

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

William S. Wilkinson; Ann L. Nevins and
Amy L. Perkins as Personal Representatives
for the Estate of Dorothy A. Wilkinson;
Barbara Caryl Materne, Trustee of the Petty
Living Trust; Charlie R. Blaine and Vanessa
E. Blaine, as Co-Trustees of the Charlie R.
Blaine and Vanessa E. Blaine Revocable
Trust; Lois Jean Patch, life tenant; and Lana J.
Sundahl, Linda Joy Weigel, Deborah J. Goetz,
Marva J. Will, Ronald J. Patch, Michael Larry
Patch, and Jon Charles Patch, Remaindermen,

Plaintiffs and Appellants,

vs.

The Board of University and School Lands of
the State of North Dakota, Brigham Oil &
Gas, LLP; Statoil Oil & Gas LP; EOG
Resources, Inc.; XTO Energy Inc.; Petrogulf
Corporation, and all other persons unknown
who have or claim an interest in the property
described in the Complaint,

Defendants/Appellees,
and

North Dakota State Engineer,

Intervenor and Appellee.

SUPREME COURT NO. 20220037

Civil No. 53-2012-CV-00038

ORAL ARGUMENT REQUESTED

ON APPEAL FROM ORDER FOR JUDGMENT (12/10/2021)
AND JUDGMENT (1/10/2022)
COUNTY OF WILLIAMS,
NORTHWEST JUDICIAL DISTRICT COURT
STATE OF NORTH DAKOTA
THE HONORABLE PAUL JACOBSON

**APPELLEE STATOIL & GAS, LLP, fka BRIGHAM OIL & GAS LLP nka
EQUINOR ENERGY, LP'S PRINCIPAL BRIEF**

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STATEMENT OF THE CASE

[¶ 1] This matter comes before this Court on Appeal from the Order for Judgment entered by the Honorable Paul W. Jacobson after a bench trial held over two days in the State Court for the Northwest Judicial District, Williams County, North Dakota (hereinafter “District Court”). The bench trial was conducted pursuant to this Court’s Opinion in Wilkinson v. Board of Univ., 2020 ND 179, ¶32 (“*Wilkinson II*”). The sole issue before the District Court on remand was the Plaintiffs/Appellants’ remaining claims that were not adjudicated in the District Court’s prior Order determining that N.D.C.C. 61-33.1 applied and the Plaintiffs owned the minerals. R510. The Plaintiffs’ remaining claims as stated in their Amended Complaint were causes of action for Takings (Count II and Count III); Conversion (Count IV); Constructive Trust and Unjust Enrichment (Count V); and Civil Conspiracy (Count VI); and Section 1983 claim (Count VII). R47. Neither the taking claims (Count II and Count III) nor the Section 1983 claim (Count VII) were asserted against Defendant/Appellee Statoil Oil & Gas LP fka Brigham Oil & Gas LLP nka Equinor Energy, LP (hereinafter “Statoil”). Id. The Plaintiffs also did not persist in their Conversion (Count IV) or their Constructive Trust and Unjust Enrichment (Count V) claims against Statoil in either their presentation of evidence at trial, post-trial briefing to the District Court; or in their opening brief to this Court. R653. The sole issue before this Court on appeal from the Order for Judgment and Judgment of the District Court that regards Statoil is Civil Conspiracy (Count VI).

[¶ 2] The Plaintiffs have alleged that the tort theory underlying the alleged civil conspiracy was conversion of the Plaintiffs minerals by the State of North Dakota. The Plaintiffs argue on appeal that the District Court erred in dismissing the Plaintiffs’

conversion claim, specifically that the State of North Dakota converted the Plaintiffs' royalties by requiring royalty funds to be deposited into the State of North Dakota's "own escrow account". (Appellants' Brief at ¶55). The District Court found that the Plaintiffs had not properly pled a claim for conversion of the severed minerals but only a claim for conversion of the mineral interests, which are not personal property that can be converted. Furthermore, the District Court found that even overlooking the deficiency in pleading that the State of North Dakota only entered into leases and did not take any action affecting severed minerals, which would be personal property. R813:40. While the Plaintiffs never argued at trial or in their post-trial briefing to the District Court that Statoil was a converter of the severed minerals, the District Court found that even had the Plaintiffs persisted in a conversion claim against Statoil that the adjustment period for Operators under N.D.C.C. Ch. 61-33.1 provided Statoil until June 25, 2022 before any damages, such as those sought by the Plaintiffs, could even begin to accrue. R813:41. Again, the Plaintiffs have not raised any argument in their opening brief that Statoil in any way converted the Plaintiffs' mineral interests or severed minerals.

[¶ 3] The Plaintiffs argue on appeal that the District Court erred by not considering conversion as the underlying tort for the basis of their civil conspiracy claim. (Appellants' Brief at ¶62). However, this is incorrect. The District Court specifically addressed conversion as the underlying tort and stated as follows: "the Plaintiffs' civil conspiracy claim against Statoil also fails because the underlying tort [i.e. conversion] claims fail for the reasons previously discussed." R813:44: ¶110. The District Court also found that the Plaintiffs presented no evidence indicating that the State or Statoil "acted in concert to commit an unlawful act or to commit a lawful act by unlawful means." Id. On Appeal,

the Plaintiffs seemingly argue that the leases and the escrow agreement are implicit proof of the conspiracy. There does not appear to be sufficient information from the Plaintiffs' Opening Brief to really flesh out the Plaintiffs' argument here and what is specifically the alleged wrongful act, the alleged lawful act by unlawful means, or more importantly the purported error by the District Court. It also seems that the Plaintiffs disregard the District Court's finding that the leases were not entered into by the State and Statoil, but that Statoil came into possession of the Section 12 leases under assignments from Bowie Oil Partners, LLC.¹ Furthermore, the District Court discussed that the deposit of funds into escrow was required under N.D.A.C. § 85-06-01-09 and the prior Board Rule 85-06-06-08.1 (effective April 23, 2010). The Land Board implemented the rule requiring the deposit into escrow before Bowie Oil Partners, LLC obtained the leases dated August 3, 2010 for the disputed property in the W1/2 of Section 12 at issue in this lawsuit. The District Court properly found that there was no basis in either fact or law to establish that the State and Statoil conspired in any way and, accordingly, dismissed the Plaintiffs' claim under the theory of civil conspiracy. In this appeal, the Plaintiffs have failed to identify how any of the Court's factual findings related to conversion or civil conspiracy were clearly erroneous. The Plaintiffs have also similarly failed to identify how any of the legal conclusions of the District Court are based on an erroneous view of the law.

¶ 4] Addressing the Plaintiffs' claimed damages, the District Court found that Statoil

¹ It should also be noted that Bowie Oil Partners, LLC is not Statoil's predecessor in the sense that there is any unity of ownership or corporate control. The Plaintiffs' brief makes repeated reference to Bowie Oil Partners, LLC as Statoil's predecessor in a potentially misleading manner where it refers to Equinor as Statoil's successor. Statoil was formerly known as Brigham Oil & Gas, LP and is now known as Equinor Energy, LP. Bowie Oil Partners, LLC is an entirely separate entity.

was not liable for any of the Plaintiffs' claimed damages asserted against Statoil, as the Supreme Court in *Wilkinson II* found that N.D.C.C. Ch. 61-33.1 applied, and that Statoil had complied with the process set forth in N.D.C.C. Ch. 61-33.1, which provides that “[a]ny applicable penalties, liability, or interest for the late payment of royalties or revenues from an affected oil and gas well may not begin to accrue until [June 25, 2022].” R813:41. The immunity from damages in the form of penalties, liability, or interest for the late payment of royalties was unambiguously adopted by the legislature in respect to the operators of oil and gas wells affected by the acreage determination, such as Statoil in the instant case. These are exactly the damages that the Plaintiffs sought to recover from Statoil and the District Court properly dismissed these claims.

STATEMENT OF THE FACTS

I. PROCEDURAL BACKGROUND

A. A legal dispute exists as to the ownership of the Disputed Property claimed by the Plaintiffs and the State of North Dakota at the time Plaintiffs initiated their quiet title action.

[¶ 5] This action was originally commenced by the Plaintiffs as a quiet title action by Complaint dated January 9, 2012. R2. The Plaintiffs filed an Amended Complaint alleging additional causes of action on July 1, 2014 (the “Amended Complaint”). R47. Included within that Amended Complaint were causes of action for Conversion (Count IV); Constructive Trust and Unjust Enrichment (Count 5); and Civil Conspiracy (Count VI) as to all defendants. Statoil is not involved in Wilkinson’s taking claims (Count II and Count III) or in Wilkinson’s Section 1983 claim (Count VII). *Id.*

B. The District Court determines the State of North Dakota owns the Disputed Property.

[¶ 6] On May 17, 2016, the District Court entered its Order granting the State of North Dakota’s Motion for Summary Judgment. R306. On May 18, 2016, the District Court entered its Amended Order for Summary Judgment. R312. The District Court found as follows:

This Court finds that precedent clearly establishes that the State holds the title of beds of navigable waters up to the OHWM in its current condition, including the underlying minerals. As such, the Court concludes the Phase I Delineation should be used to determine the OHWM for the Property rather than the Phase II Investigation. Therefore, the Property, both surface and mineral interests, is determined to be sovereign land of the State of North Dakota.

Id. at ¶31.

The Court’s 2016 Orders and Judgment determined that title to the property at issue was quieted to the State of North Dakota based on the current OHWM of the Missouri River, a navigable river, based on the Phase I delineation. The Court also dismissed Counts II through VII as “there are no grounds to support” those claims in its 2016 Orders and Judgment. Id. at ¶36.

C. The Legislature changes the legal landscape by passing a statute that prescribes the process by which ownership of the Disputed Property is determined.

[¶ 7] In the 2017 Legislative Session, the North Dakota Legislature enacted N.D.C.C. Ch. 61-33.1 which governed mineral rights of land inundated by the Pick-Sloan Missouri Project dams. N.D.C.C. Ch. 61-33.1 became effective April 21, 2017 as an emergency measure and applied retroactively. N.D.C.C. Ch. 61-33.1 was enacted while the first appeal was pending in the instant case before the North Dakota Supreme Court in Wilkinson v. Board of Univ. & Sch. Lands, 2017 ND 231, 903 N.W.2d 51 (hereinafter,

“*Wilkinson I*”). In *Wilkinson I*, the North Dakota Supreme Court reversed the summary judgment entered by this District Court in favor of the State, and remanded the case “for the district court to determine whether N.D.C.C. Ch. 61-33.1 applies and governs ownership of the minerals at issue in this case.” (*Id.* at ¶ 20). The Supreme Court further held that the District Court was to reconsider the issue of whether there was a taking of the Plaintiffs’ mineral interests if the District Court decides the State owns the disputed minerals. (*Id.* at ¶ 25).

D. The North Dakota Supreme Court reverses the grant of Summary Judgment to the State of North Dakota and remands the matter for a determination of whether the recently enacted NDCC Ch. 61-33.1 applies and governs the ownership of the Disputed Property. (*Wilkinson I*)

[¶ 8] After remand, the case was stayed by Order entered December 1, 2017 “until such time as final review findings under N.D.C.C. § 61-33.1-03 are adopted by the North Dakota Industrial Commission (“NDIC”)”. R408. N.D.C.C. § 61-33.1-03 provides for the determination of the ordinary high-water mark (“OHWM”) of the historical Missouri river channel. Pursuant to this statute the state hired the Wenck Engineering Firm to conduct the required study (the “Wenck Study”). The NDIC, after making certain modifications based on the recommendations from the Department of Mineral Resources, adopted the Wenck Study, with the issuance on September 27, 2018 of North Dakota Industrial Commission Order No. 29129 (the “NDIC Order”). The NDIC Order established the OHWM of the historical Missouri riverbed channel. R424.

E. The District Court determines that NDCC Ch. 61-33.1 applies to the Disputed Property and quiets title to the Disputed Property in the Plaintiffs, based on the Historical OHWM.

[¶ 9] After the stay was lifted the Plaintiffs, on April 15, 2019, moved for “summary judgment against the Defendants and in favor of the Plaintiffs”. R469. By Order entered September 6, 2019 this District Court held, at ¶ 3 of its order, that it was only deciding the issues as follows:

The Supreme Court held that two narrow issues must be addressed on remand: (1) the application of N.D.C.C. Ch. 61-33.1 to the Wilkinsons' mineral interests; and (2) if the Court decides the State owns the Wilkinsons' mineral interests, the Court must consider the Wilkinsons' takings claim.

R510 at ¶2.

[¶ 10] This District Court decided “[a]s a matter of law, N.D.C.C. Ch. 61-33.1 applies [to the Disputed Minerals] and controls the ownership of the property at issue”. Because the court did not decide the State owned the mineral interests, the order did not address the takings issue.

As a matter of law, N.D.C.C. Ch. 61-33.1 applies and controls the ownership of the property at issue. The Industrial Commission determined that the Wilkinsons' minerals are above the OHWM of the historic Missouri riverbed channel, and therefore, the Wilkinsons are entitled to those minerals.

R510 at ¶22.

The Order directed that judgment be entered accordingly in the Plaintiffs’ favor. Judgment was entered on September 16, 2019 quieting all right, title, and interest in the Disputed Property in favor of the Plaintiffs. R513.

F. The 2019 North Dakota Legislature amends NDCC Ch. 61-33.1 to provide for a final acreage determination, which is adopted on June 25, 2020.

[¶ 11] When the Plaintiffs filed their Motion for Summary Judgment on April 15, 2019, there were both House and Senate Bills pending before the 2019 North Dakota Legislature seeking to amend portions of N.D.C.C. Ch. 61-33.1. Those bills resulted in the passage of Senate Bill 2211 as an emergency measure, with retroactive application to the date of closure of the Pick-Sloan Missouri Basin Project dams, signed by the Governor on May 1, 2019. The amendment provided for a final acreage determination to be conducted by the Board of University and School Lands (hereinafter “Board”), as follows:

8. Upon adoption of the final review findings by the industrial commission, the board of university and school lands may contract with a qualified engineering and surveying firm to analyze the final review findings and determine the acreage on a quarter-quarter basis or government lot basis above and below the ordinary high water mark as delineated by the final review findings of the industrial commission. The acreage determination is final upon approval by the board.

N.D.C.C. § 61-33.1-03.

The Board contracted with Kadrmas Lee & Jackson to complete the acreage determination.

The Board adopted the acreage adjustment survey on June 25, 2020.

G. The North Dakota Supreme Court affirms the District Court’s grant of summary judgment to the Plaintiffs determining that NDCC Ch. 61-33.1 applies to the Disputed Property but remands the case until the statutory process is completed and the District Court has addressed Plaintiffs’ remaining claims. (*Wilkinson II*).

[¶ 12] Following the District Court’s grant of Summary Judgment to the Plaintiffs on September 16, 2019, another appeal of the instant case went up to the North Dakota Supreme Court in Wilkinson v. Board of Univ., 2020 ND 179, 947 N.W.2d 910 (hereinafter, “*Wilkinson II*”). The North Dakota Supreme Court in *Wilkinson II* upheld the

District Court’s findings that N.D.C.C. Ch. 61-33.1 applied to the Plaintiffs’ property, but the Court clarified that the other processes outlined in N.D.C.C. Ch. 61-33.1 must be completed, as follows:

We affirm the district court's conclusions that N.D.C.C. Ch. 61-33.1 applies in this case and that the Wilkinson property is above the OHWM of the historical Missouri riverbed channel and is not State sovereign lands. However, the court erred by determining “That concludes the statutory process as applied to the Wilkinsons and their claims in the Amended Complaint.” Determining the property is above the OHWM of the historical Missouri riverbed channel, does not end the statutory process. Chapter 61-33.1, N.D.C.C., contains further processes that apply to this property. The final acreage determinations have not been made and royalties and bonus payments may need to be released to the plaintiffs as required by N.D.C.C. Ch. 61-33.1. The rest of the statutory process must be completed and the district court's decision to end this case before determining the plaintiffs’ damages was premature.

Wilkinson v. Board of Univ., 2020 ND 179, ¶ 32, 947 N.W.2d 910.

H. The District Court holds a Trial on the Wilkinson’s remaining claims and potential damages.

[¶ 13] This matter was tried before the District Court on July 22 and 23, 2021. At or near the time of trial, the Plaintiffs dismissed their claims against EOG. R647. EOG and Statoil also dismissed all claims between and against the other. R651. By the Plaintiffs’ own representation “[t]he only question before the [District] Court on remand is the Wilkinson’s damages[.]” R586: ¶1. The District Court characterized the remaining claims at trial as follows:

- Has there been a taking by the State under the United States Constitution?
- Has there been a taking by the State under the North Dakota Constitution?
- Has there been conversion by the State or Statoil?²
- Has there been constructive trust/unjust enrichment by the State or Statoil?³

² The Plaintiffs’ testimony and argument to the District Court was solely related to conversion by the State. Plaintiffs presented no testimony or argument that Statoil committed the tort of conversion at trial. R653:32-35.

³ The Plaintiffs’ testimony and argument to the District Court was solely related to constructive trust/unjust enrichment by the State. Plaintiffs presented no testimony or

- Have the State and Statoil committed civil conspiracy?
- Has the State committed any 42 U.S.C. § 1983 violations?
- What amount of damages and attorneys' fees are Plaintiffs entitled to recover and from whom?⁴

I. The District Court dismisses the Plaintiffs' remaining claims.

[¶ 14] On December 10, 2021, the District Court finds in favor of the State and Statoil and dismissed the entirety of the Plaintiffs' remaining claims with prejudice.

II. FACTUAL BACKGROUND

The record at trial supported the District Court's findings that Statoil's actions complied with the applicable law and processes set forth in N.D.C.C. Ch. 61-33.1 and that Plaintiffs presented no evidence that supported a conclusion that the State and Statoil conspired to deprive the Plaintiffs of their royalties.

[¶ 15] This case began as a quiet title action initiated by the Plaintiffs' then attorney Malcolm Brown by Complaint dated January 9, 2012. R2. The District Court found that "[t]his case is a title dispute created by two conflicting legal theories regarding property ownership beneath the Missouri River that was subject to condemnation during Garrison Dam's construction." R813:16. After the Legislature passed N.D.C.C. Ch. 61-33.1 and with this Court's decisions in *Wilkinson I and II*, this case was subject to the process set forth in N.D.C.C. Ch. 61-33.1. The District Court found that the title dispute in the instant case began in 2010 and continued through this Court's ruling in *Wilkinson II*. R813:17.

[¶ 16] "In 2009, the State commissioned an OHWM delineation of the Missouri River from the Montana border to Williston. This delineation is commonly referred to as the Phase I delineation or the Phase I line. The Land Board used the Phase I line to determine

argument that Statoil should be liable under the equitable theories of constructive trust/unjust enrichment at trial. R653:35-36.

⁴ The Plaintiffs' Motion for Attorneys' fees is solely directed against the State. R540 and R541. The Plaintiffs have not levied any theory of recovery of attorney's fees against Statoil. *Id.*

acreage amounts to issue oil and gas leases for minerals below the OHWM of the Missouri River as it then existed.” R813:8. The Missouri River in the NW1/4 and SW1/4 of Section 12, Township 153 North, Range 102 West were listed on the Land Board’s website for nomination. R844:136 at Ins. 17-20, R813:9. The State ultimately entered leases with Bowie Oil Partners, LLC in those quarter sections in the west 1/2 of Section 12. R678, R679. “Statoil came into possession of the section 12 leases through assignment.” R813:44.

[¶ 17] Statoil is the operator of the Lippert 1-12 H Well (hereinafter “Lippert” well). R813:10 at ¶29. The spacing unit for the Lippert well consists of Sections 1 and 12, Township 153 North, Range 102 West. Id. The Lippert Well is located in the area defined by 61-33.1. The Lippert Well is an oil and gas well affected by the final acreage determination. During the pendency of the title dispute, Statoil paid royalties into a “disputed title royalty escrow account” established pursuant to N.D.A.C. § 85-06-01-09 and the prior Board Rule 85-06-06-08.1. Id. The District Court found that the deposit of funds in this escrow account pursuant to the requirements of the Administrative Code and Board Rule was not evidence of a conspiracy. R813:44. The District Court also found that the acreage adjustment process was not evidence of a conspiracy but was part of the process set forth by the legislature in N.D.C.C. Ch. 61-33.1.

[¶ 18] The District Court found based on the testimony at trial that Statoil had complied with the process set forth in N.D.C.C. Ch. 61-33.1 as it released all royalties owed to the Plaintiffs on or about November 20, 2020. R813:15. This was within the six-month time frame set forth in 61-33.1-04(1). NDCC 61-33.1-04(2) provides: “Upon the adoption of the acreage determination by the Board of University and School Lands (which occurred

on June 25, 2020) Operators of oil and gas well affected by the final acreage determination shall begin to implement any acreage and revenue adjustments relating to state owned and privately owned oil and gas interests.” NDCC 61-33.1-04(2)(b) further provides: “The Operators shall complete the adjustments within two years after the Board approves the acreage determination.”

[¶ 19] The damages that were sought by the Plaintiffs at trial were all damages related to the purported late payment of royalties for the ten-year period of time, where both the State and the Plaintiffs were claiming title to the NW1/4 and SW1/4 of Section 12. The damages sought by the Plaintiffs at trial included interest, lost investment opportunity, Jon Patch’s time, and other liability for the time during which the Plaintiffs did not receive royalties during the pendency of the title dispute. The Plaintiffs also sought to recover attorney’s fees and costs against the State of North Dakota. The District Court properly found that the damages claimed by the Plaintiffs are not damages recoverable against Statoil by the clear language of N.D.C.C. 61-33.1-04(2)(b), which provides immunity to the operators of affected oil and gas wells, as follows: “Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline [June 25, 2022].” R813:41.

LEGAL ARGUMENT

Standard of Review

[¶ 20] “The standard of review on appeal from a bench trial is well-established:

In an appeal from a bench trial, the trial court's findings of fact are reviewed under the clearly erroneous standard of N.D.R.Civ.P. 52(a) and its conclusions of law are fully reviewable. Fargo Foods, Inc., v. Bernabucci, 1999 ND 120, ¶ 10, 596 N.W.2d 38. A finding of fact is clearly erroneous if it is induced by an *496 erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the evidence, we are left with a definite

and firm conviction a mistake has been made. Moen v. Thomas, 2001 ND 95, ¶ 19, 627 N.W.2d 146. ‘In a bench trial, the trial court is “the determiner of credibility issues and we do not second-guess the trial court on its credibility determinations.”’ *Id.* at ¶ 20.” Brash v. Gulleason, 2013 ND 156, ¶ 7, 835 N.W.2d 798 (quoting Fladeland v. Gudbranson, 2004 ND 118, ¶ 7, 681 N.W.2d 431). A trial court's findings are “presumptively correct.” Tweeten v. Miller, 477 N.W.2d 822, 824 (N.D.1991).

567 [¶ 13] In applying the clearly erroneous standard of review, we will not substitute our judgment for the trial court's judgment. Erickson v. Olsen, 2014 ND 66, ¶ 19, 844 N.W.2d 585. “A trial court's choice between two permissible views of the weight of the evidence is not clearly erroneous, and simply because we may have viewed the evidence differently does not entitle us to reverse the trial court.” *Id.* (quoting RRMC Constr., Inc. v. Barth, 2010 ND 60, ¶ 7, 780 N.W.2d 656). A trial court's findings are adequate if the record enables us to understand the court's factual determinations and the basis for its conclusions of law and judgment. *See* Almont Lumber & Equip., Co. v. Dirk, 1998 ND 187, ¶ 13, 585 N.W.2d 798; First Am. Bank W. v. Berdahl, 556 N.W.2d 63, 65 (N.D.1996).

Service Oil, Inc. v. Gjestvang, 2015 ND 77, ¶¶ 12-13, 861 N.W.2d 490.

Argument

[¶ 21] The focus of the Plaintiffs’ briefing to this Court on Appeal is the Plaintiffs’ takings claims under the United States and North Dakota Constitutions and the 42 USC § 1983 claim against the State. The sole issue on appeal as it relates to Statoil is brought under the Plaintiffs’ theory of civil conspiracy.

1. **The Plaintiffs have waived any argument that Statoil committed the tort of conversion or should be found liable under the equitable remedy/theory of constructive trust/unjust enrichment because the Plaintiffs did not raise it at trial or in the Plaintiffs’ opening brief to this Court on Appeal.**

[¶ 22] It is apparent from the Plaintiffs’ Post Trial Brief and Plaintiffs/Appellants’ Opening Brief that the Plaintiffs have abandoned their arguments that Statoil in any manner committed the tort of conversion. R653:33 (“The State converted the Wilkinsons’ royalties by virtue of their possessing and controlling the royalties”) and *see* Appellants’ Br. at pp. 27-29. The Plaintiffs’ claim for conversion is directed solely against the State. *Id.*

[¶ 23] It is also clear from the Plaintiffs’ Post Trial Brief R653:36 and Plaintiffs/Appellants’ Brief that the Plaintiffs are not asserting their claims under Count V of their Amended Complaint, specifically unjust enrichment/constructive trust, against Statoil. The entirety of the Plaintiffs claim for Unjust Enrichment is asserted against the State and relates in its entirety to the Section 13 property. The claim relates to lease bonuses that the dismissed parties, Petrogulf and XTO, paid to the State in Section 13. *Id.* (“The State was unjustly enriched at the Wilkinsons’ expense when it received [bonus] payments by virtue of claiming something it didn’t own, namely, the Wilkinsons’ 57.09 mineral acres in Section 13”) and *see* Appellants’ Brief at pp.29-30 (“Because the State was unjustly enriched at the Wilkinsons’ expense, equity demands the State disgorge those payments in the amount of \$207,336.61. to the Wilkinsons.”) Statoil did not pay any bonus to the State in Section 13. As such, Statoil does not take a position on the Plaintiffs’ equitable claim for unjust enrichment insofar as it is solely asserted against the State, who is represented by its own responding counsel.

[¶ 24] Issues not raised in a party’s opening brief on appeal are waived and will not be considered. Chavero-Linares v. Smith, 782 F.3d 1038, 1040 (8th Cir. 2015); F.T.C. v. Neiswonger, 580 F.3d 769, 775 (8th Cir. 2009). “Claims not raised in an opening brief are deemed waived.” Jenkins v. Winter, 540 F.3d 742, 751 (8th Cir. 2008) Fair v. Norris, 480 F.3d 865, 869 (8th Cir.2007); *see also* Express Scripts, Inc. v. Aegon Direct Mktg. Servs., Inc., 516 F.3d 695, 702 (8th Cir.2008), citing Miss. River Corp. v. FTC, 454 F.2d 1083, 1093 (8th Cir.1972) (“[p]roper judicial administration” requires that appellant raise issues in opening brief); K.D. v. County of Crow Wing, 434 F.3d 1051, 1055 n. 4 (8th Cir.2006); Chay–Velasquez, 367 F.3d 751, 756 (8th Cir.2004) (“Since there was no meaningful

argument on this claim in his opening brief, it is waived.”). Like the Eighth Circuit, this Court has consistently held that issues not raised below and not briefed on appeal, will not be considered by this Court. State v. Johnson, 2011 ND 48, ¶ 17, 795 N.W.2d 367. Accordingly, the Plaintiffs have waived Counts IV-Conversion and V-Constructive Trust/Unjust Enrichment as to Statoil.

2. The District Court did not err in finding that the State did not convert the Plaintiffs’ property.⁵

[¶ 25] After weighing the evidence presented at the bench trial, the District Court found no conversion by any of the Defendants, as follows:

"Conversion consists of a tortious detention or destruction of personal property, or a wrongful exercise of dominion or control over the property inconsistent with or in defiance of the rights of the owner." Ritter Laber & Assoc., Inc. v. Koch Oil, Inc., 2004 ND 117, ¶11, 680 N. W.2d 634. It "requires an intent to exercise control or interfere with the use of property to such a degree as to require a forced sale of the plaintiffs interest ... to the defendant." Id. While conversion concerns personal property, the Plaintiffs are alleging a conversion of mineral interests. Mineral interests are real property, not personal property. Schulz v. Hauck, 312 N.W.2d 360, 361 (N.D. 1981).

However, "upon severance ... the royalty interest accrues and becomes a personal property interest." Finstrom v. First State Bank, 525 N.W.2d 675, 677 (N.D. 1994); see also, Siana Oil & Gas Co. v. Dublin Co., 2018 ND 164, ¶ 19, 915 N.W.2d 134. But the Plaintiffs' [sic] have not alleged in their Amended Complaint the conversion of severed minerals, only the mineral interests. Therefore, the elements of a conversion claim have neither been alleged or established against either Statoil or the State.

However, even overlooking this deficiency in the Amended Complaint, the Plaintiffs have alleged no action by the State and the State has taken no

⁵Statoil also joins in the State’s argument that this court lacks jurisdiction over the alleged conversion by the State due to the Plaintiffs’ failure to timely file a notice of claim under N.D.C.C. § 32-12.2-04. See R99 and see State ex rel. Stenehjem v. Maras, 2021 ND 68, ¶ 11, 958 N.W.2d 475. (“The notice requirements set out in N.D.C.C. § 32-12.2-04(1) are jurisdictional, and “strict compliance” is required.”)

action to justify a conversion claim. The only "action" taken by the State in this case has been entering into leases.

...

Likewise, the conversion claim against Statoil also fails because Statoil has not committed any wrongful conduct. This case was initially brought as a quiet title action due to a title dispute. During the pendency of the title dispute, Statoil was justified in holding royalty payments in suspense. *See* Restatement 2d of Torts, § 240 ("[O]ne in possession of a chattel who is in reasonable doubt as to the right of a claimant to its immediate possession does not become a converter by making a qualified refusal to surrender the chattel to the claimant for the purpose of affording a reasonable opportunity to inquire into such right."). Additionally, after N.D.C.C. ch. 61-33.1 was passed, Statoil had until June 25, 2022, before "[a]ny applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well" could accrue.

The elements of a conversion claim have not been established against either Statoil or the State. This Court dismisses Count IV of the Plaintiffs' Amended Complaint against Statoil and the State with prejudice. Emphasis added.

R813:39-41.

[¶ 26] On appeal, the Plaintiffs argue that the District Court erred in concluding that the State converted and exercised control over the Plaintiffs' royalties by possessing them in the "State's own escrow account." The District Court considered this argument by the Plaintiffs and the evidence presented at trial and rejected the Plaintiffs' characterization of the escrow account as being "possessed" or the royalties held by the State. The nature of an escrow account is such that a third party holds something, generally funds, until some event occurs that allows the funds to be released. Here, the Bank of North Dakota held the royalties in the disputed title royalty escrow account, until the title dispute was resolved by the processes set forth in NDCC Ch. 61-33.1. The District Court did not find that the escrow account or the agreement between the Land Board and the Bank of North Dakota

evidenced possession of the Plaintiffs' royalties by the State. Board Rule 85-06-06-08.1⁶ entitled "Disputed Title Royalty Escrow Account" in effect at the time that the State entered its leases in Section 12 provided in pertinent part as follows:

Any lessee, assignee, or entity that assumes, or agrees to perform, any of the lessee's rights and responsibilities under the lease, that proposes to withhold royalty payments based upon an ownership dispute must establish an escrow deposit account and must deposit the disputed payments into this account. The account must be established at the Bank of North Dakota, or other state or national chartered insured financial institution approved by the Commissioner, with the Board as a party to the escrow agreement. Upon final resolution of the dispute, and with consent of the Commissioner, the escrow agent shall be authorized to release all monies held in the account to the entity that established the escrow account for proper distribution to the rightful owners.

[¶ 27] The District Court found that there was a "title dispute created by two conflicting legal theories regarding property ownership beneath the Missouri River that was subject to condemnation during Garrison Dam's construction." R813:16. The District Court properly found that Statoil did not commit any wrongful conduct, reasoning that this case was initially brought by the Plaintiffs as a quiet title action due to a title dispute. R813:40. Furthermore, the District Court found, during the pendency of the title dispute, Statoil was justified in holding royalty payments in suspense, specifically, the District Court found that Statoil complied with the applicable Board Rule 85-06-06-08.1, in effect at the time, by depositing royalties into escrow with the Bank of North Dakota. R813:44. The District Court also made a reasoned determination that after this Court's decision in *Wilkinson II*, which determined that NDCC Ch. 61-33.1 applied to the Disputed property, that the process outlined in the newly amended NDCC Ch. 61-33.1 provided that "Statoil had until

⁶ Board Rule 85-06-06-08.1 was effective April 23, 2010. Board Rule 85-06-06-08.1 has subsequently been incorporated into an Administrative Rule as of January 20, 2020 in N.D.A.C. § 85-06-01-09.

June 25, 2022, before any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well could accrue.” R813:41.

[¶ 28] The District Court’s findings of fact and legal analysis of the Plaintiffs’ conversion claim was well-grounded in the evidence and properly applied the case law. “A trial court’s determination on whether a conversion has been committed is a finding of fact subject to the clearly erroneous standard of review.” Nelson v. Mattson, 2018 ND 99, ¶ 24, 910 N.W.2d 171 citing (Paxton v. Wiebe, 1998 ND 169, ¶ 29, 584 N.W.2d 72.) While the Plaintiffs propose alternative findings, these were not the findings that were adopted by the District Court. This Court has stated: “We will not overturn the trial court’s decision merely because it is not the one we may have made...” Id. Accordingly, the Plaintiffs have not met their burden in showing that the district Court’s determination that a conversion had not been committed was clearly erroneous, nor have the Plaintiffs shown any mistake of law. This Court should affirm the trial court’s dismissal of Plaintiff’s Count IV-Conversion in its entirety as to all Defendants.

3. The District Court properly dismissed Count VI-Civil Conspiracy, which is the sole claim that the Plaintiffs asserted against Statoil at trial and on Appeal.

[¶ 29] The sole claim of the Plaintiffs against Statoil based on their Post-Trial briefing is Civil Conspiracy. The Plaintiffs advocate that Statoil and the State acted in concert, conspiring to deprive the Wilkinsons of their minerals and royalties. *See* R653:37. In order to prove a civil conspiracy, the Plaintiffs must prove five separate elements:

- 1) Two or more persons, and for this purpose a corporation is a person;
- 2) An object to be accomplished;
- 3) A meeting of the minds on the object or course of action;
- 4) One or more unlawful or overt acts; and
- 5) Damages as the proximate result thereof.

In re N.D. Personal Injury Asbestos Litigation, 737 F. Supp. 1087, 1096.

The Plaintiffs have simply lobbed this theory of Civil Conspiracy with conclusory allegations but no direction to the trial record as to any evidence that supports this conclusion. “For a conspiracy to exist, however, there must be an underlying tort which the alleged conspirators agreed to commit.” *Id.* at 1095. Neither Unjust Enrichment nor The Takings/Section 1983 Claim are tort claims and, therefore, cannot serve as the underlying basis for a claim of Civil Conspiracy. The only underlying Tort that is alleged by the Plaintiffs is Conversion by the State. “Dismissal of the underlying tort claim defeats the related claim for civil conspiracy.” Burris Carpet Plus, Inc. v. Burris, 2010 ND 118, ¶ 45, 785 N.W.2d 164.

[¶ 30] The Plaintiffs have failed to show in any manner that Statoil, Petrogulf, or XTO had any meeting of the minds with the State on the alleged object of the conspiracy, which Plaintiffs claim was for the State to possess and control the Plaintiffs’ royalties.⁷ *See* R653:33. The evidence that the Plaintiffs direct this Court in support of the alleged meeting of the minds between Statoil and the State is Exhibit P-21, which is a letter from Brigham Oil & Gas to the Board of University and School Lands, dated June 10, 2010 (“Letter”). R711. The Letter from Brigham nominates various tracts listed within the Board of

⁷ The disputed mineral interests are real property which cannot be converted. The Plaintiffs, in paragraph 52⁷ of their Conversion action (Count IV) in the Amended Complaint (R47) have alleged that the Defendants have knowingly and intentionally detained and exercised dominion and control over Plaintiffs’ Property. The term Property is defined in paragraph 1 of the Amended Complaint as the oil, gas, and other minerals under the described real estate. The Plaintiffs are alleging that the Defendants have converted “mineral interests.” A “mineral interest” is a real property interest. Schulz v. Hauck, 312 N.W.2d 360, 361 (N.D. 1981). Because conversion involves only personal property, an action for conversion cannot lie where the interest allegedly converted is an interest in real property. The Plaintiffs never sought to amend their Complaint and correct this error, which serves another basis for dismissal of both Conversion and, consequently, Civil Conspiracy, which is a cause of action dependent on the underlying Tort.

University and School Lands' database for auction. The tracts listed in the Letter include the Missouri River in the NW1/4 and SW1/4 of Section 12.

[¶ 31] The Letter provides as follows:

Brigham is aware of the State of North Dakota's recent claim to the high water mark along the Missouri River, and it appears that the State is claiming and is now leasing more acreage than previously leased and/or claimed. In reflecting the nominations above, Brigham is only nominating the tracts listed above and has not approved or certified title to said river tracts. It is Brigham's understanding that in the event the State's claim to the high water mark is not successful, the State will refund or credit the excess bonus monies paid.

The Plaintiffs claim that the above-cited language supports a conclusion that Statoil knew that the Plaintiffs owned the minerals. This is not consistent with the language of the Letter. The Letter simply indicates that Brigham was aware of the State's recent claim to the OHWM. Ownership of the minerals in this matter was determined pursuant to N.D.C.C. Ch. 61-33.1. This was the decision of this Court and the North Dakota Supreme Court in *Wilkinson II*. N.D.C.C. Ch. 61-33.1, which Plaintiffs have claimed that they were instrumental in urging the legislature to pass, did not exist on June 10, 2010 when Brigham nominated the various tracts, including the Missouri River in the NW1/4 and SW1/4 of Section 12, for auction. The North Dakota Legislature enacted the initial version of N.D.C.C. Ch. 61-33.1 in the 2017 Legislative Session.

[¶ 32] The specific language in the letter acknowledges the potential title dispute but does not evidence any intent to deprive the Plaintiffs of their minerals or advocate for either of the conflicting legal theories at issue in the title dispute. Statoil simply sought to develop the oil and gas. The Plaintiffs clearly wanted this section developed as is evidenced by the Plaintiffs' own actions in leasing their claimed mineral interests for development. R844:73:1-4. Statoil also opted to deposit the royalty funds into a disputed title royalty

escrow account during the pendency of the title dispute as required by the law in effect at the time. While this quiet title action initiated by the Plaintiffs was pending final decision, ownership had not been determined. The District Court quoted the Second Restatement of torts: “One in possession of a chattel who is in reasonable doubt as to the right of a claimant does not become a converter by making a qualified refusal to surrender the chattel to the claimant for the purpose of affording a reasonable opportunity to inquire into such right.” R813:40-41. This is consistent with the exceptions to N.D.C.C. § 47-16-39.1, which exempts operators from the obligation to pay royalties “in the event of a dispute of title.” The District Court properly found that “[d]uring the pendency of the title dispute, Statoil was justified in holding royalty payments in suspense.” R813:40.

[¶ 33] The District Court properly found that the Plaintiffs failed to show any evidence that Statoil and the State had a meeting of the minds to commit the tortious act, which Plaintiffs suggest is the State’s claim to the minerals and royalties. The Plaintiffs failed to show that Statoil in any way participated with the State at or before the time the State asserted its claim to the Missouri River in Section 12. The presentation of evidence at trial showed that the State had already entered the Missouri River in the NW1/4 and SW1/4 of Section 12 into the database as available for nomination prior to Statoil fka Brigham’s June 10, 2020 Letter seeking to nominate the various tracts.

[¶ 34] The testimony of Commissioner Jodi Smith clearly established that the quarter sections of land at issue in Section 12 were identified on the Board of University and School Lands’ website as available for nomination, as follows:

17 A. The minerals that would've been deemed to be sovereign
18 minerals, also within the boundaries of the ordinary high water
19 mark per Phase I, would have been placed for leasing on the
20 Land Board's website, available for nomination.

R844:136:17-20.

20 A. If the State of North Dakota did not have any interest
21 in the tract, it wouldn't be available for nomination on our
22 website.

R844:159:20-22.

The NW and SW quarter of Section 12 were made available for nomination based on the Board's application of the Phase I delineation that the Board applied to these sections at the time. Id. The NW1/4 and SW1/4 of Section 12 were auctioned in August 2010 and the winning bidder was Bowie Oil Partners. R844:136-137. Brigham nominated the Section 12 property, but Bowie Oil Partners won the auction. Id. The Evidence at trial failed to establish that Statoil fka Brigham in any way participated in the State asserting its claim to the Missouri River in Section 12, which was already listed in the State's database. Furthermore, the Board Rule requiring the deposit of funds into the disputed title royalty escrow account was adopted before Statoil (formerly Brigham) nominated the tracts for lease. The adoption of this Board Rule occurred wholly independent of any action of Statoil.

[¶ 35] Lastly, the Plaintiffs must prove the final element of civil conspiracy; to-wit that the Defendant's acts, in furtherance of the alleged conspiracy, caused Plaintiffs' damages. The only damages that were presented by the Plaintiffs at trial are unquestionably damages in the form of penalties, liability, or interest for late payment of royalties or revenues. N.D.C.C. Ch. 61-33.1 specifically states that any such penalty, liability, or interest for the late payment of royalties "**may not begin to accrue until the end of the two-year**

deadline". NDCC 61-33.1-04(2)(b)⁸. The Plaintiffs have suffered no damages as a consequence of Statoil's development of the spacing unit. In fact, quite to the contrary, the development of the well has provided the Plaintiffs with their respective interest in the production as opposed to other sections of the river, such as Section 13, that remain undeveloped. The District Court properly found in weighing the evidence at trial that the facts presented by the Plaintiffs did not establish a civil conspiracy between the State and Statoil and the civil conspiracy claim was properly dismissed by the District Court. The evidence clearly established that the State of North Dakota made its claim to the NW1/4 and SW1/4 in Section 12 under the Phase I study before Statoil began developing the spacing unit in Sections 1 and 12. The actions by the State in making its claim under the Phase I Study were wholly independent of Statoil's development of the spacing unit. "A trial court's choice between two permissible views of the weight of the evidence is not clearly erroneous, and simply because we may have viewed the evidence differently does not entitle us to reverse the trial court." RRMC Constr., Inc. v. Barth, 2010 ND 60, ¶ 7, 780 N.W.2d 656. Furthermore, as there was no civil conspiracy, which was the only basis for applying joint and several liability, there is no joint and several liability available to the Plaintiffs.

⁸ As this Court stated in *Wilkinson II*, "Our primary objective in interpreting statutes is to determine the legislature's intent. When a statute is unambiguous, we look at the plain language of the statute to determine its meaning." *Wilkinson II* at ¶24. The clear language manifests the intention of the Legislature, which is that Operators should not be punished for developing wells in this state in areas where there is a dispute of title. This is consistent with the exception to the obligation to pay royalties for disputed title in 47-16-39.1, which provides "**This section does not apply... in the event of a dispute of title[]**." As this Supreme Court has repeatedly held: Courts are not to substitute their judgment for that of elected legislators.

CONCLUSION & ORAL ARGUMENT REQUEST

[¶36] For all of the foregoing reasons, this Court should affirm the Orders and Judgment of the District Court in their entirety as the Plaintiffs have failed to meet their burden of establishing clear error by the district court. Defendant/Appellee Statoil believes oral argument would assist the Court in deciding the issues in this Appeal in order to clarify the factual record developed in the District Court and address any specific questions regarding the District Court's Order or presentation of evidence at trial.

Dated this 25th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

¶37] The undersigned certifies the above Brief is in compliance with N.D.R. App. P. 32(d) and the total number of pages in Appellee’s Brief is 32.

Dated this 25th day of April, 2022.

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[¶38] I hereby certify that a true and correct copy of the foregoing Appellees' Brief was on the 25th day of April, 2022, served as follows:

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