is submitted that had the Defendants released the wrongfully converted property to Skaw either

during May of 2016 or directly after PMI first contacted the Defendants, the costs accrued by PMI would have been substantially less and this matter would not have entered into litigation. The Defendants' fault and wrongful failure to allow Plaintiff to regain possession of Plaintiff's personal property resulted in the accrual of $17,000 of PMI fees and costs. The Defendants did this to themselves by wrongfully and stubbornly refusing to allow Plaintiff to regain possession of Plaintiff's assets as wrongfully converted by Defendants.

[¶ 67.] The lower Court received and weighed the testimony of the parties, determined the credibility of the witnesses and, in its reasonable discretion, awarded Skaw judgment in the sum of $17,000 for time and money properly expended in pursuit of Skaw's wrongfully converted property.

CONCLUSION

[¶ 68.] In light of the foregoing, it is respectfully requested that the lower Court decision be in all ways affirmed.

REQUEST FOR ORAL ARGUMENT

[¶ 69.] Plaintiff/Appellee hereby requests oral argument in this matter. Oral argument is requested for this matter given the complex interaction between the timeline of events and law.

Dated this 6th day of August, 2019.

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CERTIFICATE OF COMPLIANCE

I, David A. Tschider, hereby certify that the Brief of Plaintiff/Appellee containing a total of 34 pages complies with N.D.R.App.P, Rule 32(8)(e).

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IN SUPREME COURT

STATE OF NORTH DAKOTA

SKAW ND PRECAST LLC,	)	
	)	
PLAINTIFF/APPELLE,	)	Supreme Court Case No.: 20190138
	)	District Court Case No.: 53-2017-CV-01410
VS.	)	
	)	
OIL CAPITAL READY MIX, LLC, AGAPE HOLDINGS, LLP, SCOTT DYK AND SAMUEL DYK,	)	
	)	
DEFENDANTS/APPELLANTS.	)	

CERTIFICATE OF SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

I hereby certify that on August 6, 2019, I caused to be electronically filed the Appellee's Brief and Appellee's Appendix with the Clerk of the North Dakota Supreme Court (as supclerkofcourt@ndcourts.gov) and served the same electronically as follows:

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Dated: August 6, 2019

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