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STATE OF NORTH DAKOTA

In the Supreme Court
State Of North Dakota

October 3, 2019

Supreme Court No. 20190247

Grand Forks County Number: 18-2017-CV-01791

Roger Feltman and TRRP, LLC,

Plaintiff and Appellant,

v.

Daniel Gaustad and Pearson, Christensen & Clapp, PLLP,

Defendant and Appellee

APPEAL FROM MAY 14, 2019 FINAL JUDGMENT OF
THE DISTRICT COURT OF GRAND FORKS COUNTY,
NORTH DAKOTA, NORTHEAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STACY J. LOUSER, PRESIDING

INITIAL BRIEF OF PLAINTIFF AND APPELLANT

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II. The District Court erred by entering summary judgment in the law firm defendants' favor while mistakenly concluding that all of the appellant's allegations of professional negligence related solely to events which had occurred prior to the date on which the March 22, 2012, "Settlement

and Release Agreement" was executed whereby the underlying federal litigation captioned *Feltman v. Wash. Mut. Bank, FA*, No. 2:07-cv-59, 2008 U.S. Dist. LEXIS 14678, 2008 WL 544991 (D.N.D. Feb. 27, 2008) was dismissed with prejudice and as such "are not properly a part of this lawsuit".

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[¶1] STATEMENT OF THE ISSUES

I. The District Court erred as a matter of law by entering summary judgment against the appellants where defendant Attorney Gaustad had effectively abandoned his client by precipitously dismissing with prejudice his client Appellants' underlying federal district court litigation[1] -- thereby facilitating an unauthorized modification of the agreement by lender bank defendants in the underlying case where Gaustad had left four (4) mandatory express conditions precedent to the effectuation of the settlement agreement in the litigation unsatisfied – important conditions precedent which would have inured to Feltman's material benefit[2] – conditions with which the banks never did comply and an order of dismissal with prejudice relieved them thereof after Gaustad had first diverted $30,000 in settlement funds to himself as "attorney's fees" immediately prior to prematurely dismissing the case.

II. The District Court erred by entering summary judgment in the law firm defendants' favor while mistakenly concluding that Appellants' claim failed to support any damages as all of the appellant's allegations of professional negligence related solely to events which had occurred prior to the date on which the March 22, 2012, "Settlement and Release Agreement" was executed whereby the underlying federal litigation captioned *Feltman v. Wash. Mut. Bank, FA*, No. 2:07-cv-59, 2008 U.S. Dist. LEXIS 14678, 2008 WL 544991 (D.N.D. Feb. 27, 2008) was dismissed with prejudice and as such "are not properly a part of this lawsuit".

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[1] See, *Feltman v. Wash. Mut. Bank, FA*, No. 2:07-cv-59, 2008 U.S. Dist. LEXIS 14678, 2008 WL 544991 (D.N.D. Feb. 27, 2008).

[2] See, ¶8 of the Settlement and Release Agreement.

> 8. Dismissal of Federal Litigation. ***Within 10 days* of the completion *of the* items delineated in Paragraphs 2-6 above**, the Feltmans shall cause the Federal Litigation to be dismissed, with prejudice, by filing the required number of copies of such dismissal with the Court, and shall forward a copy of the dismissal to legal counsel for Chase and FDIC-R. The parties agree that they shall each bear their own respective costs, expenses and attorneys' fees associated with the Federal Litigation. [**App 102; Doc. 121**] (emphasis added).

[¶2] STATEMENT OF THE CASE

[¶3] The District Court in this matter dismissed the Appellants', Roger Feltman and TRRP, LLC, (hereinafter "Appellant" or "Feltman") complaint in its entirety without addressing the majority or substance of Appellants' legal malpractice claims contained therein. The District Court limited its decision dismissing Appellants' complaint to a failure on the part of the Appellants' to establish the essential element of damages. Appellants' appeal from this "Order on Motions for Summary Judgment; Order for Judgment; and Judgment" issued by the District Court on May 14, 2019. [**APP 209; Doc. 214**]. The District Court dismissed all of the Appellants' plead causes of action in this matter pursuant to the North Dakota Rules of Civil Procedure Rule 56 based upon the following conclusion of law:

> [156] As determined in Section II of this Order, Feltman has not established one of the elements of legal malpractice, i.e., that Feltman suffered damages when Gaustad breached a duty and "prematurely" dismissed the federal lawsuit, because, as a matter of law, Feltman had six years within which to sue Chase for enforcement of the Settlement Agreement and dismissal did not foreclose that remedy.
> [157] … Because Feltman has failed to establish a factual dispute as to an element of legal malpractice, summary judgment dismissing Feltman's claims is appropriate.
> *See*, Order on Motions for Summary Judgment; Order for Judgment, and Judgment. [**APP 209; Doc. 214**]. (emphasis added).

[¶4] Without citation to legal authority the District Court appears to strike all of Feltman's claims and/or evidentiary support contained within the complaint at [¶ 36] in Section II (A) by stating:

> Because Feltman freely executed the Settlement Agreement—a contract—in spite of red flags, any allegations and/or support for Feltman's claims of legal malpractice that pre-date the execution of the Settlement Agreement are not properly part of this lawsuit.
> **[APP 209; Doc. 214]**

[¶5] The District Court incorrectly at Section II (B) held that the Appellants' were not entitled to summary judgment as a matter of law because Appellants have not established a duty that was breached by Gaustad's unauthorized modification of the Confidential Settlement and Release Agreement in the underlying case wherein Gaustad had left four (4) mandatory express conditions precedent to the effectuation of the settlement agreement in the litigation unsatisfied – important conditions precedent which would have inured to Feltman's material benefit – conditions with which the banks never did comply and an order of dismissal with prejudice relieved them thereof by stating at [¶42] of the following:

> One of the elements of legal malpractice is damages. Feltman has not established any duty by Gaustad that was breached when the federal case was dismissed. The dismissal "with prejudice" did not leave Feltman without a remedy, because Feltman had six years after the Agreement was executed to file an action to have the Settlement Agreement enforced.
> [APP 209; Doc. 214]

[¶6] The District Court committed reversible error in dismissing the Appellants' legal malpractice action against the law firm defendants'.

[¶7] STATEMENT OF THE FACTS

[¶8] Legal issues with Washington Mutual (WAMU) Bank began in November 2004, when Feltman received a "Notice before Foreclosure" from WAMU

regarding properties being financed with them. Feltman hired attorney Dan Gaustad "Gaustad" in late 2004. WAMU Bank was over charging for escrow payments, insurance, and penalties causing the Feltman loans to go into foreclosure.

[¶9] In November 2005, nearly one year after the Feltmans hired Gaustad to address the foreclosure issue, Gaustad received a settlement proposal from Troy Mosby "Mosby" of WAMU Executive Response Center. *See* Doc. 60. Gaustad discussed the settlement issue with the Feltmans and denied the settlement because it did not, "*address the very heart of the issues [the Feltmans] have experienced and which caused the present situation*," which was the mismanagement of the escrow accounts. [**APP 39, Doc. 61**].

[¶10] On February 8, 2006 Leah Bartoces, "Bartoces" Consumer Group Paralegal from WAMU, sent Gaustad a letter notifying him that his letter to Mosby had been forwarded to WAMU's legal Department for review. Bartoces also requested any additional information that may "*facilitate a settlement,*" and noted that a hold had been placed on Feltman's account. See, Doc. 62, 63, & 64.

[¶11] On December 28, 2006, WAMU provided a counter offer to Feltman's initial offer to settle. WAMU's offer essentially was:

> On the 235, 237, 239 and 241 Buramott properties WAMU would refund any positive escrow balances, waive any negative escrow balances and provided payoff amounts for these properties and all property taxes were paid through 2005 and 2006. As to the Burgamott duplex (409 and 413) conversion issue, WAMU offered a $500.00 settlement. The property taxes on this duplex were paid for 2005, but not 2006. WAMU agreed to waive all fees and costs on these loans and provided a payoff

> of these loans. WAMU noted that the 10th Street Duplex loans were current and the real estate taxes were paid for 2005 & 2006. WAMU agreed to waive any fees and costs on these loans and provided a payoff statement for these properties. WAMU agreed that all property escrows would be the Feltmans responsibility from that point forward. WAMU also agreed to "*prepare the necessary report to the credit bureau in which it reports indicating the loans are paid as agreed*." See, Doc. 68.

[¶12] Gaustad advised Feltman to **DEN**Y the settlement offer as the issues had been ongoing for over two years with no resolution; Feltman's credit had been damaged creating the inability to finance any business project; Feltman's lost income due to the inability to bid projects that required bonding; and Feltman had suffered emotional distress.

[¶13] In 2008 WAMU was placed in receivership limiting the amount of settlement available, as any settlement had to comply with the terms set forth by the FDIC. See, Exhibit 76 - (Resolutions Handbook FDIC). Gaustad did not notify the Feltmans that their claim of damages had changed significantly due to the receivership of WAMU. In fact, Gaustad filed a Proof of Claim with the FDIC seeking damages of $4,097,881.28 to 11,225,155.28 on May 9, 2009, which was denied. See, Doc. 76, 77, 77-83, 44-46, & 99. See also, Doc. 161. On April 24, 2009, just prior to filing the FDIC proof of claim, Gaustad advised Feltman to hire an expert regarding the emotional damages they suffered. Patricia J. Aletky, PHD/LP "Atetky" of Minneapolis Clinic of Neurology was retained to meet with Feltman and provide an opinion regarding the extent of emotional damage suffered. See Doc. 100. On April 24, 2009, Feltman met with Aletky who found Feltman to be "*credible historians*" and that Feltman(s) "*have been profoundly*

affected in a negative way in virtually every aspect of [our] lives by this ongoing matter" and that this situation, "*adversely affected [our] quality of life on a daily basis*." Id. Gaustad advised Feltman that Dr. Aletky's testimony would have a "*significant impact*" on their case. [**APP 118, Doc. 159**] - Affidavit of Roger Feltman, ¶¶ 6P, 25.

[¶14] On October 4, 2011, Engel from Gaustad's office contacted Feltman inquiring about damages in preparation of the upcoming Settlement Conference with the Federal Court set to occur in December, 2011. See Doc. 102. In support of his damages Feltman provided Gaustad's office with Profit and Loss Statements. See, Doc. 103. In November 2011 prior to the Settlement Conference, Gaustad met with Feltman. Gaustad provided Feltman with a copy of the Settlement Letter provided to Judge Klein wherein Gaustad requested damages in excess of two million dollars ($2,000,000.00). See, Doc. 104.

[¶15] In December 2011, the Settlement Conference with Federal Magistrate Judge Klein convened and Feltman, though present, was not allowed to speak or participate as Gaustad did not want Feltman to speak. [**APP 118, Doc. 159**] - Affidavit of Roger Feltman, ¶30. Whenever Feltman questioned Gaustad about his statements to the magistrate while the magistrate was not present—Gaustad indicated that he was just playing Devil's Advocate. Id. Gaustad reversed his position on the amount of damages Feltman should be requesting during the settlement conference. [**APP 118, Doc. 159**] - Affidavit of Roger Feltman, at¶ 30. Feltman, upon the advice of Gaustad, agreed to settle putting the terms of the

agreement on the Court record at the end of the settlement conference. Id. at ¶¶ 30, 32.

[¶16] On December 13, 2011 Gaustad provided Feltman with a copy of the settlement agreement. See, Doc. 105 -Exhibit 36. Feltman was informed by Gaustad's office that "*everything is ok as Gaustad read [the Agreement] over.*" [**APP 118, Doc. 159**] - Affidavit of Roger Feltman, at ¶6. On January 6, 2012 a Notice was sent to Gaustad, from the Independent Foreclosure Review requesting the Feltmans submit a review form if they had been financially injured. This form was never submitted because the case settled. See, Doc. 106. On January 17, 2012 Gaustad requested that the Feltmans' settlement check be payable to his office. [**APP 99, Doc. 107**]. On that same day, Gaustad notified WAMU that Feltman approved the settlement Agreement but wanted to see Exhibit A outlining all of the balance due amounts on loans. Doc. 108. In February 2012 Gaustad was pushing to get the Settlement Agreement signed while being fully aware that Feltman had the same continuing Chase Bank related loan problems. Id.; see also, Doc. 111, 112, & 113.

[¶17] On March 22, 2012, a paralegal with the last name of "Engel" from attorney Gaustad's office drove to Feltman's home to obtain signatures on the Settlement Agreement even though there were the same ongoing Chase Bank issues with the loans and credit reporting. [**APP 118, Doc. 159**] - Affidavit of Roger Feltman, ¶45. That same day, Gaustad emailed Bryant and Brakke the confidential settlement agreement signed by the Feltmans noting, "*Upon receipt of*

the signed stipulation for dismissal and satisfaction of the conditions, as noted in paragraph 8, I will then submit the document to the Court, along with the order and judgment for dismissal." See Doc. 119 -Exhibit 50.

[¶18] On April 10, 2012 Bryant sent a letter to Gaustad with the Chase letter on letterhead, and a check in the amount of $30,000.00 payable to Pearson, Christensen & Clapp, PLLP. See Doc. 124 & 125. On April 12, 2012 Gaustad provides Feltman with the Chase letter noting all the requirements of the Settlement Agreement have been fulfilled and that he would be filing the Stipulation to Dismiss the lawsuit. See Doc. 126. Feltman notified Gaustad that he was not comfortable dismissing the lawsuit as there were ongoing issues with Chase Bank and his loans. [**APP 118, Doc. 159**]. Regardless of Feltman's discomfort Gaustad signed and filed the Stipulation to Dismiss and the Order for Dismissal was then signed by the Court on April 13, 2012 dismissing the Feltman case in Federal Court. [**APP 115, Doc. 127**].

[¶19] Feltman continued to have the same issues with Chase regarding the escrow and force placed insurance. Further, Feltman was still not receiving correct payment invoices from Chase. Gaustad was fully aware of these issues and Paragraph 8 of the Settlement Agreement which stated that the Stipulation to Dismiss was not to be filed until all the terms were complete. [**APP 102, Doc. 121**]. On April 30, 2012, only 17 days after dismissing the Feltman case, Engel emailed Bryant noting that Feltman had not received the new loan statements on any of their loans and Chase continued to send statements that contained

escrows. [**APP 118, Doc. 159**]. From May 2, 2012 to June 15, 2012 Gaustad continued to email Chase regarding the unchanged and ongoing loan issues notifying Chase of its continued failure to comply with the terms of the Settlement Agreement. On Friday, June 29, 2012, Gaustad sent Bryant an email outlining the same loan insurance issues and noncompliance with the Settlement Agreement. See Doc. 86. Gaustad, in a communication to Chase, states that "*absent quick resolution by Chase of their inability to comply with the terms of the settlement Agreement, my clients will be forced to pursue all available remedies including an enforcement of action against Chase to compel their compliance with the agreement*." Id. Chase replied they were "*diligently looking into this…and any failure to comply …is completely unintentional*." See Doc. 87.

[¶20] Only three months after dismissing the Federal case, Feltman was in worse shape than when Gaustad was hired in 2004, but lacked a remedy as the federal case was dismissed with prejudice and Gaustad had effectively relieved Chase from any legal duty to comply with the Settlement and Release Agreement in doing so.

[¶21] On February 5, 2013 Daniel L. Johnson, Vice President of First United Bank wrote a letter demonstrating that Chase continued to negatively impact Feltman's credit. [**APP 78, Doc. 89**]. On April 4, 2013 Gaustad wrote another letter to Chase and Bryant requesting mortgage transactions dating back to January 1, 2011 as he was going to conduct an audit. [**APP 79-80, Doc. 90**]-Exhibit 67. Gaustad referenced the Real Estate Settlement Procedures Act requiring this

information be provided within 30 days. On May 7, 2013, nearly a year and one half (1½) after the Settlement Conference, Gaustad met with Feltman to decide whether to commence a new action against Chase in Federal court, or wait for Chase to commence a foreclosure action in Walsh County. When Feltman expressed his frustration with Gaustad in dismissing their initial suit prior to all the terms of the Settlement and Release Agreement being met, Gaustad asked Feltman to decide whether he wanted continued representation from Gaustad. [**APP 118, Doc. 159**]; see also, **[APP 82, Doc. 91]**.

[¶22] In July 2013 Feltman decided to retain additional legal counsel and hire attorney, David K TeSelle, "TeSelle" out of Colorado. TeSelle notified Feltman, "*this does not sound like a bank who just has an internal communications problem who intends to fix things as Mr. Gaustad said, but instead sounds like a bank who fully intends to foreclose.*" TeSelle was right as on July 8, 2013 Feltman received a Notice Before Foreclosure from Chase. See **[APP 85, Doc. 93]**. On August 12, 2013 Feltman received an Acceleration Warning (Notice of Intent to Foreclose) stating he was in Default again. See **[APP 89, Doc. 94]**.

[¶23] In January 2014, Feltman, with the assistance of Dan Johnson of United Bank, was finally able to determine payoff amounts for the Chase loans and refinance. **[APP 118, Doc. 159]**. In order to do so, Feltman agreed to pay fees and penalties to Chase regardless of the purported Settlement and Release Agreement promises. Id. At the time of refinancing Feltman was able to secure additional funding to pay his Colorado attorney Dave TeSelle as well as paying

an additional $30,000 to Gaustad for attorney's fees owed. **[APP 118, Doc. 159]**

Affidavit of Roger Feltman, at ¶74.

[¶24] LAW AND ARGUMENT

I. The District Court erred as a matter of law by entering summary judgment against the appellants where defendant Attorney Gaustad had effectively abandoned his client by precipitously dismissing with prejudice his clients' (Appellants') underlying federal district court litigation[3] -- thereby facilitating an unauthorized modification of the agreement with the lender bank defendants in the underlying case by Gaustad's conduct where Gaustad had left four (4) mandatory express conditions precedent to the effectuation of the settlement agreement in the litigation unsatisfied – important conditions precedent which would have inured to Feltman's material benefit[4] – conditions with which the banks never did comply and an order of dismissal with prejudice relieved them thereof after Gaustad had first diverted $30,000 in settlement funds to himself as "attorney's fees" immediately prior to prematurely dismissing the case.

A. The plaintiff's only remedy in this case is against the Pearson Christensen law firm defendants – not against the settling banks in the underlying federal court litigation – because defendant attorney Gaustad acted improperly as the plaintiff's counsel displaying "apparent authority" by effectively "modifying" the terms of the settlement agreement by Gaustad's conduct – to the serious disadvantage of the plaintiffs.

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[3] See, *Feltman v. Wash. Mut. Bank, FA*, No. 2:07-cv-59, 2008 U.S. Dist. LEXIS 14678, 2008 WL 544991 (D.N.D. Feb. 27, 2008).

[4] See, ¶8 of the Confidential Settlement and Release Agreement, which provides as follows:

> 8. Dismissal of Federal Litigation. ***Within 10 days* of the completion *of the* items delineated in Paragraphs 2-6 above**, the Feltmans shall cause the Federal Litigation to be dismissed, with prejudice, by filing the required number of copies of such dismissal with the Court, and shall forward a copy of the dismissal to legal counsel for Chase and FDIC-R. The parties agree that they shall each bear their own respective costs, expenses and attorneys' fees associated with the Federal Litigation. [**App 102; Doc. 121**] (emphasis added).

[¶25] In a foundational error in the proceedings below, the District Court in its written summary judgment decision in this case stated – **quite incorrectly** -- that, "(a)ll of the alleged failures listed by Feltman occurred prior to the execution of the Settlement Agreement." "Order on Motions for Summary Judgment", etc., **[APP 209; Doc. 214].**

[¶26] The District Court then went on to state, incorrectly, as follows:

> [¶39] The only post-Settlement Agreement failure asserted by Feltman relates to the stipulation and order for dismissal. Feltman concludes that "the proximate cause of damage in this matter is both Gaustad's failure to act as well as the actions taken by Gaustad that clearly were negligent and a breach of Gaustad's duty to the Plaintiffs." *Id.* at ¶44. Feltman argues further that Gaustad "was supposed to ensure compliance from Chase (Bank) prior to the case being dismissed in Federal Court", which, he concludes, "demonstrates the proximate cause of continued emotional distress, credit problems, legal fees, the ruination of Feltman's contracting business." *Id.* at ¶45. **Feltman has not pointed the Court to any authority stating that an attorney has a duty to ensure compliance with a settlement reached by the parties**. (*emphasis added*).
>
> "Order on Motions for Summary Judgment", etc., slip opinion at ¶39, pages 13-14, **[App 221-222, Doc. 214]**.

[¶27] In so holding, the District Court seriously miscast the true nature and actual legal significance of attorney Gaustad's actions and professional conduct, and in so doing, committed reversible error. As narrated above herein, defendant attorney Gaustad was serving as the Feltman plaintiffs' legal counsel on March 22, 2012, when an agreement was entered into between the Feltman plaintiffs and the banking/lender defendants to resolve and finally bring to an end the long-

running, underlying federal court litigation.[5] See, the "Confidential Settlement and Release Agreement", at **[App 102, Doc. 121].**

[¶28] Vitally important and highly material to this settlement agreement were six (6) paragraphs appearing at ¶¶ 2 through 6, and ¶8, appearing on pages 4 through 6 of the document. *Id*. at **Appx. 105-107**. These key contractual terms of the "Confidential Settlement and Release Agreement" provided as follows:

> 2. Payment by Chase to Feltmans. Chase agrees to pay to the Feltmans' and their legal counsel the sum of $30,000 within 30 business days of receiving the Feltmans' full and completed execution of this Settlement Agreement along with any W-9 forms required by Chase. Chase will report this payment by IRS form 1099. The Feltman's acknowledge and agree that they are solely responsible for the payment of any and all federal, state, city, or local taxes which may be due and owing as a result of payments made by Chase or due to any term contained in this Settlement Agreement.
>
> 3. Credit Correction. Chase agrees, within 30 business days of the date of this fully executed Settlement Agreement, to make a request to Experian, Equifax TransUnion, LLC via Chase's electronic credit reporting system (e-oscar), that Experian, Equifax and TransUnion on the Feltmans' credit reports associated with the Loans. Chase makes no representations or warranties as to whether or how long it may take Experian, Equifax, and TransUnion to honor this request. Chase will provide the Feltmans' with a copy of the AUD Form associated with thee-oscar request described in this paragraph and confirm to the Feltmans' that it made this request. In addition, Chase shall provide to the Feltmans' a letter, on Chase letterhead, that will state a dispute regarding the Loans and Properties arose which has been resolved, and that Chase has requested that any derogatory credit reporting on the Feltmans' credit reports associated with the Loans be deleted. Notwithstanding the confidentiality provisions found at Paragraph 9, the Feltmans shall be permitted to disclose and publish this letter from Chase and the AUD form associated with the e-oscar request to any person, association, organization or

[5] *Feltman v. Wash. Mut. Bank, FA*, No. 2:07-cv-59, 2008 U.S. Dist. LEXIS 14678, 2008 WL 544991 (D.N.D. Feb. 27, 2008).

entity as may be necessary for the Feltmans' to obtain credit, bonding or other matters relating to their business operations.

4. Escrow Accounts. All negative escrow balances associated with the Loans will be forgiven by Chase and all positive escrow balances associated with the Loans shall be refunded to the Feltmans.

5. Accrued Interest and Late Fees. All accrued late interest and late fees associated with the Loans as of the date of this fully executed Settlement Agreement shall be forgiven and the Loans will be deemed to be current. The Feltmans shall remain responsible for repaying all unpaid principal balances associated with the Loans at the interest rates prescribed by the applicable Loan notes.

6. Future Waiver of Escrow. With respect to the Loans for which Chase is the investor, Chase will waive any escrow requirements associated with those Loans from the date of this fully executed Settlement Agreement and thereafter the monthly payments for the Loans will be adjusted accordingly. With respect to the Loans for which Fannie Mae is the investor, Chase will make a request to Fannie Mae for those Loans to be non-escrowed. Chase makes no representations or warranties that Fannie Mae will agree to this request, and the Feltmans shall abide by Fannie Mae's decision in response to this request. For any Loans that become non-escrowed, the Feltmans shall remain responsible for, without limitation, the payment of all taxes and insurance, and the Feltmans shall provide proof of insurance and payment of all taxes associated with the loans and the properties on a timely basis going forward as required by Chase and/or Fannie Mae . . . . . .

8. Dismissal of Federal Litigation. Within 10 days of the completion of the items delineated in Paragraphs 2-6 above, the Feltmans shall cause the Federal Litigation to be dismissed, with prejudice, by filing the required number of copies of such dismissal with the Court, and shall forward a copy of the dismissal to legal counsel for Chase and FDIC-R. The parties agree that they shall each bear their own respective costs, expenses and attorneys' fees associated with the Federal Litigation. (*emphasis added*).

"Confidential Settlement and Release Agreement", at ¶¶ 2-6 and 8, **[APP 102, Doc. 121], Appx. 105-107.**

[¶29] On April 10, 2012 Bryant [counsel for Chase Bank] sent a letter to attorney Gaustad with the Chase correspondence on Chase Bank letterhead, and a check in the amount of $30,000.00 payable to Pearson, Christensen & Clapp, PLLP. See Doc. 124 & 125.

[¶30] On April 12, 2012 **Gaustad provided Feltman with the Chase letter falsely stating that all the requirements of the Settlement Agreement have been fulfilled and that he would be filing the Stipulation to Dismiss the lawsuit**. See Doc. 126.

[¶31] Feltman expressly notified attorney Gaustad that he was not comfortable dismissing the lawsuit as there were ongoing issues with Chase. [**APP 118, Doc. 159**] - Affidavit of Roger Feltman, at ¶52.

[¶32] Nevertheless, the stipulated-to Order for Dismissal was signed on April 13, 2012 dismissing the Feltman case in Federal Court. **[APP 115, Doc. 127].** Gaustad not Feltman signed the stipulation to dismiss the federal litigation. **Feltman continued to have the same issues with Chase regarding the escrow and force-placed insurance. Further, Feltman was still not receiving correct payment invoices. Gaustad was fully aware of these issues and Paragraph 8 of the Settlement Agreement which stated that the Stipulation to Dismiss was not to be filed until all the terms were complete. [APP 102, Doc. 121].**

[¶33] Chase Bank had paid the $30,000.00 with a check made payable to the Pearson Christensen firm – with attorney Gaustad having thereafter taken the funds in their entirety as attorney's fees – and where Gaustad had then signed a

stipulation effectuating the dismissal of the Feltman federal court action "with prejudice" – **incredibly, the terms in of the "Confidential Settlement and Release Agreement**", at ¶¶ 3-6 & 8, **[APP 102, Doc. 121]**, **Appx. 105-107, were abrogated by attorney Gaustad in an act which actually constituted "implied modification" of the settlement agreement contract "by (Gaustad's) conduct" as Gaustad acted – as to the "bank lender defendants" – with "apparent authority", as Feltman and his interests were cast adrift by Gaustad.**

[¶34] The presumption of "apparent authority" which is accorded to an attorney who purports to act on behalf of his or her clients in North Dakota is extremely broad indeed. As the North Dakota Supreme Court explained in *Hoffman v. Hoffman*, 2003 ND 161, 670 N.W.2d 500 (N.D. 2003):

> [*P18] **Generally, a lawyer need only claim he is acting on behalf of an individual for third parties to presume the attorney possesses the necessary authority to act on behalf of a client**. Charles W. Wolfram, *Modern Legal Ethics* 150 (1986). "When a lawyer's **apparent authority** is in question, what reasonably appears calculated to advance the client's objectives must be determined from the third person's viewpoint." Restatement (Third) of the Law Governing Lawyers § 27 cmt c. **If an attorney purports to represent an individual to the adverse party, that party is justified in presuming an attorney-client relationship**. (*emphasis added*).
>
> 2003 ND 161 at ¶18; 670 N.W.2d at 504

[¶35] While ¶19 of the "Confidential Settlement and Release Agreement", at **[APP 102, Doc. 121]**, **Appx. at 110,** contains the standard language that, "(t)his Settlement may not be enlarged, modified or altered, except in writing signed by all parties hereto expressly referencing it", the post-signing conduct of Chase

Bank by paying the $30,000.00 and ignoring the contract terms in ¶¶ 3-6 & 8, **[APP 102, Doc. 121]**, **Appx. 105-107**, after signing the Confidential Settlement Agreement – and the post-signing conduct of attorney Gaustad by his abandonment of his client's contractual rights in those same paragraphs of the Agreement – constituted an implied modification of the terms of the contract to the substantial detriment of his Feltman client – notwithstanding the provisions of ¶19 of the Agreement.

[¶36] As a California appellate court explained in this setting, by extensive reference to *Williston on Contracts* treatise:

> **Waiver of a contractual right is ordinarily a question of fact to be determined by a jury or the trial court if there is no jury** . . . . .
>
> *13 Williston on Contracts* (4th ed. 2000) § 39:14, pp. 558-562 (Williston) [waiver of contract rights may be express or implied through conduct].)
>
> Williston observes: "It is generally accepted that the parties to a contract who are to benefit from its terms and conditions may, by their mutual agreement, waive those conditions and terms. An implied waiver . . . occurs by mutual agreement when the parties, through their conduct, manifest an intent to be bound by the contract, even though the stated condition precedent [or other term] has not been satisfied." (Williston, *supra*, § 39:23, p. 597, fns. omitted.) Furthermore, "the vast majority of courts maintain that a party may, by words or conduct, waive a provision in a contract [that] was inserted for his or her benefit, and that no consideration is necessary for such a waiver to be effective." (Williston, *supra*, § 39:25, p. 610, fn. omitted.) "In the case of a true waiver implied in fact from conduct, the intent to waive must be clearly manifested or the conduct must be such that an intent to waive may be reasonably inferred." (Williston, *supra*, § 39:28, p. 625, fns. omitted.)
>
> **The presence of a contract provision excluding modifications except by a signed writing does not prevent parties from waiving that provision by conduct antithetical to that term**.. . . . . .
>
> **When combined with conduct constituting a waiver of a written**

> **modifications clause, parties are free to otherwise modify their contract by conduct inconsistent with its terms**. "**An agreement to modify a written contract will be implied if the conduct of the parties is inconsistent with the written contract so as to warrant the conclusion that the parties intended to modify it**." (*Daugherty Co. v. Kimberly-Clark Corp*. (1971) 14 Cal. App. 3d 151, 158, 92 Cal. Rptr. 120; *Garrison v. Edward Brown & Sons* (1944) 25 Cal.2d 473, 479 ["**Before a contract modifying a written contract can be implied, the conduct of the parties according to the findings of the trial court must be inconsistent with the written contract so as to warrant the conclusion that the parties intended to modify the written contract**"]; *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1038 [same]; see also *Wagner v. Glendale Adventist Medical Center* (1989) 216 Cal. App. 3d 1379, 1388, 265 Cal. Rptr. 412 (*Wagner*). (*emphasis added*).
>
> *Holmes **v**. Ministerios De Amistad, Inc*., 2004 Cal. App. Unpub. LEXIS 7476; 2004 WL 1789635, **28-34 (Cal. App. August 11, 2004)

[¶37] This is the general rule. It is clear that a contractual provision providing that any modification must be made in writing "may be expressly or impliedly waived by the clear conduct or agreement of the parties or their duly authorized representatives." *Home Owners Constr. Co. v. Borough of Glen Rock*, 34 N.J. 305, 169 A.2d 129, 135 (N.J. 1961). **The parties may agree to a modification** "through words, creating an express contract, or **by conduct, creating a contract implied-in-fact**." (*emphasis added*). *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 608 A.2d 280, 284 (N.J. 1992) **(**citing Restatement (Second) of Contracts § 19(1) (1981))**.**

[¶38] As the federal district court explained in *G.P.P., Inc. v. Guardian Prot. Produc*ts, , 2017 U.S. Dist. LEXIS 70848, **19-20 (E.D. Cal. May 9, 2017):

> "**California contract law recognizes the principle of implied modification by conduct**." *GE Capital Corp. v. MSI Modular Sys.*, Case No. CV 14-09873-RGK (JEMx), 2015 U.S. Dist. LEXIS 185053, 2015 WL 11438597, at *2 (C.D. Cal. Aug. 17, 2015) (citing *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 109 Cal. App. 4th 1020, 1038, 135 Cal. Rptr. 2d 736 (2003), *disagreed with on other grounds by Simon v. San Paolo U.S. Holding*

> *Co.*, 35 Cal. 4th 1159, 1182-83, 29 Cal. Rptr. 3d 379, 113 P.3d 63 (2005)); *see also* Cal. Com. Code § 1303(f) **("[A] course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.**"). *See generally Emp'rs Reinsurance Co. v. Superior Court*, 161 Cal. App. 4th 906, 920-21, 74 Cal. Rptr. 3d 733 (2008) ("**Not only is course of performance relevant in ascertaining the meaning of the parties' agreement, it may supplement or qualify the terms of the agreement, or show a waiver or modification of any term inconsistent with the course of performance**." (citations omitted)). "**When one party has, through oral representations and conduct or custom, subsequently behaved in a manner antithetical to one or more terms of an express written contract, he or she has induced the other party to rely on the representations and conduct or custom.**" *Wagner v. Glendale Adventist Med. Ctr.*, 216 Cal. App. 3d 1379, 1388, 265 Cal. Rptr. 412 (1989). "In that circumstance, it would be . . . inequitable to deny the relying party the benefit of the other party's apparent modification of the written contract." *Id.*
>
> Thus, "where the subsequent conduct of parties is inconsistent with and clearly contrary to provisions of the written agreement, the parties' modification setting aside the written provisions will be implied." *Diamond Woodworks, Inc.*, 109 Cal. App. 4th at 1038 (citing *Garrison v. Edward Brown & Sons*, 25 Cal. 2d 473, 479, 154 P.2d 377 (1944)). Indeed, "a written agreement may be modified by the parties' conduct, even if the written agreement includes a clause expressly prohibiting modification." *Alvarado Orthopedic Research, L.P. v. Linvatec Corp.*, No. 11-CV-246-IEG (RBB), 2013 U.S. Dist. LEXIS 74072, 2013 WL 2351814, at *4 (S.D. Cal. May 24, 2013). (*emphasis added*).
>
> 2017 U.S. Dist. LEXIS 70848 at **19-20

[¶39] Attorney Gaustad – as to the Chase Bank defendant settling party in the underlying federal court action – possessed "apparent authority" to effectuate "modification" of the "Confidential Settlement Agreement" contract – to the extreme detriment of his client, Feltman.

[¶40] Under these circumstances, attorney Gaustad effectively abandoned his client's interests and original contract rights in ¶¶ 3-6 & 8, **[APP 102, Doc. 121]**, **Appx. 105-107** of the Confidential Settlement Agreement. This constituted

abandonment by attorney Gaustad of his client's interests amounting to attorney negligence.

[¶41] Attorney Gaustad was never authorized by his client Feltman to abandon Feltman's rights in ¶¶ 3-6 & 8, **[APP 102, Doc. 121]**, **Appx. 105-107** of the Confidential Settlement Agreement. By collecting the $30,000.00 payment from Chase Bank – which directly inured to Gaustad's own benefit as the funds ostensibly payable to client Feltman were converted to attorney's fees by Gaustad – and by immediately thereafter stipulating with Chase Bank to dismiss the case – Gaustad left Feltman to be injured by Chase Bank – post-settlement – as described above.

[¶42] For its part, Chase Bank refused to comply and satisfy the terms set forth in ¶¶ 3-6 & 8 of the Confidential Settlement Agreement – clearly considering that these paragraphs in the agreement had been rendered meaningless and of no effect as a result of Attorney Gaustad's joinder with Chase in disregarding the terms set forth in these paragraphs.

[¶43] Gaustad was granted no actual authority by his client Feltman to join with Chase Bank in "impliedly modifying" the Confidential Settlement Agreement by conduct. Indeed, "(t)he mere retainer of an attorney does not clothe (the attorney) with authority to . . . alter the terms of a contract or act otherwise beyond the scope of his actual or apparent authority." *Ashworth v. Hankins*, 452 S.W.2d 838, 841 (Ark. 1970).

[¶44] Finally, the matter of whether such an "implied modification" of the Confidential Settlement Agreement by conduct had occurred was a genuine issue of material fact, ill-suited for adjudication by entry of summary judgment.

[¶45] The District Court's decision granting summary judgment in this case was thus reversible error. Summary judgment was improper in this case, which should remanded to the District Court for a determination of this case upon its merits.

II. The District Court erred by entering summary judgment in the law firm defendants' favor while mistakenly concluding that all of the appellant's allegations of professional negligence related solely to events which had occurred prior to the date on which the March 22, 2012, "Settlement and Release Agreement" was executed whereby the underlying federal litigation captioned *Feltman v. Wash. Mut. Bank, FA*, No. 2:07-cv-59, 2008 U.S. Dist. LEXIS 14678, 2008 WL 544991 (D.N.D. Feb. 27, 2008) was dismissed with prejudice and as such "are not properly a part of this lawsuit".

[¶46] The District Court's Order on Motions for Summary Judgment improperly denied Plaintiff/Appellants' requested relief and wrongly dismissed the Plaintiff/Appellants' entire cause of action.

A. Appellants' Summary Judgment Motion relative to Gaustad's liability should be granted as Gaustad's actions were so egregious and obvious they constitute legal malpractice as a matter of law.

[¶47] In legal malpractice action, Gaustad's conduct was so egregious and obvious that a layperson could evaluate the breach of duty meeting the general exception to the requirement of expert testimony. *Wastvedt v. Vaaler*, 430 N.W.2d 561, 564-65 (N.D. 1988); *Larson v. Norkot Mfg., Inc.*, 2002 ND 175, P10, 653 N.W.2d 33 (quotation omitted). *See also*, *Meyer v. Maus*, 2001 ND 87, ¶ 14, 626 N.W.2d 281,

286-87. "Prohibition against self-dealing lies at the heart of the fiduciary relationship." *Burlington Northern and Sante Fe Ry. Co. v. Burling Resources Oil & Gas Co.,* 590 N.W.2d 433, 438 (N.D. 1999). Essentially, there is a "presumption that self-dealing is not proper and the burden is on the fiduciary to show it was." *Renaissance Academy for Math and Science of Missouri, Inc. v. Imagine Schools, Inc.*, 2014 WL 7267011, 4 (2014). Here as aptly noted above Gaustad, by collecting the $30,000.00 payment from Chase Bank – which directly inured to Gaustad's own benefit as the funds ostensibly payable to client Feltman were converted to attorney's fees by Gaustad – and by immediately thereafter stipulating with Chase Bank to dismiss the case – Gaustad left Feltman to be injured by Chase Bank – post-settlement – as described above.

[¶48] For its part, Chase Bank refused to comply and satisfy the terms set forth in ¶¶ 3-6 & 8 of the Confidential Settlement Agreement – clearly considering that these paragraphs in the agreement had been rendered meaningless and of no effect as a result of Attorney Gaustad's joinder with Chase in disregarding the terms set forth in these paragraphs.

[¶49] The facts introduced clearly show that counsel for Chase Bank sent a letter to attorney Gaustad with the Chase correspondence on Chase Bank letterhead, and a check in the amount of $30,000.00 payable to Pearson, Christensen & Clapp, PLLP. See Doc. 124 & 125. It is further provided that Gaustad provided Feltman with the Chase letter stating he would be filing the Stipulation to Dismiss the lawsuit. See Doc. 126. Feltman expressly notified attorney Gaustad

that he was not comfortable dismissing the lawsuit as there were ongoing issues with Chase. [**APP 118, Doc. 159**]. Nevertheless, the stipulated-to Order for Dismissal was signed on April 13, 2012 dismissing the Feltman case in Federal Court. [**APP 115, Doc. 127**].

[¶50] The record clearly reflects the fact that Feltman, with Gaustad's full and complete knowledge, continued to have the same issues that prompted both the litigation and settlement with Chase Bank and its predecessor. Further, Feltman was still not receiving correct payment invoices and receiving foreclosure notices. **Gaustad was fully aware of these issues and Paragraph 8 of the Settlement Agreement which stated that the Stipulation to Dismiss was not to be filed until all the terms were complete**. [**APP 102, Doc. 121**].

[¶51] So, while Chase Bank had paid the $30,000.00 with a check made payable to the Pearson Christensen firm – with attorney Gaustad having thereafter taken the funds in their entirety as attorney's fees – and where Gaustad had then signed a stipulation effectuating the dismissal of the Feltman federal court action "with prejudice" while incredibly, the terms in of the "Confidential Settlement and Release Agreement", at ¶¶ 3-6 & 8, [**APP 102, Doc. 121**], **Appx. 105-107,** were abrogated by attorney Gaustad in an act which relieved the "bank lender defendants" with any further duty and as a practical matter Feltman and his interests were cast aside.

B. Attorney Fees Damage

[¶52] Feltman has provided a demonstrated record of damages due to Gaustad's actions in the underlying matter. Of special import is the damage category of attorney fees that are being requested by Appellants'. Given the demonstrated conduct of Gaustad disgorgement of the fees paid to Gaustad in the underlying litigation to include those fees paid **before** and **after** the execution of the Settlement and Release Agreement are recoverable damages in this matter. Further, Gaustad's mishandling of the Plaintiffs' claims, causes of action, and defenses is the proximate cause of the Plaintiffs incurred legal fees at the subsequent law firm Burg Simpson and as such the District Court committed reversible error in disallowing as an item of damage suffered by Feltman the amount of attorney's fees paid to the Burg Simpson law firm to remedy the improper actions of Gaustad. A recent California Appellate Court states almost verbatim the sentiment of this Court as stated in in *Olson v. Fraase*, 421 N.W.2d 820 (N.D. 1988) wherein the North Dakota Supreme Court states:

> We recognize that some courts have held that where a client is required to engage new counsel for a separate action proximately resulting from his attorney's negligence, reasonable attorney fees incurred in the separate action may be awarded in a legal malpractice action as an item of special damages. *See First Nat'l Bank of Clovis v. Diane, Inc.*, 102 N.M. 548, 698 P.2d 5, 12 (Ct.App. 1985), and cases cited therein; Annot., 45 A.L.R.2d 62, § 4 (1956). Stated otherwise, attorney fees are awardable where the wrongful act has forced the aggrieved person into litigation with a third party (as a result of the defendant's wrongful act). *See Blair v. Boulger*, 336 N.W.2d 337, 340 (N.D.), *cert. denied*, 464 U.S. 995, 104 S. Ct. 491, 78 L. Ed. 2d 685 (1983) ["One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover

> reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action." (quoting Restatement of Torts 2d § 914(2))].
>
> *Olson v. Fraase*, 421 N.W.2d 820, 829 (N.D. 1988).

[¶53] The California Appellate Court in *Simke, Chodos, Silberfeld & Anteau, Inc. v. Athans*, 195 Cal. App. 4th 1275, 128 Cal. Rptr. 3d 95, (2011) held:

> Generally, damages do not include attorney fees incurred and sought in the present litigation, although fees incurred in a prior action and sought by a client in a subsequent legal malpractice case are considered damages and must be stated by amount in the complaint. (See *Huckell v. Matranga* (1979) 99 Cal.App.3d 471, 482–483 [160 Cal. Rptr. 177] [attorney fees are not ordinarily damages]; *Lynch v. Warwick* (2002) 95 Cal.App.4th 267, 269–270 & fn. 1 [115 Cal. Rptr. 2d 391] [attorney fees incurred in prior representation and sought in subsequent legal malpractice case are damages]; *Akin, Gump, Strauss, Hauer & Feld v. NDR* (Tex. 2009) 299 S.W.3d 106, 119–122 [same]; *John Kohl & Co. P.C. v. Dearborn & Ewing* (Tenn. 1998) 977 S.W.2d 528, 534 [same]; *Sorenson v. Fio Rito* (1980) 90 Ill.App.3d 368, 371–374 [45 Ill. Dec. 714, 413 N.E.2d 47] [defendant-attorney's malpractice permitted client to recover as damages the attorney fees paid to second attorney to correct defendant's mistake].)
> *Simke, Chodos, Silberfeld & Anteau, Inc. v. Athans*, 195 Cal. App. 4th 1275, 1288, 128 Cal. Rptr. 3d 95, 104 (2011)

[¶54] The Appellants' have presented a viable claim for damages in both disgorging Gaustad's attorney's fees as well as the attorney's fees of the law firm hired to right Gaustad's wrongs relative to the underlying litigation. The District Court committed error in failing to recognize these damages.

C. Negligent Infliction of Emotional Distress

[¶55] Gaustad was fully aware of the emotional toll on Plaintiffs as he hired and charged for an Expert, Patricia J. Aletky, of Minneapolis Clinic of Neurology, to prove emotional damage to Feltman. See Doc. 100. On April 24, 2009, the

Feltmans met with Aletky who found Feltman(s) "*have been profoundly affected in a negative way in virtually every aspect of [our] lives by this ongoing matter*" and that this situation, "*adversely affected [our] quality of life on a daily basis*." Id. Gaustad advised Feltman that Dr. Aletky's testimony would have a "*significant impact*" on the case. See **[APP 118, Doc. 159]** Affidavit of Roger Feltman, ¶¶ 6P, 25.

[¶56] Liability against Gaustad and an award of damages both pre and post Settlement and Release Agreement for the emotional distress of Feltman is available as a damage given the facts in this case:

> Turning more to the cause of action in this case, we have thus far refrained from actually holding emotional distress damages may be awarded for legal malpractice. *See id.* at 423. In *Lawrence*, a plaintiff brought a legal malpractice action against his attorney in a bankruptcy action who negligently failed to disclose in the bankruptcy questionnaire and schedules a settlement that the plaintiff had entered into with a business associate within a year prior to the bankruptcy. *Id.* at 416. … . ***Nonetheless, we observed, "in 'special cases involving peculiarly personal subject matters' do the majority of jurisdictions recognize that mental anguish may be a foreseeable damage resulting from attorney negligence***." *Id.* (quoting *Selsnick v. Horton*, 96 Nev. 944, 620 P.2d 1256, 1257 (Nev. 1980)).
>
> …
>
> The *Lawrence* majority drew a dissent from Justice Carter. Justice Carter disagreed slightly with the legal framework, arguing the physical injury requirement is justified for certain reasons; and in situations in which the reasons underlying the rule do not apply, the rule should not either. *Id.* at 423-24 (Carter, J., dissenting). The primary focus of Justice Carter's dissent was a pointed disagreement with the conclusion the majority reached. Justice Carter wrote:
>
> Lawyers are hired for the very purpose of assisting their clients in avoiding the harsh consequences, including emotional consequences, that frequently attend a failure to observe legal requirements. In the present case, the jury could have found that the defendant's negligent actions in filling out bankruptcy schedules made it appear that the client had committed a serious federal crime. This in turn led to indictment,

arrest and trial with the possibility of conviction and imprisonment—circumstances that by their very nature placed the client in a very stressful situation that continued over a lengthy period of time. The severe emotional impact that this would place on any normal person is neither trivial nor speculative. It would not, however, ordinarily produce a physical injury so as to be compensable under the general rule.

The present case meets both the "special relation of the actor" test applied in *Oswald* and the "unlikely occurrence of physical injury in connection with foreseeable emotional distress" test invoked in the *Mentzer* telegram case. The reasons for the general rule of nonliability advanced in section 436A of the Restatement do not fit the present controversy. The anxiety that would normally accompany the travail of being indicted, arrested, and tried for a serious federal crime is not in the realm of the trivial. A person subjected to those occurrences will not be subject to feigning emotional distress. These circumstances create a strong likelihood that such distress will occur and will exist throughout the entire period of the criminal proceeding.

Id. at 424.

…

Yet, we observe other courts have permitted awards of emotional distress damages when emotional distress is a natural and foreseeable consequence of a breach of contract or attorney malpractice. *See, e.g., Wagenmann v. Adams*, 829 F.2d 196, 221-22 (1st Cir. 1987) (applying Massachusetts law) (holding emotional distress damages are available when attorney negligence results in the client being "forcibly deprived of his liberty and dispatched to a mental hospital"); *Holliday*, 264 Cal. Rptr. at 455-56 (holding emotional distress damages were appropriate when plaintiff had been wrongfully convicted of manslaughter because of his trial attorney's negligence); *Person v. Behnke*, 242 Ill. App. 3d 933, 611 N.E.2d 1350, 1353, 183 Ill. Dec. 702 (Ill. App. Ct. 1993) ("We hold that a valid claim exists for noneconomic damages resulting from a plaintiff's loss of custody and visitation of his children which allegedly resulted from an attorney's negligence."); *Henderson v. Domingue*, 626 So. 2d 555, 559 (La. Ct. App. 1993); *Kohn v. Schiappa*, 281 N.J. Super. 235, 656 A.2d 1322, 1324 (N.J. Super. Ct. Law Div. 1995); *McEvoy v. Helikson*, 277 Ore. 781, 562 P.2d 540, 542, 544 (Or. 1977) (holding plaintiff could obtain emotional distress damages when attorney negligence surrounding divorce and child custody proceedings resulted in plaintiff's ex-wife fleeing to Switzerland with their child), *superseded by rule on other grounds as stated in Moore v. Willis*, 307 Ore. 254, 767 P.2d 62, 64 (Or. 1988); *see also Hilt*, 707 P.2d at 96 (stressing that the interest invaded in that case was

an economic one and that plaintiff could recoup that interest through ordinary compensatory damages); ***D. Dusty Rhoades & Laura W. Morgan, Symposium, Recovery for Emotional Distress Damages in Attorney Malpractice Actions, 45 S.C. L. Rev. 837, 845 (1994)*** ("When an attorney's negligence causes a client's loss of liberty, courts have been willing to step away from the general rule barring damages for emotional distress.").

…

In contrast, a court permitting emotional distress damages in a legal malpractice case surrounding unauthorized disclosure of information in an adoption proceeding said:

> Since no economic "claim" was impaired by counsel's alleged negligence, the "suit within a suit" framework typically utilized in adjudicating legal malpractice actions, has no application. Consequently, without the ability to seek redress for emotional distress damages, negligent counsel would have virtual immunity for any malpractice committed when retained for non-economic purposes. The unfairness of such a result is quickly manifest given the wide variety of attorney-client relationships other than adoption proceedings, which are not predicated upon economic interests. Drafting a living will, contested child custody or visitation disputes, criminal defense work, as well as numerous pursuits in the general equity courts are but a few examples. In such instances one would be unable to quantify any economic loss. On the other hand, severe mental and emotional distress, resulting from the loss of custody or visitation rights, or wrongful incarceration, is readily foreseeable.
>
> *Kohn*, 656 A.2d at 1324.

As the First Circuit declared,

> there is little room to doubt that the harm Wagenmann suffered due to Healy's bungling was real and significant, and that the injury was reasonably foreseeable under the circumstances. Any attorney in Healy's position should readily have anticipated the agonies attendant upon involuntary (and inappropriate) commitment to [a state hospital] and the subsequent stigma and fear associated with such a traumatic episode.
> . . .

> Were we to accept the notion that a client's recovery on the grim facts of a case such as this must be limited to purely economic loss, we would be doubly wrong. The negligent lawyer would receive the benefit of an enormous windfall, and the victimized client would be left without fair recourse in the face of ghastly wrongdoing. Despite having caused his client a substantial loss of liberty and exposed him to a consequent parade of horribles, counsel would effectively be immunized from liability because of the fortuity of the marketplace. That Healy was guilty of malpractice in the defense of commitment proceedings, rather than in the prosecution of a civil claim for damages, is no reason artificially to shield him from the condign consequences of his carelessness. We are not required by the law of the commonwealth, as we read it, to reach such an unjust result.
>
> *Wagenmann*, 829 F.2d at 222.

Miranda v. Said, 836 N.W.2d 8, 24-30, 2013 Iowa Sup. LEXIS 89, *41-56, 2013 WL 3794007 (Iowa July 19, 2013) (emphasis added)

[¶57] Clearly in this case Gaustad had actual knowledge of the likely emotional harm and effects to Feltman's physical health being suffered by the Plaintiff. The repair to Feltmans credit along with the relief from improper escrow calculations and force insured notices was at the very heart of the representation. The Settlement and Release Agreement ¶¶ 3-6 were core needs of the Appellants'. The evidence compiled by Gaustad in the underlying litigation supports the award of reputation and emotion distress damages:

> The Does also seek reputation damages and argue that these damages are compensable under negligence based on *Gillespie v. Klun*, ***in which we upheld a jury award for damage to plaintiffs' reputation and credit rating resulting from legal malpractice in a real-estate transaction***. 406 N.W.2d 547, 558 (Minn. App. 1987), *review denied* (Minn. July 9, 1987). Even assuming *Gillespie* stands for this premise, the Does offered

> nothing other than their own unsubstantiated statements to establish damage to their reputation. In *Gillespie*, the record established a good credit rating and business reputation before the transaction, which led to "financial disaster," loss of "life savings," and outstanding debt after the transaction. *Id.* at 557-58. The Does offered no evidence of their reputations before or after respondents' disclosure.
>
> *Doe v. Kmart Corp.*, No. A16-0465, 2017 Minn. App. Unpub. LEXIS 125, at *14-15 (Feb. 6, 2017) (emphasis added).

[¶58] Feltman has presented an actionable case of negligent infliction of emotional distress and the District Court's failure to recognize these facts is reversible error.

[¶59] CONCLUSION

[¶60] The District Court committed reversible error in failing to grant Appellants' Motion for Summary judgment and in dismissing this claim for legal malpractice against the law firm defendants.

Dated this 3rd day of October, 2019

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, in compliance with Rule 32(a)(8)(A). N.D.R.App.P., that the above brief contains 34 pages, including footnotes and endnotes but excluding any addendum, which is within the limit of 38 pages.

Dated this 10th day of October, 2019,

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CERTIFICATE OF SERVICE

I hereby certify that on the following documents:

1. **Initial Brief of Appellant (served on October 3, 2019);**
2. **Appendix of Appellant (served on October 2, 2019); and**
3. **Motion by Appellants' to File an Untimely Brief (served on October 3, 2019).**

were filed electronically with the Clerk of Court through the ELECTRONIC FILING PORTAL OF THE NORTH DAKOTA SUPREME COUIRT, with like service of the above listed documents to the following:

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Dated this 3rd day of October, 2019,

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2. **Appendix of Appellant;**

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