20190241

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 25, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20190241
Cass County District Court No. 09-2018-CV-02419

Bullinger Enterprises, L.L.L.P.,

Plaintiff/Appellant

v.

Howard Dahl, Brian Dahl, and Thor Iverson,

Defendants/Appellees

BRIEF OF APPELLANT – ORAL ARGUMENT REQUESTED

APPEAL FROM JUDGMENT ENTERED JUNE 19, 2019
(DOC. ID# 115)

THE DISTRICT COURT FOR THE EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE SUSAN L. BAILEY

Michael L. Gust (ND #06468)
Matthew D. Kirschenmann (ND #08222)
ANDERSON, BOTTRELL, SANDEN & THOMPSON
4132 30th Avenue South, Suite 100
P.O. Box 10247
Fargo, ND 58106-0247
(701) 235-3300
mgust@andersonbottrell.com
mkirschenmann@andersonbottrell.com
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE ISSUES

1. Whether the District Court erred in applying N.D.C.C. § 28-01-16(6) and finding on summary judgment that Appellant knew, or with the exercise of reasonable diligence, should have known, of its cause of action by the end of March 2012.

STATEMENT OF THE CASE

[¶1] This case involves the deceit and wrongful conduct of Appellees in providing Appellant Bullinger Enterprises, L.L.L.P. ("Bullinger") with inaccurate information, and violating fiduciary duties owed to it. These acts enticed Bullinger to agree to enter into a transaction whereby Bullinger exchanged its ownership interest in Wil-Rich, LLC ("Wil-Rich") in return for an ownership percentage in Amity Technology, LLC ("Amity").

[¶2] The key misrepresentation at issue is Howard Dahl ("Howard"), Brian Dahl ("Brian") (collectively the "Dahls"), and Thor Iverson's ("Iverson") representation that AGCO Corporation ("AGCO") valued Wil-Rich at $20 million—the valuation given to it at the time of the transaction in question—and was not willing to value it any higher. Rather, Appellees diluted Wil-Rich's value by setting a $20 million valuation themselves in order to attribute a higher, $40 million valuation, to Amity, and representing to Bullinger that AGCO was not willing to pay any more for Wil-Rich. Howard and Brian were members and governors of Wil-Rich prior to the transaction. Howard, Brian, and Iverson were also members and governors of Amity. Bullinger discovered Appellees' misrepresentation in 2014 when AGCO's representative told Bullinger that while AGCO was only willing to pay $60 million for the two entities, it did not care what values were attributed to each.

[¶3] Bullinger sued Appellees for breach of fiduciary duties and deceit. However, the District Court dismissed Appellant's Complaint on summary judgment based upon the statute of limitations. The District Court incorrectly

applied the discovery rule to find that Bullinger knew, or should have known with exercise of reasonable diligence, that AGCO did not set Wil-Rich's valuation by "the middle of March 2012." The District Court based its determination on emails wherein Bullinger requested information substantiating the valuations. However, Bullinger's primary inquiry was how Amity was valued at $40 million. While Bullinger disputes receiving all of the documentation requested, even if he did, nothing in those documents would have put Bullinger on notice that Appellees—not AGCO—set Wil-Rich's value at $20 million.

[¶4] This Court should reverse the District Court's summary judgment and remand this case for a trial on the merits.

[¶5] Appellant requests oral argument in this matter. Oral argument may assist the Court to better understand the history of this matter, including the scope of the issues, evidence presented, and arguments before the District Court. In addition, oral argument will afford Appellant an opportunity to respond to any questions this Court may have in light of the arguments herein.

STATEMENT OF THE FACTS

A. General background of Wil-Rich and Amity and negotiations with AGCO

[¶6] In or around May 2001, Bullinger completed the purchase of an entity commonly referred to as Wil-Rich out of bankruptcy proceedings. Wil-Rich manufactured agricultural machinery and equipment. See App. at p. 195. At the time of Bullinger's purchase, Howard and Brian were also interested in purchasing Wil-Rich, and eventually became owners. Bullinger owned 45 percent of Wil-Rich;

the Dahls each owned a 25 percent interest, and Victor Klosterman ("Klosterman") owned the remaining five percent. See App. at p. 195.

[¶7] In or around September 2006, the ownership of Wil-Rich, LLC, purchased the Wishek Manufacturing Company and set up a new entity known as Wishek Manufacturing, LLC ("Wishek"). Wishek is an agricultural manufacturing company whose primary product was a disk used for tillage. See App. at p. 195.

[¶8] In the spring of 2010, Howard started looking for private equity firms to become associated with Amity and to inject cash into the same. See App. at p. 195. Amity is a locally based company that prior to January 1, 2011, manufactured and sold sugar beet harvesters and an air seeder. See App. at p. 195. Howard was interested in making Wil-Rich, LLC, and Wishek (collectively "Wil-Rich/Wishek") a part of any potential deal. Howard asked Mike if he would be interested, and Mike indicated that if the price was right, he certainly would be. Over the course of the next several months through the spring and summer of 2010, Howard continued to take the lead in finding a partner to come into the Amity business. See App. at p. 195.

[¶9] Over the course of the spring and summer 2010, while Howard was looking for a strategic business partner, Howard, Iverson, and Mike, on behalf of Bullinger, discussed valuations of Amity, Wil-Rich, LLC, and Wishek. Various numbers were discussed throughout the summer but no concrete valuations were agreed upon. See App. at p. 147.

[¶10] In mid-2010, AGCO began discussions with Howard to become the strategic partner of Amity. AGCO was also in the agricultural equipment manufacturing

industry and appeared to be a solid strategic partner for Amity. See App. at p. 195-96. Howard and Iverson represented Amity throughout the negotiations with AGCO. See App. at p. 148. Ultimately, AGCO and Amity agreed that they would form a joint venture known as AGCO-Amity JV, LLC ("AGCO-Amity JV"), whereby the entities would market and sell agricultural machinery and equipment. See App. at p. 198.

[¶11] As had been the case throughout the spring and summer of 2010, prior to the joint venture going forward, Amity and Wil-Rich/Wishek needed to agree on a valuation of their businesses. Throughout discussions, Howard and Iverson believed that the valuations should be $60 million for Amity and $20 million for Wil-Rich/Wishek, respectively. See App. at p. 147. Throughout these discussions, Mike and Klosterman believed a more accurate value of Wil-Rich/Wishek would be around $25 million. See App. at p. 158.

[¶12] When discussions became serious between AGCO and Amity, Howard proposed a $100 million valuation for Amity, which included Wil-Rich/Wishek, to AGCO. The $100 million was broken down as follows: $20 million for the sugar beet business of Amity; $60 million for the air seeding assets of Amity; and $20 million for Wil-Rich/Wishek. See App. at p. 178. Such a valuation was based upon Howard's belief that AGCO's real interest was in Amity's air drill seeding business. After significant additional negotiations, Amity's sugar beet business was removed from the transaction.

B. The misrepresentations to Bullinger

[¶13] After continued negotiations with AGCO, Howard and Iverson ultimately came back to Mike with a proposed sale price of $60 million. The $60 million was broken down as follows: $40 million for Amity's air drill seeding business, which excluded all sugar beet equipment, and $20 million for Wil-Rich/Wishek. See App. at p. 176. Mike and Klosterman once again disagreed with the valuation of Wil-Rich/Wishek and stated the valuation should be higher. In response, Howard and Iverson told Mike that AGCO had set the price at $60 million, value (Wil-rich at $20 million), and that is all that AGCO was willing to pay. See App. at p. 178-79. Iverson attempted to reassure Mike that Appellees' projections for Amity's sales will more than make up for the lower valuation as the joint venture grows over the few years." See App. at p. 179. Then, on or about November 1, 2010, Howard and Mike discussed the valuations of Wil-Rich/Wishek and Amity. Howard misrepresented to Mike that ***AGCO set the price of Wil-Rich/Wishek at $20 million and AGCO would only pay $20 million for Wil-Rich/Wishek as part of the deal***:

> A. So then - - then Howard said, "Well, if - - if - - if - -" then he came back and said, "Well, if AGCO would pay $20 million, would you ever be interested in - - in talking about that?" And I said, "Yes. But I'd like to be involved in the negotiations, And, in my interpretation of that is we would keep the assets of the company." We had $5 million in equity built in the company. We were having a good year at that time. And then Howard said to me, "Well, we don't get the equity in the company." And I says, "So what do you mean?" "Well, we just get 20 million." And I says, "Well, that's not right." I said "the company is worth more than that. But, we're earning money this year and we're going to put it on our - - on our tax returns and pay tax on it. And are you telling me that AGCO isn't even going to let us have the money back for the taxes?" And his response to me is, "Let me check with them."

See App. at p. 147. Mike had several other conversations whereby Appellees represented AGCO would only pay $20 million for Wil-Rich/Wishek. Specifically:

> A. We had a couple conversations. Some were phone conversations. Might have been in person. He was over at my lake place one day. I was in Medora another time where we had a phone conversation. Probably had a couple other conversations in Fargo. The issue was - -
>
> Q. So let's - - I want to explore what you remember about that; okay?
>
> A. I just told you what I remember. We had one at our - - at the lake place.
>
> Q. Okay.
>
> A. I remember a phone call when I was in Medora.
>
> Q. Okay.
>
> A. And we probably had a couple other phone calls while we were in Fargo….
>
> A. - - as we're trying to - - it's like any negotiation would go on about the sale of a business, is there was conversation that we had back and forth. And the argument - - the key point of the entire discussion was the valuation of 20 million as being undervalued….
>
> A. But the conversation about valuation was the most important thing in the entire discussion as to we got to get more than $20 million out of this business. It's worth more than $20 million.

See App. at p. 148.

[¶14] Based upon the affirmative assertion of Iverson, and Howard's knowledge of Iverson's statement and his failure to correct the same, Bullinger was led to believe that it was AGCO that negotiated and set the $60 million purchase price, which

included $20 million for Wil-Rich/Wishek. In turn, Appellees convinced Mike to accept the deal based on the misinformation:

> Q. Okay. Why would you sell half of your share - - let's put it this way. You knew that the valuation of Wil-Rich and Wishek for purposes of the AGCO transaction was assumed to be 20 million? You knew that ahead of time; right?
>
> A. Before we closed I did.
>
> Q. Yeah. But you thought the valuation should be 25-plus, and you had thought that for a long time; right?
>
> A. Uh-huh. Yes.
>
> **Q. So why would sell half - - well, why would you sell your interest for that on a - - on a $20 million valuation?**
>
> **A. Because in my discussions with both Thor and Howard that's all AGCO would pay.**
>
> Q. So you just wanted as much as you could get out of the deal? You didn't care if you thought it was fair or not?
>
> A. That's all AGCO would pay.
>
> Q. Well, you could have said no to the deal and go do someone else?
>
> A. Could have said no to the deal.
>
> Q. Why didn't you?
>
> A. Howard had been telling me for a period of time that John Deere will no longer sell our - - our tillage equipment because they have their own tillage equipment. And Case wants their dealers to be only selling Case tillage equipment and we're a short line. And - - and Ronnie Offutt can't buy more dealerships unless he throws us out. And - - and I - - I trusted all of this stuff that Howard was saying and that we're not going to make it in the long run and we should sell and - - and we're going to put this - - all this air seeding business that they have just perfected into this thing and - - and in the long run you're going to be far better off and on and on and on. And he just beat me down I guess.

Q. Are you contending that any of these statements you just attributed to Howard are false or were false at the time?

A. Oh, I don't know if they were false at the time. I think everything he said was wrong in the end but…

Q. But you're not contending he was saying that to deceive you into doing this deal?

A. Oh, to motivate me to take 20 million I believe that, yeah.

Q. And ultimately you say he - -

A. He - - he knew our value was more than 25 million. Howard Dahl knew that our value was - - was more than 25 million.

Q. Why do you say that?

A. Because he's a smart businessman. But remember, ten years earlier they thought they were going to end up with Wil-Rich and Wishek and didn't - - or Wil-Rich. I ended up with it, and they ended up with only half. And I think there was a certain built-in motivation to end up with it some day starting in '07. I mean, he - - I would say virtually almost every year he would talk about trying to get us to merge it into him. And then he knew what I was totally not interested in private equity firms. Because I don't believe in private equity firms for our purpose. **And when the AGCO thing came, he told me all AGCO would pay is 20 million. Thor told me that.** So you get to the end of the string and - - and he tells you that, "Don't worry about it. You're going to end up with way more money in the end," because of all this air seeding business that wasn't ready to go to market.

Q. So he just beat you down you said?

A. Yes, with his speech, yeah.

See App. at p. 149-50 (emphasis added).

C. Wil-Rich/Wishek merger with Amity

[¶15] It was decided that prior to the joint venture with AGCO, Amity would merge with Wil-Rich/Wishek. For purposes of that merger, Amity and Wil-Rich/Wishek needed to be valued. It was decided that new Amity shares would be issued to the ownership of Wil-Rich/Wishek at a 3:1 ratio. See App. at p. 197. To substantiate the ratio, Amity's air drill seeding business was valued at $40 million, its remaining assets were valued at $20 million, and Wil-Rich/Wishek was valued at $20 million. See App. at p. 176. Bullinger agreed to the $20 million valuation of Wil-Rich/Wishek for purposes of the merger with Amity based upon Howard and Iverson's misrepresentation that AGCO had set that price. See App. at pp. 150

[¶16] Iverson testified that Amity's air drill seeding valuation was based on a projection of future sales. See App. at p. 173. Based upon those projected sales and the above valuations, the owners of Wil-Rich/Wishek (Bullinger, Klosterman, and the Dahls) were issued 457,537 shares of Amity stock. This equated to a 25% ownership interest in Amity. Based upon Bullinger's 45% ownership interest in Wil-Rich, it was given an 11.25% ownership interest in Amity. See App. at p.181.

[¶17] After the merger was complete, the joint venture between Amity and AGCO moved forward. Ultimately, it was agreed that AGCO would purchase some of Amity's assets, including the air drill seeding business, along with Wil-Rich/Wishek at a $60 million enterprise valuation. As such, AGCO paid $30 million to Amity/Wil-Rich/Wishek in exchange for a 50% interest in the joint venture. See App. at p. 176.

D. Bullinger's questioning of the valuations

[¶18] After reviewing the joint venture's 2011 financials, Mike discovered that a majority of its sales were generated from Wil-Rich/Wishek's contributions rather than from Amity's as the valuations suggested. See App. at pp. 156-160.

[¶19] In January 2012, Mike emailed Iverson questioning the projections supporting the $40 million valuation of the air drill seeder business. See App. at p. 17. Mike inquired:

> When we entered into our merger agreement with Amity you placed a valuation on the ASE [air drill seeder] business. Since there was no real historical information available on the ASE business you valued the ASE portion of the merger on proforma financial statements that you said were very conservative. Based on the results of 2011, it appears to me that they were grossly overstated.
>
> Victor and I have had several conversations regarding the inaccurate financial information that you used to determine ownership percentages of Wil-Rich, Wishek and ASE and feel that your valuation on the ASE portion of the goodwill is overstated. We believe that the Wil-Rich/Wishek valuation has always been understated; however, we felt that if the ASE business lived up to the proforma income then the merger was acceptable.

See App. at p. 182.

[¶20] Mike's email did not question how Wil-Rich/Wishek was valued at $20 million, or by whom. Indeed, at that time, Bullinger still believed that AGCO was only willing to pay that price. However, the email questioned the basis for valuing Amity's air drill seeder business at $40 million. Mike confirmed the same in his deposition:

> Q. Nowhere in your e-mail do you reference AGCO putting any sort of valuation on the air seeder business; right?
>
> A. The pro formas were probably prepared by Thor. I'm sure they were reviewed with AGCO.

Q. The question I asked for you is, in your e-mail here do you make

A. Yeah.

Q. -- any reference to AGCO valuing the $20 million –

A. No.

Q. -- deal? Okay. You go on, "Based on the results of 2011, it appears to me that they were grossly overstated." And you're referring there to the value of the air seeder line; right?

A. No. The value of the sales. Based on the sales from the results of 2011.

Q. Okay. So air seeder sales grossly overstated?

A. From the projection, yes.

Q. Okay. So we're talking here about a projection –

A. Yeah.

Q. -- and that reality didn't hit the projection?

A. Pro forma financial statements.

. . .

Q. Okay. And it is true that by this point in time you are unhappy with the deal you cut the earlier year?

A. It's maybe a little early to – to tell.

. . .

Q. Let's go –

A. It's only one year into the deal.

. . .

Q. Second paragraph, "Victor and I have had several conversations regarding the inaccurate financial information that you used to determine ownership percentages of Wil-Rich, Wishek and ASE and feel that your valuation on the ASE portion of the goodwill is overstated."

A. Correct.

Q. Did I read that correctly?

A. Yep.

Q. *So tell me, what is the inaccurate financial information that was used*?

A. *That -- that the ASE [air drill seeder] business was worth $40 million*.

Q. You go on, "We believe that the Wil-Rich/Wishek valuation has always been understated." And that in fact has always been your view of this?

A. It's 25 million minimum.

Q. And you say, "However, we felt that if the ASE business lived up to the pro forma income then the merger was acceptable." Did I read that correctly?

A. Yeah, that came from Howard and Thor on occasion about -- even Brian. Brian's message to Victor that, you know, "We put good product in there and that will make up the difference."

. . .

Q. If you look at this January 2012 e-mail, it's fair to say that by that point you felt you had gotten a bad deal; right?

A. Why it's too early to tell. It's one year into it but... If it's a slow start, I mean, warranty issues. An attorney in South Dakota who sends a letter to Amity saying that, "You're going to take back two air seeders." Howard having to pay for a farmer to redo his entire crop because the air seeders didn't work. All these things were things that over that six- or eight-week period as we're negotiating this is things that we were told that, “Hey, we're going to do 300 of these in a year and..."

See App. at p. 156-57.

[¶21] From the foregoing, it is clear that Mike questioned the valuation of Amity based on the air seeder's poor performance in 2011. However, given that the joint venture was only in its first year, and that unexpected air seeder warranty issues appeared, it was "too early" to tell if the joint venture was a bad deal. See App. at pp. 157, 159.

[¶22] On February 29, 2012, Mike requested all correspondence related to the valuations of the entities with respect to the merger. See App. at p. 184. Mike explained his concerns regarding the increased valuation of Amity's air seeder business and wanting the information substantiating that valuation:

> A. . . . I mean, [] any common person would be a little surprised at the results of the first year of operation when the part that caries the most value produces the minimal amount of results and started to look a little bit fishy, if that's a fair word to use.
>
> Q. So you were thinking --
>
> A. And it wouldn't be just me because it's me. It's any -- anybody that would make an investment in this under these terms would – it should raise their eyebrows a little bit and say, Whoa, what's going on here?
>
> Q. So by the time you sent that e-mail the relative valuation of Amity air seeder and Wil-Rich in this time is starting to look fishy to you; true? Answer out loud.
>
> A. ***It's early yet. It's only one year.*** But it -- it certainly raised a red flag like, Whoa, what's going on here?

See App. at p. 159.

[¶23] When asked why Mike did not challenge AGCO with respect to the Wil-Rich/Wishek valuation at that time, Mike responded that it was much too early yet, and that he relied on Appellees' representations that it would get better:

> Q. . . . You were in meetings with him [AGCO] in that January, February 2012 range?
>
> A. Yes.
>
> Q. And you could have gone up to him and said, "How did this price come about?" Right?
>
> A. Wouldn't have at that time yet.
>
> Q. I know you -- you say you wouldn't have, but you could have done it?
>
> A. ***Because there was no -- there was no -- no reason to at that time because we only had one year under our belt. "Sometimes things don't work out as fast as you expect it," was Thor's comment to me so***...
>
> Q. Wouldn't a reason to do it be that by January 2012 you're already telling Thor, "Hey, if I would have known the true state of this deal, I wouldn't have done it"?
>
> A. ***Because both Howard, Brian and Thor all told us, "Don't worry about it. You're going to make it on the other end***."

See App. at pp. 159, 171.

[¶24] Mike disputes ever receiving the underlying valuation correspondence he requested. See App. at p. 160 (disputing receiving the correspondence found in the Appendix at pp. 41-143). Even so, nothing in the correspondence revealed that Appellees, not AGCO, set the valuation of Wil-Rich/Wishek at $20 million. However, shortly after Mike requested the correspondence, Howard followed up with Mike in

an email attempting to explain Amity's lackluster performance, and some of the events leading up to the merger and joint venture:

> The numbers we put in the 8-31-10 projections for Wishek and Wil-Rich were in discussions with Victor. No one could have predicted how tough the fall of 2011 would be on tillage equipment and literally now much tillage equipment was destroyed. It is a great time for tillage now, but I will not hazard a guess as to where it will be 3 years from now.
>
> . . .
>
> Just so there is no mistake about this, we would not have sold our air seeder and planter line to anyone for under $40 million.
>
> It was during this negotiation time that I came to you at your lake place and discussed valuations, explaining what Seidler had offered and what was a number that you would be comfortable selling at. You expressed $20 million plus keeping the building. It was with this number that we proceeded.
>
> . . .
>
> We did not haggle over price for one primary reason, we had opportunity to remain a 50% partner with them and we truly believed, and still believe, that the partnership with them will greatly enhance the value of the company. Time will tell the merits of this assumption.
>
> . . .
>
> Yes, we had a hiccup in the spring of 2011 with some assumption made about both air volume capacity and the application of anhydrous ammonia that were faulty. Nevertheless, the upside for the product remains very strong and I believe we will obtain a strong market share with the equipment we have. It really is a special product and has worldwide patent protection.
>
> . . .
>
> If you are uncomfortable moving on, I think it would be best for everyone if we were to buy your shares. Life is too short to have any mistrust in our relationship.

See App. at p. 186-88.

[¶25] However, even this email does not disclose how Wil-Rich/Wishek was truly valued, or by whom. Nevertheless, Howard's email did just enough to cool Mike's suspicion at that time.

[¶26] In 2014, after continued years of lackluster sales on Amity's behalf, Mike attended the AGCO-Amity JV board meeting in Duluth, Georgia. See App. at p. 171. At that time, Mike approached David Williams, the Vice President and Treasurer of AGCO, and AGCO's representative in negotiating the deal with Howard and Iverson, to discuss the valuations of the business. For the first time, Mike discovered that AGCO (Williams) and Amity (Howard and Iverson) never discussed the valuation of Wil-Rich, LLC, and Wishek as a part of the total purchase price of Amity. See App. at p. 171. Only the total purchase price of Amity was discussed and at this time it was discovered that Howard and Iverson, without any input from AGCO, and contrary to their prior assertions, had set the value of Wil-Rich/Wishek at $20 million. See App. at p. 171.

[¶27] After the meeting in which Mike discovered that AGCO had not set the price on Wil-Rich/Wishek, but that it was Howard and Iverson, Mike began asking questions of Howard and Iverson. As part of these discussions, on April 10, 2014, Howard emailed Mike, stating:

> I see more clearly how you saw the nature of the negotiation, in that you thought we were discussing valuations of various products to get to the $60 million. In reality, I simply felt that after discussing with you the value you would accept for Wil-Rich, which was higher than the valuations we had from various people that we were good to go. The numbers we were using of $60 million for Amity and $20 million for Wil-Rich/Wishek were in line with all of the numbers we had been given by

> third parties over the previous 12 months. Rightly or wrongly, those were the numbers that governed all our thinking and they are not numbers we simply grabbed out of thin air.

See App. at p. 189.

[¶28] Howard's contention in the April 10, 2014, email is in direct conflict with Iverson's email of October 25, 2010, wherein Iverson said that the $20 million valuation of Wil-Rich/Wishek was set by AGCO, whereas in 2014 Howard asserted that the valuation of Wil-Rich/Wishek was based upon discussions with "third parties" over the 12 months prior to the sale. See App. at pp. 178-79, 189. This is not what was disclosed to Mike or Klosterman in the fall of 2010. Howard and Iverson unequivocally stated that the $20 million valuation of Wil-Rich/Wishek was done by AGCO. See App. at pp. 148, 151.

E. The District Court's summary judgment

[¶29] Bullinger commenced this action asserting that the Appellees' breached their fiduciary duties in misrepresenting that AGCO set the $20 million valuation for Wil-Rich/Wishek. The District Court ultimately granted summary judgment in favor of Appellees finding that Bullinger knew or should have known, with the exercise of reasonable diligence, of Appellee's misrepresentations no later than March 2012. See App. at p. 207.

[¶30] In determining the "discovery date" as a matter of law, the District Court relied on Mike's January 19, 2012, and subsequent correspondence. The District Court noted the following pertinent to its decision:

> [I]t is undisputed that on January 19, 2012, Mike Bullinger sent an email to Iverson and complained about "inaccurate financial

information" purportedly used to value Wil-Rich and/or Amity and determine ownership percentages Wil-Rich owners would obtain in Amity. Further by, January 2012, Mike Bullinger believed the transaction seemed "fishy" and that the performance of the Joint Venture "raised eyebrows" and "certainly raised a red flag like, Whoa, what's going on here." Clearly, Bullinger stated its inquiry into the valuation of Amity and Wil-Rich in January 2012.

In February 2012, Bullinger demanded that Iverson send him various correspondence between Amity and the private equity firms with whom Amity was discussing investment, including specifically AGCO. In March 2012, Iverson provided Mike Bullinger the requested information. While Bullinger disputes having received all emails sent, Bullinger was certainly making its inquiry and would have had a duty to follow up if it didn't receive all that was requested. On March 14, 2012, Howard Dahl emailed Mike Bullinger and addressed the history leading up to Amity's acquisition of Wil-Rich and culminating in the Joint Venture with AGCO. Howard Dahl pointed out to Mike Bullinger "You expressed $20 million plus keeping the building. It was with the number that we proceeded." Howard Dahl's email certainly highlighted that the parties were in disagreement with how Wil-Rich and Amity were valued.

It is concluded that Bullinger knew, or with the exercise of reasonable diligence should have known, of the alleged fraud and its resulting injury as early as January 2012, but certainly no later than the middle of March 2012. By mid-March 2012, Bullinger knew that three were genuine disagreements on how the parties reached the $20,000,000 valuation for Wil-Rich. Howard Dahl's email of March 14, 2012, certainly gave Bullinger notice of facts which would put a person of ordinary intelligence on inquiry, which "is equivalent to knowledge of all of the facts a reasonable diligent inquiry would disclose." [] Assuming Bullinger genuinely relied on the alleged misrepresentations that AGCO set the Wil-Rich valuation at $20,000,000, a reasonable diligent inquiry would have certainly included simply contacting someone at AGCO as soon as January 2012, but certainly no later than March 2012, to learn one way or the other whether AGCO set the Wil-Rich valuation at $20,000,000.

All of Bullinger's claims are rooted in the alleged misrepresentation that AGCO set the $20,000,000 valuation for Wil-Rich, whether titled fraud, deceit, or breach of fiduciary duty based on underlying fraud or deceit.

See App. at p. 205-06.

[¶31] Absent from the District Court's findings and the correspondence between Howard and Mike is any affirmative assertion regarding the truth about how the $20 million valuation for Wil-Rich/Wishek was set. Rather, the District Court disregarded Appellees' fiduciary duties to Bullinger and placed an impermissible burden on Bullinger to discover facts that were unrelated to his inquiry regarding how Amity's air drill seeder business was valued.

[¶32] Bullinger moved the District Court to reconsider its summary judgment entered based on the expiration of the statute of limitations. See App. at p. 211. Bullinger asserted that the District Court did not properly consider the fact Appellees have a fiduciary relationship with Bullinger and therefore should have been more lenient in assessing Bullinger's diligence. Bullinger further argued that the statute of limitations did not begin to run until Appellees' tortious act ceased, which was finally uncovered in 2014. The District Court denied Bullinger's motion for reconsideration. See App. at p. 212.

[¶33] This Court should reverse the District Court's summary judgment and remand this matter for a trial on the merits.

LAW AND ARGUMENT

A. Standard of review

[¶34] In Dunford v. Tryhus, this Court recited the oft-intoned standard for reviewing a district court's grant of summary judgment:

> Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine

> issues of material fact or inferences that reasonably can be drawn from the undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment must show there are no genuine issues of material fact and the case is appropriate for judgment as a matter of law. On appeal, ***we view the evidence in the light most favorable to the opposing party, and that party must be given the benefit of all favorable inferences***. We review a district court's decision to grant summary judgment de novo on the entire record.

2009 ND 212, ¶ 5, 776 N.W.2d 539 (quotations and citations omitted) (emphasis added).

B. The District Court misapplied the law by entering summary judgment dismissing Bullinger's Complaint based on the statute of limitations

[¶35] Section 28-01-16(6) identifies fraud claims as having a six-year statute of limitations, but provides "***the claim for relief in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud***." (Emphasis added.)

[¶36] In Larson v. Midland Hosp. Supply, Inc., this Court explained the application of the discovery rule in tolling the statute of limitations for fraud claims:

> Generally, the statute of limitations begins to run from the commission of the wrongful act giving rise to the cause of action; however, that rule is subject to a discovery rule. Wells v. First Am. Bank W., 1999 ND 170, ¶ 9, 598 N.W.2d 834.
>
> > "The discovery rule postpones a claim's accrual until the plaintiff knew, or with the exercise of reasonable diligence should have known, of the wrongful act and its resulting injury.... ***We have used an objective standard for the knowledge requirement under the discovery rule. The focus is upon whether the plaintiff is aware of facts that would place a reasonable person on notice a potential claim***

> ***exists, without regard to the plaintiff's subjective beliefs***."
>
> Id. at ¶ 10 (citations omitted). "Notice of facts, which would put a person of ordinary intelligence on inquiry, is equivalent to knowledge of all of the facts a reasonable diligent inquiry would disclose." Jones v. Barnett, 2000 ND 207, ¶ 8, 619 N.W.2d 490. "After acquiring knowledge of the facts, a party has a responsibility to promptly find out what legal rights result from those facts, and failure to do so will be construed against the party." Id. "***The determination of when a plaintiff's cause of action has accrued is generally a question of fact***, but if there is no dispute about the relevant facts, the determination is for the court." Dunford v. Tryhus, 2009 ND 212, ¶ 6, 776 N.W.2d 539 (quoting Tarnavsky v. McKenzie Cty. Grazing Ass'n, 2003 ND 117, ¶ 9, 665 N.W.2d 18).

2016 ND 214, ¶ 11, 891 N.W.2d 364 (emphasis added); see also Doan ex rel. Doan v. City of Bismarck, 2001 ND 152, ¶ 26, 632 N.W.2d 815 ("Generally, summary judgment is inappropriate for resolving issues involving reasonableness standards.").

[¶37] Where, as here, a fiduciary relationship exists between the parties a plaintiff's duty to make a diligent inquiry is less exacting:

> Other courts have said the same degree of diligence may not be required when a fiduciary relationship exists; however, they also have held reasonable diligence still is required and the statute of limitations begins to run when the plaintiff has notice of facts that would put a reasonable person on inquiry. See, e.g., Schmidt v. Skolas, 770 F.3d 241, 253 (3d Cir.2014) (stating the concept of ***reasonable diligence is more deferential to the plaintiffs when a fiduciary relationship exists***); Graham–Sult v. Clainos, 756 F.3d 724, 743 (9th Cir.2013) (stating ***the same degree of diligence is not required when a fiduciary relationship exists***, but plaintiffs continue to have a duty to investigate when they have notice of facts sufficient to arouse a reasonable person's suspicions); Hope v. Klabal, 457 F.3d 784, 791 (8th Cir.2006) (stating a delay in discovering wrongdoing may be excusable if a fiduciary relationship exists); Cantor Fitzgerald Inc. v. Lutnick, 313 F.3d 704, 711–12 (2d Cir.2002) (stating ***the plaintiff's burden of***

> ***discovery is reduced when a fiduciary relationship exists***, but the statute of limitations begins when the plaintiff has notice or information of circumstances to put a reasonable person on inquiry); J. Geils Band Emp. Ben. Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1259 (1st Cir.1996) (holding plaintiffs were required to investigate after receiving multiple "storm warnings" to exercise reasonable diligence, even if a fiduciary relationship existed).

Larson v. Midland Hosp. Supply, Inc., 2016 ND 214, ¶ 14, 891 N.W.2d 364 (emphasis added). What's more, this Court has even suggested where a fiduciary relationship exists, the fiduciary is obligated to disclose and the statute of limitation will not begin to run until such disclosure under principles of estoppel:

> The existence of a fiduciary relationship may give rise to a duty to disclose, *see* Rolin Mfg., Inc. v. Mosbrucker, 544 N.W.2d 132, 136 (N.D.1996); Krueger v. St. Joseph's Hospital, 305 N.W.2d 18, 25 (N.D.1981), relieving the injured party of the burden of showing an affirmative deception to postpone the running of a statute of limitations. See Malachowski v. Bank One, Indianapolis, 590 N.E.2d 559, 563 (Ind.1992); Lumber Village, Inc. v. Siegler, 135 Mich.App. 685, 355 N.W.2d 654, 658 (1984).

Snortland v. State, 2000 ND 162, ¶ 15, 615 N.W.2d 574.

[¶38] As set forth below, Bullinger's statute of limitations did not begin to run until it obtained actual knowledge of Appellees' misrepresentations in 2014.

1. Bullinger was not on inquiry notice that AGCO did not set Wil-Rich/Wishek's valuation by March 2012

[¶39] The date of Bullinger's ***actual notice*** of Appellees' misrepresentations is not in dispute. Indeed, Howard confirmed at his deposition:

> A: (by Howard Dahl): I will only speculate that I don't think it was in '12 where Thor was accused of lying. I think it's after David Williams' revelation.
>
> Q: (By Mike Gust) Okay.

> A: And if that revelation did not occur until a February board meeting, '14, I think his accusation of Thor lying and at that time the accusation of me lying last summer were strictly a result of the conversation with David Williams.

See App. at p. 175.

[¶40] Nevertheless, the District Court found that Bullinger should have known of the alleged fraud and the resulting injury "as early as January 2012, but certainly no later than the middle of March 2012." The District Court relied primarily on Bullinger's inquiry with respect to the pro forma financial statements giving rise to its "inquiry notice" as to ***who*** valued Wil-Rich/Wishek. In doing so, the District Court imposed an unrealistic and legally unsupportable burden on Bullinger.

[¶41] Whether one is on "inquiry notice" is generally a question of fact. Larson v. Midland Hospital Supply, Inc., 2016 ND 214, ¶ 11, 891 N.W.2d 364. "Inquiry notice" "imputes notice only of those facts that are naturally and reasonably connected with the facts known, and of which the known facts can be said to furnish a clue, and does not impute notice of every conceivable fact, however remote, which might come to light by exhausting all possible means of knowledge." Sime v. Malouf, 95 Cal. App. 2d 82, 212 P.2d 946 (1949); Exxon Corp. v. Raetzer, 533 S.W.2d 842, 846–47 (Tex. Civ. App. 1976), writ refused NRE (June 9, 1976) ("Although actual notice includes the knowledge of all those facts that a reasonable inquiry would have disclosed, the duty of inquiry extends only to those matters that are fairly suggested by the facts really known; circumstances that may merely arouse suspicion in the mind of a reasonably prudent person are

generally regarded as insufficient to charge notice.'"). This Court has adopted the same theory of imputed knowledge:

> While it is a general rule that one who has knowledge of facts sufficient to put him on inquiry is deemed to have notice of the facts which reasonable inquiry would disclose, that rule does not impute notice of every conceivable fact and circumstance, however remote, which might come to light if every possible means of knowledge were exhausted. It was well said by Judge Wright, in Birdsall v. Russell, 29 N. Y. 250: "***There must appear in the nature of the case such a connection between the facts discovered and the further facts to be discovered that the former may be said to furnish a reasonable and natural clue to the latter***."

Johnson v. Erlandson, 105 N.W. 722, 724 (N.D. 1905) (emphasis added).

[¶42] By imputing knowledge of ***who*** valued Wil-Rich/Wishek onto Bullinger via its inquire as to ***how*** the air drill seeder business of Amity was valued, the District Court conflated two distinct issues: (1) the underlying factual data for how the air drill seeder business of Amity was valued; and (2) the fact that Appellees' misrepresented ***who*** valued Wil-Rich/Wishek. Indeed, the issue of who valued Wil-Rich/Wishek at $20 million and whether AGCO was involved was not even raised in the January or March 2012 correspondence. Nor was there any fact (i.e., clue) disclosed that would have led a reasonable person to question ***who*** valued Wil-Rich/Wishek after Appellees' serial representations it was AGCO.

[¶43] The District Court cited Howard's email of March 14, 2012, as continuing facts which would put a person of ordinary intelligence on inquiry—which is equivalent to knowledge of all the facts a reasonable diligent inquiry would disclose. The Court further noted that a "reasonable diligent inquiry would have

certainly included simply contacting someone at AGCO as soon as January 2012, but certainly no later than March 2012." In making this determination, this District Court misapplied the summary judgment standard by broadening the scope of Mike's actual inquiry in January-March 2012 (i.e., the basis for Amity's air drill seeder valuation of $40 million). See App. at pp. 156-58 (Mike attesting that the "inaccurate financial information" to which he was referring was that the "ASE [air drill seeder] business was worth $40 million."). Neither Mike's January 2012 email, nor his testimony may be construed that he was inquiring about ***who*** valued Wil-Rich/Wishek. In fact, the District Court failed to give Bullinger that benefit of the inference raised in Mike's deposition testimony that Bullinger only questioned the basis of Amity's $40 million valuation for its air drill seeder business.

[¶44] Similarly, the District Court erred in construing Mike's testimony that the valuation of Amity's air drill seeding business at $40 million in light of its lackluster performance was "fishy" and "raised an eyebrow". As clarified in his deposition testimony, Mike's statements should only have been construed to extend to his questioning of how Amity's air drill seeking business was valued. Instead, the District Court expanded the scope of Mike's testimony as questioning at that time ***who*** valued Wil-Rich/Wishek. The District Court's failure to construe all reasonable inference in Bullinger's favor was a misapplication of Rule 56.

[¶45] The District Court erred in determining that, as a matter of law, Bullinger was on inquiry notice by March 2012 with respect to ***who*** valued Wil-Rich/Wishek.

2. The District Court erred in failing to consider the Appellees' fiduciary relationship with Bullinger

i. ***The District Court should have held Bullinger to a less exacting "diligence" standard when the fraud committed against him was by a fiduciary***

[¶46] Even though Bullinger was not on inquiry notice even under an ordinary standard of diligence; where, as here, a fiduciary relationship exists, the diligence requirement is even less exacting. The District Court erred in holding Bullinger to a heightened diligence standard.

[¶47] As set forth in Larson, *supra*, "the same degree of diligence may not be required when a fiduciary relationship exists." Id at ¶ 14. See also Schmidt v. Skolas, 770 F.3d 241, 253 (3d Cir. 2014) ("The existence of a fiduciary relationship is relevant to a discovery rule analysis precisely because it entails such a presumptive level of trust in the fiduciary by the principal that it may take a 'smoking gun' to excite searching inquiry on the principal's part into its fiduciary's behavior. . . . ***There is nothing in the limited record we may consider at this stage that amounts to the sort of "smoking gun" that would trigger Schmidt's diligence obligations***.") (emphasis added).

[¶48] There can be no question that a fiduciary relationship exists between Bullinger and the Dahls as owners of Wil-Rich/Wishek. See N.D.C.C. § 10-32.1-41(1) (imposing fiduciary duties upon members of a limited liability company to other members and the company).

[¶49] Also unquestionable is the fact that the documents purportedly furnished, to Mike in March 2012, nor Howard's March 2012 email contain a "smoking gun"

triggering Mike's diligence obligations to investigate the trust as to ***who*** set the value of Wil-Rich/Wishek at $20 million. Indeed, Mike previously relied, and continued to rely on his fiduciary's representation that AGCO set the value. Such reliance built on ten years of trust was certainly reasonable. See N.D.C.C. § 10-32.1-41(1) (members of LLC owe other members duty of loyalty and care); Van Camp v. Bradford, 63 Ohio Misc. 2d 245, 256, 623 N.E.2d 731, 738 (Ohio Com. Pl. 1993) (when a fiduciary relationship exists, the beneficiary is entitled to rely on representations made by the fiduciary).

[¶50] The District Court erred by failing to apply a more lenient standard of diligence in discovery who valued Wil-Rich/Wishek in light of its fiduciary relationship with the Dahls.

ii. *The District Court erred in failing to toll the statute of limitations to the earlier of when Bullinger's fiduciaries disclosed the misrepresentation, or when Bullinger had actual notice of the same*

[¶51] As this Court is aware, the statute of limitations for a continuing tort does not begin to run until the tortious acts cease. Beavers v. Walters, 537 N.W.2d 647, 650 (N.D. 1995). Based upon the fiduciary relationship with Bullinger, it was Appellees' affirmative duty to disclose their conduct and put Bullinger on full notice of who valued Wil-Rich/Wishek.

> Although reasonable reliance is generally required, the existence of a confidential or fiduciary relationship creates a duty to fully disclose material facts. Vail v. Vail, 233 N.C. 109, 116, 63 S.E.2d 202, 207 (1951). When the duty to disclose is breached, fraud has been committed and the deceived party need not prove reasonable reliance. *Id.* Indeed, ***in the context of fiduciary relationships, the law excuses a deceived party's***

> ***failure to exercise reasonable diligence, as the duty to investigate is subordinate to the duty of full disclosure***:
>
> > ***[T]he failure of the defrauded person to use diligence in discovering the fraud may be excused where there exists a relation of trust and confidence between the parties. This is so for the reason that a confidential or fiduciary relation imposes upon the one who is trusted the duty to exercise the utmost of good faith and to disclose all material facts affecting the relation***.

Seraph Garrison, LLC ex rel. Garrison Enterprises, Inc. v. Garrison, 247 N.C. App. 115, 128, 787 S.E.2d 398, 408 (2016) (emphasis added).

[¶52] Applying the appropriate summary judgment standard, Bullinger is entitled to the inference that it was unaware of Appellees' misrepresentations that AGCO set the value of Wil-Rich/Wishek at $20 million. It is undisputed that AGCO, and the idea of who set the price for Wil-Rich/Wishek, was never discussed in early 2012. See App. at pp 175 (Howard deposition testimony acknowledging that he believed it was in 2014 when Bullinger discovered AGCO did not set the valuation of Wil-Rich/Wishek); 189 (April 10, 2014, email acknowledging that Howard "sees more clearly how [Mike] saw the nature of the negotiation.").

[¶53] Howard's continual failure to disclose who truly valued Wil-Rich/Wishek amounted to an ongoing concealment of material facts. In other words, a continuation of Appellees' deceit and breach of fiduciary duty. The District Court's use of the discovery rule where Bullinger's fiduciary continued his tortious conduct was a misapplication of the law.

[¶54] What's more, the ultimate issue of when, and whether, Appellees acknowledged their deceitful conduct is a question of fact. As argued below, based upon the deposition transcript of Klosterman, Klosterman heard Iverson state that AGCO set the price for the sale and would not pay any more than $20 million for Wil-Rich:

> A. And I know Brian and Howard, myself, Mike, Thor. I'm thinking -- I can't tell you the exact date or the exact meeting, but we have very few meetings that all of us would be at so I'm quite sure it was a -- joint venture board meeting with AGCO. And -- and I -- and I know most people had left because we were scattered out on a huge table for just a few people. And -- and somehow it came up and -- and I just -- **I remember it very well because Thor jumped right out of his chair and said, "And that's all AGCO would pay for it."**
>
> . . .
>
> Q. And Thor Iverson said, "AGCO would only pay $20 million"?
>
> A. Yes.
>
> Q. Did Howard say anything in response to that, if you recall?
>
> A. I don't recall. It -- I can't say. I don't recall.
>
> Q. Did Brian Dahl say anything, if you recall?
>
> A. There was some conversation, but I don't remember what was said or -- the only part that stands out is -- is Thor jumped right out of his chair and said, "And that's all AGCO would pay for it. That's what they set."

See App. at pp. 191-193.

[¶55] There is no evidence in the record that Bullinger's fiduciaries attempted to correct this statement. The only time Appellees, even arguably, disclosed ***who*** valued Wil-Rich/Wishek was in Howard's April 10, 2014, email to Mike

acknowledging how Howard then saw "more clearly how [Mike] saw the nature of the negotiation in that [Mike] thought we were discussing valuations of various products to get to the $60 million." Then, for the first time, Howard acknowledged:

> In reality, I simply felt that after discussing with you the value you would accept for Wil-Rich, which was higher than the valuations we had from various people that we were good to go. The numbers we were using of $60 million for Amity and $20 million for Wil-Rich/Wishek were in line with all of the numbers we had been given by third parties over the previous 12 months. Rightly or wrongly, those were the numbers that governed all our thinking and they are not numbers we simply grabbed out of thin air.

See App. at p. 189. But whether even these representations amount to a "full disclosure" is an unaddressed question of fact that the District Court did not answer. Rather the District Court constructed every inference against Bullinger and dismissed its substantial claims on summary judgment.

[¶56] The District Court erred in failing to toll the statute of limitations until the later of when Bullinger's fiduciary affirmatively disclosed ***who*** valued Wil-Rich/Wishek, or when Bullinger obtained actual knowledge of the same.

CONCLUSION

[¶57] This Court should reverse the District Court's summary judgment dismissing Bullinger's Complaint based on the statute of limitations and remand for a trial on the merits.

Dated this 25th day of November, 2019.

/s/ Michael L. Gust

Michael L. Gust (ND #06468)
Matthew D. Kirschenmann (ND #08222)
Anderson, Bottrell, Sanden & Thompson
4132 30th Ave SW, Suite 100
PO Box 10247
Fargo, ND 58106-0247
(701) 235-3300
mgust@andersonbottrell.com
mkirschenmann@andersonbottrell.com
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellant's Brief complies with the page limit of North Dakota Rules of Appellate Procedure 32(e) because it contains no more than 37 pages, as indicated by the page-count utility of the word processing software.

Dated this 25th day of November, 2019.

/s/ Michael L. Gust
Michael L. Gust (ND #06468)
Matthew D. Kirschenmann (ND #08222)
Anderson, Bottrell, Sanden & Thompson
4132 30th Ave SW, Suite 100
PO Box 10247
Fargo, ND 58106-0247
(701) 235-3300
mgust@andersonbottrell.com
mkirschenmann@andersonbottrell.com
Attorneys for Appellant

AFFIDAVIT OF SERVICE

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

The undersigned, being first sworn, says upon her oath that on the 25th day of November, 2019, she delivered via e-mail a true and correct copy of each of the following:

Brief of Appellant
Appellant's Appendix

A copy of the foregoing was securely e-mailed to the addresses as follows:

Benjamin J. Hasbrouck
Aubrey J. Zuger
bhasbrouck@fredlaw.com
azuger@fredlaw.com

I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Dated this 25th day of November, 2019.

/s/ Jennifer A. Ernst
Jennifer A. Ernst