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OPINIONS AND ORDERS

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (SEPTEMBER 7, 2021)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN BENSON; BRIAN BENSON,

Plaintiffs-Appellants,

v.

FAMILY TREE CORPORATION, INC.;
DESERT PARTNERS IV, L.P.,

Defendants,

ANN KEMSKE; JON KEMSKE,

Defendants-Appellees,

BRIGHAM OIL & GAS, LP;
OASIS PETROLEUM INCORPORATED,

Defendants,

JODEE LAWLER; CAROLYN PROBST;
JUDGE ROBIN SCHMIDT,

Movants.

No. 20-2943

Appeal from United States District Court
for the District of Minnesota

Before: SHEPHERD, GRASZ, and
KOBES, Circuit Judges.

PER CURIAM:

In this diversity action, Minnesota residents John and Brian Benson appeal the district court's[1] grant of the defendants' motion to dismiss based on res judicata. We affirm.

To begin, we conclude the defendants properly raised the defense of res judicata in their motion to dismiss. *See C.H. Robinson Worldwide, Inc. v. Lobrano*, 695 F.3d 758, 763-64 (8th Cir. 2012) (res judicata may be raised as affirmative defense in motion to dismiss; Federal Rule of Civil Procedure 12(b)(6) dismissal appropriately based on affirmative defense apparent from face of the complaint, public records, and materials embraced by the complaint). Further, we need not reach the Bensons' claim for declaratory relief argument because they did not raise it in their response to the motion to dismiss and instead urged the district court to accept the magistrate judge's report and recommendation concluding the claim was barred by claim preclusion. *See Ridenour v. Boehringer Ingelheim Pharms., Inc.*, 679 F.3d 1062, 1067 (8th Cir. 2012) (A party "must present all his

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[1] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota, adopting in part the report and recommendation of the Honorable David T. Schultz, United States Magistrate Judge for the District of Minnesota.

claims squarely to the magistrate judge . . . to preserve them for review.").

Finally, after careful de novo review, we conclude that dismissal of the Bensons' tort claims was proper. *See Laase v. County of Isanti*, 638 F.3d 853, 856 (8th Cir. 2011) (reviewing de novo the grant of motion to dismiss for failure to state a claim based on res judicata and relying on the law of forum that rendered first judgment to control res judicata analysis); *see also Finstad v. Beresford Bancorp.*, 831 F.3d 1009, 1013 (8th Cir. 2016) (noting elements of claim preclusion under North Dakota law). Accordingly, the judgment of the district court is affirmed.

MEMORANDUM OF LAW & ORDER OF THE DISTRICT COURT DENYING PLAINTIFFS' MOTION FOR RULE 59(e) TO ALTER OR AMEND ORDER AND JUDGMENT (FEBRUARY 1, 2021)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN BENSON and BRIAN BENSON,

Plaintiffs,

v.

ANN KEMSKE and JON KEMSKE,

Defendants.

Civil File No. 17-3839 (MJD/DTS)

Before: Michael J. DAVIS,
United States District Court Judge.

I. Introduction

The above-entitled matter comes before the Court upon Plaintiffs' Motion for Rule 59(e) to Alter or Amend Order and Judgment. [Docket No. 220]

II. Background

The facts of this case are set forth in the Report and Recommendation dated June 2, 2020 [Docket No.

185] and the Court's August 18, 2020 Order [Docket No. 214].

On August 18, 2020, the Court granted Defendants' motion to dismiss, dismissed this case with prejudice, and entered judgment. [Docket Nos. 214, 215] Plaintiffs have now filed the current Motion for Rule 59(e) to Alter or Amend Order and Judgment. [Docket No. 220]

III. Discussion

A. Legal Standard

> Rule 59(e) motions serve a limited function of correcting manifest errors of law or fact or to present newly discovered evidence. Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment.

Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills, 141 F.3d 1284, 1286 (8th Cir. 1998) (citations omitted). "A district court has broad discretion in determining whether to grant or deny a motion to alter or amend judgment pursuant to Rule 59(e), and [the Court of Appeals] will not reverse absent a clear abuse of discretion." *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (citation omitted).

B. Whether Defendants' Motion Was Properly Before the Court

Plaintiffs argue that the Court made a manifest error of law by considering Defendants' Motion to Dismiss [Docket No. 170] because 1) Defendants filed

the motion to dismiss before answering the Amended Complaint; 2) Defendants filed the motion to dismiss before discovery had closed and without first obtaining permission from the Magistrate Judge as required by the Scheduling Order [Docket No. 152]; and 3) Defendants' stipulation to allow Plaintiffs to amend their Complaint and failure to object to the Court's order allowing Plaintiffs' to amend their Complaint estops them from later moving to dismiss the Amended Complaint. The Court rejects these grounds. First, these arguments could have been asserted before the Court entered judgment and, therefore, are improper grounds for a Rule 59(e) motion. Second, Defendants' motion to dismiss was properly brought under Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and 12(b)(7). Such motion "must be made before pleading if a responsive pleading is allowed." Fed. R. Civ. P. 12(b). The Scheduling Order did not prohibit bringing a motion to dismiss under Rule 12(b) before discovery had closed; nor did the Order require Court permission before filing such a motion to dismiss. Finally, Defendants' stipulation to allow Plaintiffs to amend their Complaint [Docket No. 154] did not bar Defendants from later filing a motion to dismiss based on the substance of the Amended Complaint.

C. Whether Defendants Waived the Defense of Res Judicata

After the Magistrate Judge issued the Report and Recommendation recommending that Defendants' motion to dismiss be granted in part and denied in part, but before this Court issued the Order modifying the Report and Recommendation and granting the motion to dismiss in its entirety, Defendants filed an Answer to the Amended Complaint [Docket No. 197].

Plaintiffs assert that, because the Answer did not assert res judicata as a defense, Defendants waived that defense. The Court rejects this argument. Defendants properly asserted the defense of res judicata in their motion to dismiss the Amended Complaint, which was filed before they filed their Answer to the Amended Complaint.

D. Whether the Court Made Factual Errors

Defendants assert that, in ruling on Defendants' motion to dismiss, the Court converted the motion to a motion for summary judgment by considering matters outside the pleadings and then erred by making two factual findings that were reserved for the jury: 1) that Plaintiffs were aware of Defendants' alleged fraud at the time they answered the complaint in the North Dakota Action and 2) that John Benson reserved his right to amend his North Dakota pleadings. The Court rejects Plaintiffs' arguments. First, in deciding a motion to dismiss, the Court considers the complaint and "materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings. For example, courts may consider matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint." *Greenman v. Jessen*, 787 F.3d 882, 887 (8th Cir. 2015) (citations omitted). Second, the Court based its conclusion that the claims could have been raised in the North Dakota Action on the pleadings in this litigation and in the North Dakota Action, noting that "John and Brian Benson set forth substantially the same allegations of fraud against Ann Kemske in their Answer signed on February 22, 2013 and filed in the North Dakota Action." (Aug. 18, 2020 Order at 9.) The Court's

conclusion that John Benson reserved his right to amend was based on John Benson's statement in the North Dakota proceeding transcript that he was reserving that right.

E. Damages Sought by Plaintiffs

Plaintiffs assert that the Court erred by failing to recognize that Plaintiffs sued Defendants for lost royalty payments rather than for title to lost mineral rights. They assert that this requires granting their motion based on new case law issued in *Northern Oil and Gas, Inc. v. EOG Resources, Inc.*, 970 F.3d 889, 890 (8th Cir. 2020). In *Northern Oil and Gas*, the Eighth Circuit held that, under North Dakota law, a lessee of oil and gas rights was not in privity with the lessor and thus, res judicata did not bind the lessee to the result of the quiet title action to which the lessor was a party and of which the lessee had no notice and in which the lessee did not participate. This holding has no application here, where John and Brian Benson and Ann and Jon Kemske were all parties to the North Dakota Action. There is no question of whether privity exists. The Court concludes that the Eighth Circuit's opinion in *Northern Oil and Gas* does not demonstrate that the Court made a manifest error of law.

F. Whether Plaintiffs Could Have Asserted Their Claims in the North Dakota Action

Plaintiffs assert that they could not have brought the claims asserted in this litigation until after judgment had been entered in the North Dakota Action. They further assert that the Court misapplied North Dakota law by stating that the relevant question was

whether the claims asserted in this action could have been raised in the prior proceeding. They assert that res judicata does not apply unless they knew that they could have brought their claims in the North Dakota Action. Plaintiffs previously asserted these arguments. (*See, e.g.*, [Docket No. 191] Plaintiff's Response to Defendant's Objection at 13-15.) Rule 59(e) is not a vehicle to repeat arguments previously made to and rejected by the Court. *See, e.g., Voss v. Hous. Auth. of the City of Magnolia, Ark.*, 917 F.3d 618, 626 n.6 (8th Cir. 2019). The Court concludes that its interpretation and application of North Dakota res judicata law were not manifest error.

G. Issues Raised in Plaintiffs' Reply

Plaintiffs have filed a Reply in support of their Motion for Rule 59(e) to Alter or Amend Order and Judgment. In that Reply, Plaintiffs attempt to raise an entirely new issue, claiming, for the first time in this extended litigation, that the Court misinterpreted their claim for declaratory judgment in their Amended Complaint.

Plaintiffs' Amended Complaint defines the term "subject property" as "the 160 acres" described as "McKenzie County, North Dakota: Township 152N, Range 100W Section 33 and 34, in 33 the E1/2SE1/4 and in 34 the W1/2SW1/4." (Am. Compl. ¶ 24.) Count 3 of the Amended Complaint seeks "a declaratory judgment that the subject property is [] owned as an undivided interest, and that any attempted conveyance without the consent of all owners is void as a matter of law." (*Id.* ¶ 45.) Plaintiffs now assert that Count 3 sought a declaration not as to the 160 acres in McKenzie County, North Dakota but, instead, as to

50,000 acres in 30 different counties in North Dakota and Montana. First, the plain language of the Amended Complaint provides that Count 3 seeks a declaratory judgment only as to the 160 acres in North Dakota. (See Am. Compl. ¶¶ 24, 45. *See also, e.g., id.* ¶ 1 ("This is an action for relief from fraud and negligence in a contract for sale of mineral interests (oil and gas royalty interests) in the Bakken oil basin in North Dakota.").)

Second, this is issue is one that Plaintiffs should have raised earlier in the litigation. The June 2, 2020 Report and Recommendation provided:

> In addition to their claims for damages, however, the Bensons have also sought a declaration that "the subject property [the 160 acres] is owned as an undivided interest, and that any attempt at conveyance without the consent of all owners [*e.g.* the 2010 deed] as void as a matter of law." Amd. Compl. ¶ 45, Dckt. No. 168. This claim for declaratory relief was—and was required to be—actually litigated in the North Dakota action. Such a declaration directly conflicts with the North Dakota judgment and cannot proceed. Accordingly, the Third Claim in the Amended Complaint is barred by *res judicata.*

([Docket No. 185] Report & Recommendation at 15.) It further recommended that "Defendants' motion to dismiss Plaintiffs' claim for declaratory relief be granted." (*Id.* at 20.)

Plaintiffs filed no objection to the Report and Recommendation. Defendants filed an objection to the Report and Recommendation with regard to Counts 1

and 2, but not with regard to Count 3. Plaintiffs filed a response to Defendants' objection and made no mention of the recommendation as to Count 3. *See, e.g., Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609, 620 (8th Cir. 2009). In fact, Plaintiffs urged the Court to adopt the Report and Recommendation as having "no clear error." ([Docket No. 191] at 8.) Additionally, Plaintiffs failed to assert this basis in their 35-page Rule 59(e) motion. Nor was it mentioned in Plaintiffs' memorandum in support of their Rule 59(e) motion. In sum, the Court concludes that Count 3, as pled, related only to the 160 acres, and, additionally, Plaintiffs have waived any argument that it did not.

Overall, the Court concludes that Plaintiffs have failed to show manifest errors of law or fact; nor have they presented newly discovered evidence.

Accordingly, based upon the files, records, and proceedings herein, IT IS HEREBY ORDERED:

Plaintiffs' Motion for Rule 59(e) to Alter or Amend Order and Judgment [Docket No. 220] is DENIED.

/s/ Michael J. Davis
United States District Court

Dated: February 1, 2021

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA (AUGUST 18, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN BENSON and BRIAN BENSON,

Plaintiffs,

v.

ANN KEMSKE and JON KEMSKE,

Defendants.

Civil File No. 17-3839 (MJD/DTS)

Before: Michael J. DAVIS,
United States District Court Judge.

I. Introduction

The above-entitled matter comes before the Court upon the Report and Recommendation of the United States Magistrate Judge dated June 2, 2020. Defendants Ann Kemske and Jon Kemske filed objections to the Report and Recommendation regarding application of res judicata to the claims against them.

Pursuant to statute, the Court has conducted a *de novo* review upon the record of that portion of the Report and Recommendation to which Defendants have objected. 28 U.S.C. § 636(b)(1); Local Rule 72.2(b).

Based upon that review, the Court adopts in part and declines to adopt in part the Report and Recommendation dated June 2, 2020.

II. Consideration of Defendants' Objections

Plaintiffs argue that the Court should disregard Defendants' objections to the Report and Recommendation on the grounds that that they were served late. Under Local Rule 72.2(b)(1), "[a] party may file and serve specific written objections to a magistrate judge's proposed finding and recommendations within 14 days after being served a copy of the recommended disposition, unless the court sets a different deadline." "A party may respond to another party's objections within 14 days after being served with a copy." Local Rule 72.2(b)(2). The Report and Recommendation was filed on CM/ECF on June 2, 2020. Defendants' objections were filed on CM/ECF on June 16, 2020, within the 14-day limit.

Plaintiffs assert that the objections were served on Plaintiff Brian Benson by U.S. Mail, arriving on June 19, 2020 in an envelope that was stamped with a Pitney Bowes postal meter stamp dated June 16, 2020. Plaintiffs assert that, despite the June 16 meter stamp, the envelope must have been mailed at a later date because three days is too long for the Postal Service to deliver the mail from Defendants' attorneys' office in Morris, Minnesota, to Brian Benson's address in Prior Lake, Minnesota. The issue is further muddled because Defendants mistakenly filed an affidavit of service for the March 6, 2020 mailing of their Reply to Brian Benson rather than the affidavit of service for the mailing of the objections to Brian Benson. [Docket No. 188-1]

The Court need not make a finding regarding whether the objections were mailed on June 16, or, as Plaintiffs claim, June 17 or 18. The deadline for objecting to a Report and Recommendation is not jurisdictional, and thus this Court is not barred from considering late objections. *See Vogel v. U.S. Office Prod. Co.*, 258 F.3d 509, 515 (6th Cir. 2001) ("[W]here a party files objections after [the time period allowed by rule], a district court can still consider them."); *Kruger v. Apfel*, 214 F.3d 784, 786-87 (7th Cir. 2000) (noting that the time period for filing objections "is not jurisdictional," and thus "the district court [i]s not barred from considering the late objections"). Even if the Court were to accept Plaintiffs' assumptions regarding the current speed of delivery of U.S. Mail in Minnesota, the objections were, at most, two days late, and Plaintiffs do not assert that they suffered any prejudice from the allegedly late service. In fact, Plaintiffs filed their response to the objections on June 23, a mere one week after they were filed on CM/ECF and well before the deadline to file such response. The Court finds that there was no prejudice from any possible late service on Brian Benson. Finally, the Court notes that "[t]he district judge may also reconsider on his or her own any matter decided by the magistrate judge but not objected to." Local Rule 72.2 (a)(3). Therefore, the Court will consider Defendants' objections and modify the Report and Recommendation with regard to the application of res judicata in this case.

Based on the Court's review, the Court adopts the Report & Recommendation with the exception that the Court declines to adopt Section II of the Conclusions of Law, found at pages 10 through 15 of the Report and

Recommendation and entitled "Neither *Res Judicata* Nor Claim Splitting Bars the Bensons' Fraud and Conversion Claims." Section II is replaced with the following analysis:

III. Res Judicata

A. Applicable Law of Res Judicata

North Dakota law governs the Court's res judicata analysis because "[t]he law of the forum that rendered the first judgment controls the res judicata analysis." *St. Paul Fire & Marine Ins. Co. v. Compaq Computer Corp.*, 539 F.3d 809, 821 (8th Cir. 2008).

> Res judicata, or claim preclusion, prevents relitigation of claims that were raised, or could have been raised, in prior actions between the same parties or their privies. Res judicata means a valid, final judgment is conclusive with regard to claims raised, or claims that could have been raised, as to the parties and their privies in future actions.

Fredericks v. Vogel Law Firm, 946 N.W.2d 507, 510-11 (N.D. 2020) (citations omitted).

> Res judicata applies even though the subsequent claims may be based on a different legal theory. If the subsequent claims are based upon the identical factual situation as the claims in the earlier action, then they should have been raised in the earlier action. It does not matter that the substantive issues were not directly decided in the earlier action, the key is that they were capable of

> being, and should have been, raised as part of the earlier action.

Fredericks, 946 N.W.2d at 511 (citing *Littlefield v. Union State Bank, Hazen*, N.D., 500 N.W.2d 881, 884 (N.D. 1993)). With regard to whether a claim "should have been raised" in the earlier action, "if the subsequent claims are based upon the identical factual situation as the claims in the prior proceeding, then they should have been raised in the prior proceeding." *Littlefield*, 500 N.W.2d at 884 (citations omitted).

> [A] judgment on the merits in the first action between the same parties constitutes a bar to the subsequent action based upon the same claim or claims or cause of action, not only as to matters in issue but as to all matters essentially connected with the subject of the action which might have been litigated in the first action.

Fredericks, 946 N.W.2d at 511 (citation omitted).

"A party with a single cause of action generally may not split that cause of action and maintain several lawsuits for different parts of the action. Res judicata is premised upon the prohibition against splitting a cause of action." *Fredericks*, 946 N.W.2d at 512 (citations omitted).

Res judicata under North Dakota law has four elements:

1. A final decision on the merits in the first action by a court of competent jurisdiction;
2. The second action involves the same parties, or their privies, as the first;

3. The second action raises an issue actually litigated or which should have been litigated in the first action;

4. An identity of the causes of action[.]

Mo. Breaks, LLC v. Burns, 791 N.W.2d 33, 39 (N.D. 2010) (citing *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 480 (6th Cir. 1992)).

B. Final Decision on the Merits

As noted in the Report and Recommendation, in a conclusion to which no party objected, there was a final decision on the merits in the North Dakota Action, which was affirmed by the North Dakota Supreme Court.

C. Same Parties

As noted in the Report and Recommendation, in a conclusion to which no party objected, all parties to this federal action participated in the North Dakota Action: Ann Kemske, Jon Kemske, John Benson, and Brian Benson were all parties to the North Dakota Action.

D. Issue Was or Could Have Been Raised

"Under res judicata claim preclusion, a judgment in a prior action is conclusive 'as to all claims which, under the rules, might have been put in issue in the prior trial." *Riverwood Commer. Park, LLC v. Std. Oil Co.*, 729 N.W.2d 101, 108 (N.D. 2007) (citation omitted).

The North Dakota Supreme Court has

> distinguished collateral estoppel, or issue preclusion, and res judicata, or claim preclusion,

> in part on the basis of whether an issue was actually litigated in a prior proceeding, or whether the issue was raised or could have been raised in the prior proceeding.

Cridland v. N.D. Workers Comp. Bureau, 571 N.W.2d 351, 354 (N.D. 1997) (emphasis added). Under North Dakota law, "if the subsequent claims are based upon the identical factual situation as the claims in the prior proceeding, then they should have been raised in the prior proceeding." *Littlefield*, 500 N.W.2d at 884 (citations omitted).

The parties in the North Dakota Action litigated the same set of facts that give rise to Plaintiffs' current claims for fraud, conversion, and declaratory judgment against the Kemskes: the ownership of the same mineral rights and the validity and legality of the various transfers and deeds related to those mineral rights, including the Kemskes' 1990 deed to Thomas Benson recorded in 2012, the statement of claim of mineral interest executed by Thomas Benson and recorded in 2005, and the 2010 deed from Ann Kemske to Family Tree Corporation, Inc. ("Family Tree"). *See Desert Partners IV, L.P. v. Benson*, 875 N.W.2d 510, 514-515 (N.D. 2016).

Plaintiffs' current claims against Defendants are based on the allegation that Defendants "conveyed the same mineral interests more than one time, the second time a fraudulent transaction as they no longer held any right title or interest in the property to convey." (Am. Compl. ¶ 2.) "Plaintiffs further allege that Defendants' actions resulted in a conversion of Plaintiffs['] property." (*Id.* ¶ 3.) Plaintiffs assert Count 1: Fraud, based on the allegation that "the fraudulent conveyance by Defendants Kemskes deprived [Plain-

tiffs] of ownership of oil and gas royalty interests;" Count 2: Conversion of Property, based on the allegation that the Kemskes' "actions constitute a conversion of [Plaintiffs'] personal property in mineral royalties;" and Count 3: Declaratory Judgment, seeking a declaration that "the subject property is owned as an undivided interest, and that any attempted conveyance the consent of all owners is void as a matter of law." (Am. Compl. ¶¶ 33, 38, 45.)

John and Brian Benson set forth substantially the same allegations of fraud against Ann Kemske in their Answer signed on February 22, 2013 and filed in the North Dakota Action. ([Docket No. 171-2] Lina Aff., Ex. C, Answer and Counterclaims at 4 ¶ 5 ("That the deed from Ann Kemske to Family Tree Corporation was not a legal contract due to the formation requirement of a meeting of the minds insofar that neither party was aware she did not own the property; either the 160 acres in dispute herein and/or the remaining 1,560 acres listed in the deed they attempted to convey absent of course intentional fraud.").) They also asserted that Ann and Jon Kemske had nothing to convey in 2010 after they conveyed all of their interest to Thomas Benson in 1990. (*Id.* at 5 ¶ 8.) John and Brian Benson asserted: "In fact after Ann Kemske sold/conveyed the subject property twice, as described herein, she leased it to Petrogulf Corporation on March 5, 2012 long after the well had been drilled and Petrogulf was informed that there was no interest to lease by my brother. . . . It appears that Ann Kemske would sign anything with anyone whom would give her a check . . . " (*Id.* at 10 ¶ X.) And, in the North Dakota Action, the North Dakota Supreme

Court explicitly held that the 1990 deed was valid between the parties to that deed and those with notice:

> Here the Kemskes executed a deed conveying and quitclaiming all their right, title, and interest in the 160 acres to Thomas Benson in 1990, but that deed was not recorded until 2012. That deed is valid between the parties to the instrument and those with notice.

Desert Partners IV, L.P. v. Benson, 875 N.W.2d 510, 514-15 (N.D. 2016). Ultimately, the North Dakota Supreme Court affirmed the trial court's judgment awarding Desert Partners and Family Tree ownership of the mineral rights, *Desert Partners IV, L.P. v. Benson*, 921 N.W.2d 444, 447 (N.D. 2019), deciding the very issue – ownership of the subject mineral interest – that Plaintiffs now seek to have this Court decide to the contrary in their claim for declaratory judgment.

There was no reason that Plaintiffs could not have asserted these same claims against the Kemskes in the North Dakota Action. There was no statutory bar to Plaintiffs asserting these claims against the Kemskes. *See* N.D.C.C. § 32-17-08. *Cf. Riverwood Commer. Park, LLC v. Std. Oil Co.*, 729 N.W.2d 101, 108 (N.D. 2007) (holding that "res judicata claim preclusion" does not bar claims "when a statute explicitly prohibits inclusion of additional claims in the original action"). In fact, the transcript from the North Dakota Action reveals that, on February 3, 2017, John Benson explicitly preserved his right to amend his pleadings to assert claims against the Kemskes in the North Dakota Action. At that time, the Kemskes attempted to extricate themselves from the North Dakota action, explaining that the only reason they were "still involved in this case – is because we don't

want anybody to amend the pleadings. Right now there's no relief requested against Kemskes. And that's the only reason we're here. That's the only reason we're participating in this case, to make sure somebody doesn't try to amend their pleadings at the date of trial." ([Docket No. 178] McLaughlin Aff., Ex. A, Feb. 3, 2017, N.D. Action Tr. 26-27.) John Benson responded: "I am not going to agree that I'm not going to amend any pleadings. I can amend them up until the time of trial, and I'm going to reserve that right." (*Id.* 28.) This exchange highlights that not only could John and Brian Benson have asserted the current claims against the Kemskes in the North Dakota Action, but also, John Benson knew that he could do so and affirmatively protected his right to do so until the trial occurred in that case on October 3, 2017. (He filed the current federal lawsuit on August 18, 2017.) The fact that the Bensons ultimately decided not to assert claims against the Kemskes in the North Dakota Action is irrelevant. *Cf. Fredericks*, 946 N.W.2d at 511-12 (holding res judicata applied when "the district court in the first action authorized [the current plaintiff] to bring additional claims against [current defendants]" but current plaintiff "did not bring those claims until approximately one month before trial, which the court struck as untimely," because "[a]lthough untimely, [current plaintiff's] were capable of being raised in the earlier action").

"By the time they filed their [Answer and Counterclaim] in [the North Dakota Action] in [February 2013], the [Bensons] were aware of all of the material facts alleged in this action, and there was no procedural impediment to the [Bensons] bringing their [fraud, declaratory judgment,] and conversion claims against

[the Kemskes] in [the North Dakota Action]." *Finstad v. Beresford Bancorporation, Inc.*, 831 F.3d 1009, 1014 (8th Cir. 2016). "But the [Bensons] elected not to bring the [fraud, declaratory judgment,] and conversion claims in [the North Dakota Action], and they are barred from pursuing them in a second action." *Id.*

E. Identity of Causes of Action

"Identity of causes of action means an 'identity of the facts creating the right of action and of the evidence necessary to sustain each action.'" *Sanders Confectionery Prods. v. Heller Fin., Inc.*, 973 F.2d 474, 484 (6th Cir. 1992), cited in *Mo. Breaks, LLC*, 791 N.W.2d at 39.

The North Dakota Action and the current lawsuit against the Kemskes are based on the "same nucleus of operative facts:" the ownership of the same mineral rights and the validity and legality of the various transfers and deeds related to those mineral rights, including the Kemskes' 1990 deed to Thomas Benson, the statement of claim of mineral interest executed by Thomas Benson and recorded in 2005, and the 2010 deed from Ann Kemske to Family Tree. *See Orlick v. Grand Forks Hous. Auth.*, No. 2:14-CV-54, 2015 WL 10936736, at *4 (D.N.D. Mar. 19, 2015) ("*Res judicata* bars a second lawsuit based not only on claims actually raised in earlier litigation, but also on claims which could have been raised in the earlier litigation. Although [the plaintiff's] current complaint references statutes and legal theories not raised in prior litigation, his claims are based on the same nucleus of operative facts as were his prior claims."), *aff'd*, 616 F. App'x 218 (8th Cir. 2015). Now, the Bensons assert that the Kemskes committed fraud

and conversion when Ann Kemske transferred her interest in the property to Thomas Benson in 1990 and then transferred that same interest to Family Tree in 2010. Here, the facts underlying Plaintiffs' fraud, conversion, and declaratory judgment claims against the Kemskes and the evidence necessary to sustain those claims were part of the North Dakota Action. *Cf. Rutherford v. Kessel*, 560 F.3d 874, 880-81 (8th Cir. 2009) ("The issue Julie wants to adjudicate in her quiet title action concerns her alleged ownership in the three condominium properties. That is the same issue adjudicated in the state trial court's order declaring null and void the transfers between Robert to Julie. Both suits would involve the validity of the unilateral conveyance Julie constructed in the midst of the personal injury lawsuit between Kessel and her brother. This is precisely the type of collateral attack upon a prior court's decision which the doctrine of res judicata bars.").

F. Whether Application of Res Judicata Would Create an Injustice

Application of res judicata in this case would not work an injustice. Plaintiffs have had ample opportunity to litigate their claims against the Kemskes. The North Dakota Action was a long-running action, in which Plaintiffs explicitly reserved their right to amend their pleadings to assert claims against the Kemskes until the eve of trial, which occurred after Plaintiffs filed this federal lawsuit. Plaintiff John Benson filed the current lawsuit in an attempt to enjoin the North Dakota trial. This Court denied that motion, yet Plaintiffs still did not exercise their opportunity to assert the current claims against the Kemskes in the North Dakota Action.

> Courts will not permit a litigant to try a part of his case and then, if he is disappointed with the outcome of the action, to have another day in court simply by alleging new claims or making a new demand for relief, when he could have made such demand in the prior action. In such case, the judgment in the first action is conclusive between the same parties as to all matters tried in that action or which, under the rules, might have been put in issue in the action previously tried, in which judgment was entered and from which judgment no appeal was taken.

Perdue v. Knudson, 179 N.W.2d 416, 421 (N.D. 1970).

Application of res judicata in this case furthers the policy goals of res judicata:

> A party who brings some claims into one court without seeking complete relief and brings some related claims in another court, or who presents some issues in one court proceeding and reserves others to raise them in another court, invites wasteful expense and delay. Application of the law of res judicata conserves scarce judicial resources and avoids wasteful expense and delay.

Cridland v. N.D. Workers Comp. Bureau, 571 N.W.2d 351, 354 (N.D. 1997) (citation omitted).

G. Declaratory Relief

As noted in the Report and Recommendation, the Bensons' third claim for relief against the Kemskes seeks a declaration that "the subject property [the

160 acres] is owned as an undivided interest, and that any attempt at conveyance without the consent of all owners [*e.g.*, the 2010 deed] is void as a matter of law." (Am. Compl. ¶ 45.) This claim for declaratory relief was actually litigated in the North Dakota Action. The requested declaration directly conflicts with the North Dakota judgment and is clearly barred by res judicata.

Accordingly, based upon the files, records, and proceedings herein, IT IS HEREBY ORDERED:

1. The Court ADOPTS IN PART and MODIFIES IN PART the Report and Recommendation dated June 2, 2020 [Docket No. 185].
2. Defendants' Motion to Dismiss [Docket No. 170] is GRANTED and this matter is DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/ Michael J. Davis
United States District Court

Dated: August 18, 2020

ORDER & REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE (JUNE 2, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN BENSON and BRIAN BENSON,

Plaintiffs,

v.

ANN KEMSKE and JON KEMSKE,

Defendants.

Civil No. 17-3839 (MJD/DTS)

Before: David T. SCHULTZ,
U.S. Magistrate Judge.

INTRODUCTION

This is an action, primarily for damages, based on claims of fraud and conversion. The parties are all related to each other by blood or marriage, a circumstance that drives a good deal of the fervor that has characterized this litigation. Plaintiffs allege Defendants have cheated them out of mineral rights in the Bakken oil fields in North Dakota, causing them several million dollars in damages. Defendants claim this allegation is not only specious and offensive but has been (or should have been) the subject of litigation that

took place in McKenzie County, North Dakota and concluded (after three separate appeals) in the North Dakota Supreme Court. Defendants assert this action must be dismissed because it is barred by the doctrines of *Rooker-Feldman* or *res judicata*, or by Plaintiffs' failure to join a necessary party. The Court finds that none of these doctrines applies here and recommends the motion to dismiss be denied with respect to Plaintiffs' damage claims. Plaintiff's declaratory judgment claim, however, is barred by *res judicata* and should be dismissed. Plaintiffs have also moved to disqualify Defendants' counsel, which motion is denied.

FINDINGS OF FACT

This lawsuit relates to the disposition of certain mineral rights in 160 acres of land located in McKenzie County, North Dakota.[1] The disputed mineral rights were originally owned by the paternal grandparents of Plaintiff John Benson and Defendant Ann Kemske, but were deeded to the couple's five grandchildren[2] in undivided equal shares. That is, each grandchild owned an undivided 1/5 share in the mineral rights associated with the 160 acres. This lawsuit concerns Ann Kemske's undivided 1/5 share in these mineral rights. Amd. Compl., Dckt. No. 168.

By quit claim deed dated December 13, 1990, Ann Kemske and her husband Jon Kemske conveyed

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[1] Unless otherwise noted, this statement of facts is taken directly from the opinion of the North Dakota Supreme Court reported at 875 N.W. 2d 510 (N.D. 2016).

[2] The five grandchildren are Edward Benson, John Benson, Louise Benson, Geri Benson and Ann Kemske, *né* Pflueger.

"all their right, title and interest" in the 160 acres to her uncle, Thomas Benson, Ann Kemske's uncle and John Benson's father. Though Thomas Benson filed a "statement of claim of mineral interest" in 2005, the 1990 deed itself was not recorded in the office of the recorder for McKenzie County until April 9, 2012. Two years before that deed was recorded, on April 15, 2010, Ann Kemske executed a mineral deed conveying all of her right title and interest in 1,720 acres of land in McKenzie County, including the 160 acres described above, to Family Tree Corporation, Inc. (Family Tree). Family Tree recorded this deed on May 12, 2010, and then immediately conveyed 24 net mineral acres in the 160 acres to Desert Partners IV, L.P. (Desert Partners). The mineral deed to Desert Partners was recorded on June 2, 2010.[3]

In January 2013, the oil companies sued several defendants, including Thomas Benson, John Benson, Brian Benson and the Kemskes, to quiet title to their mineral interests in the 160 acres. On July 24, 2013, John Benson filed an action in Hennepin County District Court against the Kemskes seeking a declaration that the Kemskes' deed to Family Tree was invalid and that title to the 160 acres and the mineral rights had passed to Thomas Benson who then passed title to John Benson and his son Brian Benson. Lina Aff. Ex A, Dckt. No. 171-2. The complaint did not claim fraud or conversion or seek money damages against the Kemskes, nor did it name any of the oil companies as defendants. *Id.*

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[3] Family Tree and Desert Partners are hereafter referred to collectively as "the oil companies."

The Hennepin County District Court dismissed Benson's complaint finding that the Court did not have *in rem* jurisdiction over the North Dakota property and that necessary parties (Family Tree and Desert Partners) were not joined and could not be joined because they did not reside in Minnesota. *Id.*, Ex B. Specifically, the court noted, "a judgment entered by this Court (Hennepin County District Court) in regards to mineral rights in the North Dakota property would not affect title to that land." *Id.* Thereafter, the issue of title to the land and the disputed mineral rights was litigated in state court in McKenzie County, North Dakota.

For several years, the quiet title action proceeded in North Dakota state court. The Bensons answered the complaint and counterclaimed seeking a declaration that the Kemskes' deed to Family Tree was invalid, null and void; that title to the land and mineral rights be quieted in the Bensons; and that the oil companies be forever barred from asserting title to the mineral rights. *Id.*, ex. C. The Bensons did not assert a claim for any relief against the Kemskes. *Id.* Initially, the trial court entered summary judgement in favor of the oil companies, but that judgment was reversed by the North Dakota Supreme Court because the Bensons had not received proper notice of the hearing on the motion. *See Desert Partners IV, L.P. v. Benson*, 855 N.W. 2d 608, 614 (N.D. 2014).

When the quiet title action returned to the trial court, the court again entered summary judgment for the oil companies, finding they were good faith purchasers for value and therefore had title to the disputed mineral rights. *See Desert Partners IV, L.P. v. Benson*, 875 N.W. 2d 510, 512-13 (N.D. 2016). This

judgement too was reversed by the North Dakota Supreme Court because there were genuine disputes of material fact regarding whether the oil companies—who had actual notice of the 2005 "statement of claim of mineral interest" that had been filed by Thomas Benson—had made proper inquiry into the Kemskes' ability to convey title to the land:

> . . . the statement of claim imposed a duty of further inquiry on Family Tree to ascertain the state of ownership of the disputed mineral interests, and Family Tree is deemed to have constructive notice of the facts an inquiry would have revealed. We therefore conclude there are disputed issues of material fact involving whether the plaintiffs were good-faith purchasers for valuable consideration of the disputed mineral interests.

875 N.W.2d at 515.

The case was remanded for a bench trial on the issue of the oil companies' inquiry into the facts surrounding the 2005 statement of claim and their knowledge of the Kemskes' ability to convey good title to the mineral rights. On October 3, 2017 the trial court—over Benson's objection—proceeded with a bench trial in the quiet title action and determined that " . . . on the basis of the testimony and evidence, Family Tree and Desert Partners acted in good faith in purchasing Kemske's minerals." *Desert partners IV, L.P. v. Benson*, 921 N.W. 2d 444, 450 (N.D. 2019). The North Dakota Supreme affirmed the trial court's finding and judgment. *Id.*

Shortly before the trial, on August 18, 2017, John Benson filed this action naming the Kemskes, Family

Tree Corporation, Inc., Desert Partners IV, L.P., Brigham Oil & Gas, L.P., and Oasis Petroleum Inc. as defendants. Benson's original complaint alleged four counts: Count 1 sought a declaration under the federal Declaratory Judgments Act, 28 U.S.C. § 2201, and Minnesota Declaratory Judgments Act, Minn. Stat. §§ 555.01-.16, that because the original Quitclaim Deeds created an undivided interest, none of the five Benson grandchildren could sell any of their interests without the consent of the other four grandchildren or by Thomas Benson as Power of Attorney (Compl. ¶¶ 84-85.); Count 2 sought supplementary relief, based on the declaratory judgment, for a money judgment against Oasis to release to John Benson and Brian Benson any money held in suspense related to the Subject Mineral Interest based on his allegation that he and Brian Benson were the legal owners of the Subject Mineral Interest (Compl. ¶ 106.); Count 3 sought supplementary relief, based on the declaratory judgment, for a money judgment against Family Tree and for any amounts Family Tree had received from Oasis and/or SM Energy, less the amounts paid to Geri Benson, based on his allegation that he is the owner of the mineral interests previously conveyed by Geri Benson to Family Tree and to rescind the grant to Family Tree (Compl. ¶¶ 109-13.); Count 4 requested a temporary restraining order and/or an injunction staying the North Dakota trial pending a ruling by this Court. (Compl. ¶ 115.).

By order dated October 27, 2017, the Court denied Benson's request to enjoin the North Dakota trial.[4] Order, Dckt. No. 58. On November 9, 2017, the

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[4] On the eve of trial, Benson—through an intermediary—claimed he was hospitalized and unable to proceed with the trial. The

Court dismissed Oasis as a defendant pursuant to stipulation. Order, Dckt. No. 60. After myriad procedural wranglings by the parties, this Court dismissed Family Tree and Desert Partners IV for lack of personal jurisdiction. Order, Dckt. No. 132. In December 2018, Brigham Oil and Gas was also dismissed as a defendant, leaving only the Kemskes, who had answered Benson's original complaint on September 11, 2017, as defendants.

In January 2020—again after considerable procedural machinations—the parties stipulated to an amendment of the complaint to add Benson's son, Brian, as a plaintiff and to add claims for fraud and conversion. Stipulation, Dckt. No. 154. Though Benson initially moved to add the Kemskes' law firm, Fluegel, Anderson, McLaughlin, and Brutlag (FAMB), as a named defendant, he withdrew that motion when it was pointed out to him that FAMB's joinder would destroy this Court's diversity jurisdiction. Dckt. No. 167.

The Amended Complaint, filed January 9, 2020, is now the operative complaint in this matter. The Amended Complaint names only the Kemskes as defendants, though it factually alleges negligence by FAMB for failing to record the 1990 deed to Thomas Benson. As against the Kemskes, the Bensons allege that by executing the 2010 mineral deed to Family Tree, the Kemskes committed fraud and conversion, for which the Bensons seek compensatory and punitive damages. Amd. Cmpl. ¶¶ 32-41, Dckt. No. 168. The Bensons have also included a claim for a declaratory

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trial court proceeded nonetheless, which decision was affirmed by the North Dakota Supreme Court. 921 N.W. 2d at 448.

judgment that the "attempted conveyance" in 2010 "is void as a matter of law." *Id.* ¶ 45.

The Kemskes move to dismiss the Amended Complaint in its entirety, arguing that the action is barred by *Rooker-Feldman, res judicata* and failure to join a necessary party, FAMB. The Bensons have moved to disqualify FAMB from further representation of the Kemskes in this action.

CONCLUSIONS OF LAW

I. The *Rooker-Feldman* Doctrine Does Not Bar the Present Action

The *Rooker-Feldman* Doctrine originates from two United States Supreme Court decisions, *Rooker v. Fidelity Trust Company*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The doctrine, in essence, prohibits a state court loser from seeking a better outcome in federal district court. The *Rooker-Feldman* Doctrine "precludes a federal action if the relief requested in the federal court case would effectively reverse the state court decision or void its ruling." *Neal v. Wilson*, 112 F.3d 351, 357 (8th Cir. 1997). Because the doctrine is a jurisdictional one it may be raised *sua sponte* by the court. *Lemonds v. St. Louis Cty.*, 242 F.3d 488, 492 (8th Cir. 2000), *cert. denied* 531 U.S. 1183 (2001). Ultimately, *Rooker-Feldman* is a rule of comity and federalism that is designed to preserve the sanctity of state court judgments.

The Kemskes argue, without analysis, that the *Rooker-Feldman* Doctrine bars the Bensons' federal lawsuit. The Kemskes' brief in support of its *Rooker-*

Feldman argument is long on rhetoric but short on analysis, making such pronouncements as:

- [Benson] is essentially trying to have this Court overrule the North Dakota Supreme Court. [(p. 6)]
- . . . Mr. Benson is attempting to do an end-run around the North Dakota Supreme Court. [(p. 7)]
- The North Dakota Supreme court did not give him more bites at an apple that, by now, is reduced to a rotten core. [*Id.*]
- After dates in Hennepin County District Court, North Dakota District Court, and multiple visits to the North Dakota Supreme court in Bismark, Mr. Benson [cannot bring] his traveling roadshow to . . . the District of Minnesota. [*Id.*]

The Court well understands the Kemskes' frustration with the pace and proliferation of this litigation, but the argument based on *Rooker-Feldman* does not withstand scrutiny. The argument, reduced to its essence is this: because the prior state court litigation touched upon the 2010 deed from the Kemskes to the oil companies, any judgment in this case would necessarily impugn the North Dakota state court judgment. This argument is misplaced, both as a matter of fact and as a matter of law.

To begin, the *Rooker-Feldman* Doctrine does not bar a federal action that is initiated during the pendency of a state court action, even if the state court action proceeds to judgment first. In *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S.

280 (2005), Justice Ginsburg, writing for a unanimous Supreme Court, held that *Rooker-Feldman* did not bar a federal action filed just weeks after a state court action was commenced in Delaware:

> When there is parallel state and federal litigation, *Rooker-Feldman* is not triggered simply by the entry of judgment in state court. This Court has repeatedly held that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction.' . . . comity or abstention doctrines may, in various circumstances permit or require the federal court to stay or dismiss the federal action in favor of the state court litigation . . . but neither *Rooker* nor *Feldman* support the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court. . . . disposition of the federal action, once the state court adjudication is complete would be governed by preclusion law.

544 U.S. at 292-93 (citations omitted).

This is precisely the situation here. Benson initiated this action in federal court during the pendency of the state court action. In fact, he sought to enjoin the North Dakota trial, but was denied when this Court declined to interfere in that process. The Kemskes could have moved to stay this case pending the outcome in state court but did not do so; the Kemskes could have sought dismissal on the basis of alleged claim splitting but, again, did not do so. Subsequent to the state court judgment, this Court

dismissed several defendants on the basis of personal jurisdiction. But the Kemskes chose to answer Benson's federal complaint. As Justice Ginsburg made clear, timing is everything.[5] The fact that a state court judgment was later entered by the trial court and affirmed by the North Dakota Supreme Court does not make *Rooker-Feldman* applicable to this action. Rather, as Justice Ginsburg observed in *Exxon Mobile*, now that the state court action has reached final judgment, this case is governed by preclusion law, the application of which is considered below.

Even if the timing problem did not exist and this action had been filed after the state court judgment, *Rooker-Feldman* would not apply. This Court is not acting as an appellate court reviewing the judgment of the North Dakota trial or Supreme Court. The judgment in the state action quieted title to the mineral rights as between the oil companies and Benson. That judgment was expressly and exclusively premised on the finding that the oil companies were good-faith purchasers for value from the Kemskes in 2010. A money judgment in this case finding that the Kemskes defrauded Benson or converted his property will in no way impugn or disturb the North Dakota judgment.[6] The North Dakota courts simply found

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[5] The Kemskes' brief seemingly acknowledges the importance of timing when it argues "attempts to secure review of a state court order by filing a later action in [federal court] are usually barred by a lack of jurisdiction under [*Rooker-Feldman*]." p. 7.

[6] This is not true of the declaratory relief sought in Count III, but as Justice Ginsburg noted in *Exxon-Mobile*, that is an issue governed not by *Rooker-Feldman*, but by preclusion law. Further discussion of that issue is therefore deferred to the section containing this Court's analysis of preclusion.

that, notwithstanding the 1990 deed from the Kemskes to Thomas Benson, the oil companies had title to the mineral rights because they had no notice—actual or constructive—of it. The Bensons' damage theory in this case assumes the validity of the quiet-title judgment—by effectively deeding the mineral rights to the oil Companies in 2010, the Kemskes committed fraud and conversion. There is nothing inconsistent between the Bensons' damages claim here and the North Dakota judgment. In short, *Rooker-Feldman* does not apply, and would not bar this action even if it did.

II. Neither *Res Judicata* Nor Claim Splitting Bars the Bensons' Fraud and Conversion Claims

The application of *res judicata* to this action is governed by North Dakota law. *St Paul Fire and Marine Ins. Co. v. Compaq Computer Corp.*, 539 F.3d 809, 821 (8th Cir. 2008). As the Eighth Circuit held in *Lasse v. Cty. of Isanti*, 638 F.3d 853, 856 (2011):

> By enacting the Full Faith and Credit Statute, 28 U.S.C. § 1738, 'Congress has specifically required all federal courts to give preclusive effect to state court judgments whenever the courts of the state from which the judgments emerged would do so.'

Thus, the law of the forum that rendered the first judgment, here North Dakota, controls the *res judicata* analysis. *St Paul Fire and Marine*, 539 F.3d at 821. Logically—especially under North Dakota law—the same is true for the claim splitting analysis.

Under North Dakota law, *res judicata* is considered a subset of a broader doctrine it labels "claim splitting."

See Lucas v. Porter, 755 N.W.2d 88, 93-94 (N.D. 2008). When a claimant splits its claim between concurrent lawsuits, North Dakota law applies the doctrine of claim splitting under what it calls a "rule of abatement"; when a claimant splits its claim between successive lawsuits, North Dakota law applies the doctrine under the rule labeled *res judicata*; "abatement" and *"res judicata"* are subsets of the umbrella doctrine, "claim splitting." Because this case involves successive litigations, this court will simply refer to "*res judicata.*"

Res judicata under North Dakota law has four elements: (1) a final decision on the merits in the first action by a court of competent jurisdiction; (2) the second action involves the same parties (or their privies); (3) the second action raises an issue actually litigated or which should[7] have been litigated in the first action; and (4) an identity of the causes of action. *See Mo. Breaks, LLC v. Burns*, 791 N.W.2d 33, 39 (N.D. 2010).

The first two elements of *res judicata* are obviously present here. There has been a final decision on the merits in the quiet-title action in the North Dakota trial court, which judgment was affirmed by the North Dakota Supreme Court. The parties to this case, "the second action,"—the Kemskes and the Bensons—were involved in the state court action.

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[7] Numerous decisions from the North Dakota courts have described this element as whether the issue was actually litigated or "could have been litigated in the first action." However, a close reading of those cases makes it clear that the issue had to be one which was required to (*i.e.* "should") have been raised in the original action.

The third and fourth elements, however, are absent here. The third element, that this case raises a claim that was actually litigated or was required to be litigated in the quiet-title action, is not met. The question whether the Kemskes committed fraud or conversion by deeding the mineral rights to the oil companies in 2010 was not actually litigated in the North Dakota quiet title action between the oil companies and the defendants. That action quieted title to the mineral rights as between the Bensons and the oil companies who were found to be good faith purchasers for value from the Kemskes. The quiet-title action turned on whether, because of the 2005 statement of claim, the oil companies had actual or constructive notice of the 1990 deed. *See Desert Partners IV*, 875 N.W.2d at 515. That is, the North Dakota action resolved the question whether the oil companies acted fraudulently or in bad faith, not whether the *Kemskes* did. Whether in 2010 the Kemskes committed fraud or converted the Bensons' property was not actually litigated and decided in the North Dakota action.

However, whether the Kemskes' 1990 quit-claim deed to Thomas Benson transferred mineral rights in the 160 acres was actually litigated and decided—in Benson's favor. In *Desert Partners IV, LLP v. Benson*, 875 N.W.2d 510 (2016) (*Desert Partners IV, II*), the North Dakota Supreme Court unequivocally found:

> . . . the Kemskes executed a deed conveying and quit claiming all their right, title, and interest in the 160 acres to Thomas Benson in 1990, but that deed was not recorded until 2012. That deed is valid between the parties to the instrument [Thomas Benson

> and the Kemskes] and those with notice. N.D.C.C. § 4719-46. The record also includes a 'statement of claim of mineral interests' for the disputed mineral interests in the 160 acres, which was recorded in the office of the recorder for McKenzie County on November 3, 2005, before Ann Kemske conveyed mineral interests to Family Tree in 2010.

875 N.W.2d at 514-15. The question the trial resolved was whether the oil companies had notice of the 1990 deed.

This finding is consistent with North Dakota law, which holds that "a general conveyance of land without any exception or reservation of minerals carries with it the minerals as well as the surface." *Schulz v. Hauck*, 312 N.W.2d 360, 361-62 (N.D. 1981). The 1990 deed from Ann Kemske to Thomas Benson, apparently contained no such reservation. 875 N.W.2d at 514-15.

Nor is this finding mere dicta. In the Amended Complaint in this action, the Bensons allege that the Kemskes' Answer in the quiet-title action raised this very issue: "The Kemskes also answered [the quiet-title complaint], claiming their 1990 deed to Thomas Benson was intended to convey only their surface rights to the 160 acres and not mineral rights." Amd. Compl. ¶ 26, Dckt. No. 168. In their Answer and Counterclaim, the Bensons expressly disputed that the 1990 deed contained any such reservation of mineral rights. Lina Aff., Ex. C., Dckt. No. 171-2. The Kemskes have admitted in this action that the scope of the 1990 deed was actually litigated in the quiet-title action. Br. at 4-5, Dckt. No. 171. For these reasons, the North Dakota Supreme Court has stated

in its decisions in other, later cases, that it in fact had decided this issue in the quiet-title action:

> This court determined the deed [from the Kemskes to Thomas Benson in 1990] was valid between the parties to the instrument and those with notice, and the statement of claim imposed a duty of further inquiry to ascertain the state of ownership of the disputed mineral interests.

Sundance Oil & Gas, LLC v. Hess, 903 N.W.2d 712, 719 (N.D. 2017). Thus, it was determined that the Kemskes' 1990 deed to Thomas Benson conveyed the mineral interest in the 160 acres to Thomas Benson. The quiet-title action did not determine whether, in light of that finding, the 2010 deed to the oil companies defrauded the Bensons or converted their property. Since this issue was not actually litigated, the question is whether it should have been litigated in the quiet-title action such that *res judicata* bars the Bensons' damage claims here. As discussed below, because the Bensons' claims for damages were not required to be litigated in the quiet-title action, *res judicata* does not bar them here.

North Dakota Century Code § 32-17-08 governs quiet-title actions. To understand the impact of this statute on the application of *res judicata* requires a careful reading of its provisions. Section 32-17-08 provides that in a quiet-title action the defendant "may set forth a counterclaim and recovery from plaintiff or a co-defendant. A defendant may set forth the defendant's right in the property as a counterclaim and may demand affirmative relief against the plaintiff and co-defendant, and in such case the defendant also may set forth a counterclaim and recovery from a

plaintiff or a co-defendant for permanent improvements made by the defendant. . . . " N.D.C.C. § 13-17-08. The statute permits a defendant to assert his right to title in "the subject property" as a counterclaim rather than simply an affirmative defense. By definition, a defendant's title to the property that is the subject of the litigation is necessarily litigated in a quiet-title action; the statute merely permits it to be asserted in the form of a counterclaim or a defense. The statute also permits, but does not require, a defendant in a quiet-title action to assert a "counterclaim" for affirmative relief against a co-defendant.[8] But nothing in the language of the statute requires a defendant assert a cross-claim for damages. Nor have any of the parties cited any case to this Court suggesting that the Bensons' fraud and conversion claims were required to be litigated in the quiet-title action brought by the oil companies.

In fact, such a result would seem illogical. The quiet-title action determines who has title to the mineral rights. Unless and until it is determined that the oil companies have title to those rights, the Bensons' claims for damages are, at best, inchoate. The Bensons' damage claims only come home to roost if and when the oil companies prevail in the quiet-title action.

For this same reason, this case does not meet the fourth element of *res judicata*, the identity of the causes of action. The cause of action in the quiet-title case was to determine who now owned title to the

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[8] The Court understands the reference to a "counterclaim" against a co-defendant to be what is denominated a "cross-claim" under the Federal Rules of Civil Procedure.

mineral rights. The Bensons' fraud and conversion claims are distinctly different. This action litigates whether the Kemskes' conduct in 2010 was wrongful and caused harm to the Bensons. For these reasons the doctrine of *res judicata* does not apply to bar the current action for damages against the Kemskes. Counts I and II may properly proceed.

In addition to their claims for damages, however, the Bensons have also sought a declaration that "the subject property [the 160 acres] is owned as an undivided interest, and that any attempt at conveyance without the consent of all owners [*e.g.* the 2010 deed] as void as a matter of law." Amd. Compl. ¶ 45, Dckt. No. 168. This claim for declaratory relief was—and was required to be—actually litigated in the North Dakota action. Such a declaration directly conflicts with the North Dakota judgment and cannot proceed. Accordingly, the Third Claim in the Amended Complaint is barred by *res judicata*.

III. The Kemskes' Argument for Dismissal Based on a Failure to Join a Necessary Party Is Meritless

The Kemskes also argue this case must be dismissed for failure to join FAMB, the law firm whom Benson claims negligently failed to file the 1990 quitclaim deed. This argument fails for several reasons.

To begin, Federal Rule of Civil Procedure 19(a)(1) provides that:

> A person who is subject to service of process and whose joinder will not deprive the Court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence the Court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

The Kemskes' argument is premised on the fact that the Bensons' Amended Complaint makes a factual allegation that the original law firm was negligent by failing to record the 1990 quit-claim deed. In 1990 the allegedly negligent lawyer, Robert Pflueger, practiced in a law firm named Pflueger, Kuhn, McLaughlin (PKM). That firm ceased to exist in 1993 when its three lawyers joined FAMB. Even assuming FAMB is somehow legally liable for PKM's negligence, FAMB is not a necessary party. FAMB does not claim an interest relating to the subject matter of the action. Nor does its absence from this case leave either the Kemskes or Bensons subject to any risk of double, multiple, or otherwise inconsistent obligations. Therefore, FAMB is not a necessary party under Rule 19(a)(1)(B).

It cannot be credibly argued that in FAMB's absence "the Court cannot accord complete relief among the existing parties." The existing parties to

the lawsuit are the Kemskes and the Bensons. The Bensons claim damages due to the Kemskes' 2010 conveyance of mineral rights to the oil companies. The Kemskes and the Bensons will obtain complete relief as between them when this case is litigated to its conclusion. If the Kemskes are found to have committed fraud or conversion the Bensons will have a money judgment; if not, the Kemskes will not be liable.

Moreover, any negligence potentially attributable to FAMB from the failure to record the 1990 deed was known to the Bensons by at least 2013 (if not before) when the quiet-title action was commenced. Under Minnesota's statute of limitations for legal malpractice, Minn. Stat. § 541.05, subd. 1(5), any such liability is extinguished. *See also Antone v. Mirviss*, 720 N.W.2d 331 (Minn. 2006). Therefore, FAMB cannot be held liable for this negligence and it cannot be a necessary party to this action. The mere fact that the Bensons made a factual assertion in their Amended Complaint that FAMB was negligent does not make them a necessary party. FAMB's argument (on behalf of the Kemskes) that it is a necessary party is a transparent attempt to destroy diversity jurisdiction. But under the Rule, even if FAMB were "a necessary party" whose joinder is not feasible because it would destroy this Court's jurisdiction, the remedy would not be dismissal of the action. Where joinder of a necessary party is not feasible, the Court may proceed with the existing parties based upon certain factors enumerated in F.R.C.P. 19(b), which in this case clearly weigh heavily against dismissal. Because FAMB is not a necessary party, however, the Court will not undertake a detailed 19(b) analysis. Dismissal

on the basis of FAMB's absence is unwarranted and the motion should be denied.

IV. The Bensons' Motion to Disqualify FAMB

In a twist of self-injurious irony, the Bensons move to disqualify FAMB due to their interest in the outcome of this action. *See* Dckt. No. 181. The argument to disqualify FAMB is twofold. First, the Bensons claim that FAMB formerly represented John Benson in connection with his father's estate and therefore cannot represent the Kemskes in the current action adverse to John Benson. Second, the Bensons assert that it is clearly in the Kemskes' legal interest to make FAMB a party to the case so as to "mitigate" the Kemskes' liability.

The first argument for disqualification is without merit, has already been rejected by this Court, *See* Order, Dckt. No. 68, and therefore, merits no further comment.

The second argument, that FAMB must be disqualified due to its former partner's alleged negligence, is equally without merit. Rule 1.7 of the Minnesota Rules of Professional conduct provides, in pertinent part, that "a lawyer shall not represent a client if . . . there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer."

The Bensons theorize that FAMB may be financially responsible for the alleged negligence of its former partner for representation he provided before he was associated with FAMB. As FAMB points out, this argument comes perilously close to asserting that FAMB is a necessary party to the litigation. Fortu-

nately, the argument is no more meritorious coming from their opponent. There is no basis on which the Court could conclude that FAMB's legal liability risk is anything more than theoretical. The alleged conduct occurred in 1990, twenty-seven years before the filing of this action. At the time, the allegedly negligent attorney was in a different law firm that did not merge with or become acquired by FAMB. There is no basis on which to conclude that FAMB has successor liability for decades old alleged legal malpractice. Moreover, as already noted, the statute of limitations has passed on any such potential liability. Therefore, this alleged personal interest in the litigation does not exist.

The only other manner in which the alleged negligence of Attorney Pflueger gives rise to some personal interest by FAMB or its attorneys in this case would be that it not dishonor the memory of a former partner or besmirch its own present reputation. Simply stated, this potential interest is too distant, too ephemeral, and too speculative to require disqualification of FAMB.[9] On this record there is simply no basis on which this Court could properly find that FAMB's representation is materially limited by its interests in the matter.

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED:

1. Plaintiff's motion to disqualify counsel (Dckt. No. 180) is DENIED.

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[9] The Court notes that Attorney Robert Pflueger was Ms. Kemske's father. Any concerns that the law firm might have regarding this matter are no doubt well known to Ms. Kemske.

2. The Court will conduct a telephonic status conference on June 11, 2020 at 1:30 PM to set the schedule for the remainder of the case. All parties are expected to attend prepared to discuss remaining discovery and a date for trial.

RECOMMENDATION

For the reasons set forth above, the Court RECOMMENDS: Defendants' Motion to Dismiss (Dckt. No. 170) be granted in part and denied in part as follows:

1. Defendants' motion to dismiss Plaintiffs' claim for declaratory relief be granted; and

2. Defendants' motion to dismiss Plaintiffs' claims for fraud and conversion be denied.

/s/ David T. Schultz
U.S. Magistrate Judge

Dated: June 2, 2020

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SUPREME COURT
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