20190247
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 15, 2019
STATE OF NORTH DAKOTA

# In the Supreme Court
# State Of North Dakota

November 15, 2019

**Supreme Court No. 20190247**

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

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Roger Feltman and TRRP, LLC,

Plaintiff and Appellant,

v.

Daniel Gaustad and Pearson, Christensen & Clapp, PLLP,

Defendant and Appellee

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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

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## REPLY BRIEF OF PLAINTIFF AND APPELLANT

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**[¶1] ARGUMENT**

**A. Gaustad committed malpractice by dismissing the Feltman's lawsuit prior to the mandatory terms of that agreement were carried out and while on specific notice that the defendant banks were at that time taking contrary and identical adverse actions to the Feltmans in an identical fashion to those perpetrated by the defendant banks over the course of the eight year period of litigation that finally caused the Feltmans to enter into the settle agreement to end the horror of the financial evisceration subjected upon them.**

**[¶2]** Gaustad states as his initial argument that "Gaustad did not engage in legal malpractice by ***Stipulating to Dismiss*** Feltman's lawsuit because the Stipulation to Dismiss had no effect on Feltman's ability to commence a lawsuit for a breach of the Settlement Agreement". Appellee's Brief at pg. 9. (emphasis added, **Bold** and **ALL CAPS** in the original).

**[¶3]** Paragraph ¶8 of the Confidential Settlement and Release Agreement 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).

**[¶4]** The terms of the Settlement Agreement likewise released all causes of action and claim for damages leaving only the ability to commence a lawsuit to enforce the terms of the Settlement Agreement.

> 17. Non-Litigation Covenant. ***Except to enforce any obligation, term or conditions of this Settlement Agreement*** the parties agree that none of the parties shall in any manner challenge this Settlement Agreement. The parties agree not to sue or in any way assist or

> encourage any other person or entity in suing any of the parties hereto with respect to any claim released herein. The release ln this Settlement Agreement may be pleaded as a full and complete defense to, and may be used as the basis for an injunction against any action, suit or other proceeding which may be instituted, prosecuted or attempted in breach of this release contained herein. Notwithstanding the mutual releases found at Paragraphs 10, 11, 12 and 13 nothing in this Settlement Agreement is, nor shall it be deemed to be a release of the obligations, terms and conditions of this Settlement Agreement, and nothing herein shall in any manner limit or otherwise preclude the parties from commencing an action ***solely for the purpose of enforcing any obligation, term or condition of this Settlement Agreement***. [**App 109-10; Doc. 121**] (emphasis added).

**[¶5]** By operation of law the terms of the settlement agreement where fully satisfied upon Gaustad's act of filing the dismissal of the federal action subject to the terms of the Settlement Agreement. It appears Gaustad is arguing that it was not his responsibility to ensure that paragraphs 2-6 of the Settlement Agreement were fully satisfied before he was authorized to dismiss the Feltmans' federal action. Appellee's Brief in this matter misstates the true issue and attempts to deflect the legal malpractice perpetrated by Gaustad:

> The dismissal had no effect on Feltman's ability to enforce the settlement agreement since ***the settlement agreement, and a wealth of caselaw, dictates he could commence a lawsuit for a breach of the settlement agreement if he wanted to do so***. Therefore, Feltman's argument that he did not have a remedy when Gaustad dismissed the lawsuit is incorrect as a matter of law.
>
> Appellee's Brief at ¶21 (emphasis added).

**[¶6]** Feltmans, in fact, did not have a legal right to bring an action for beach of the Settlement Agreement as they completely released all claims not specifically mentioned in paragraph 17 of the Settlement Agreement:

10. Release by Feltmans of Chase. Upon full execution of this Settlement Agreement, the Feltman's release and forever discharge Chase of any and from any and all claims, demands, actions, causes of action, liabilities, suits, debts, sums of money, accounts, bonds, bills, covenants, contracts, controversies, agreements, promises, damages, and judgments whatsoever, state or federal, in law or equity, whether known or unknown, asserted or unasserted, suspected or unsuspected, which they may now have or claim to have against Chase, upon, or by reason of any matter, event, cause or thing whatsoever, arising out of, based in whole or in part upon, relating to, or existing by reason of the facts, circumstances, transactions, events, or occurrences, acts, omissions or failures to act, or whatever kind or character whatsoever, with respect to any and all matters relating to the loans and the properties as of the date of this Settlement Agreement. [**App 107; Doc. 121**].

**[¶7]** Further Gaustad by dismissing the action waived the condition precedent contained in the Settlement Agreement to the Feltman's detriment:

> "Waiver is a voluntary and intentional relinquishment or *abandonment* of a known advantage, benefit, claim, privilege, or right." *Sanders v. Gravel Prods., Inc.*, 2008 ND 161, ¶ 10, 755 N.W.2d 826 (citation omitted and emphasis added). This Court has specifically held that "[w]aiver may be established either by an express agreement *or by inference from acts or conduct*," even when a contract contains a clause requiring any waiver or modification of the contract must be in writing. ***Savre v. Santoyo*,** 2015 ND 170, ¶ 21, 865 N.W.2d 419 (citation omitted); *see also Estate of Kingston v. Kingston Farms P'ship*, 130 A.D.3d 1464, 13 N.Y.S.3d 748, 750 (N.Y. App. Div. 2015) ("Waiver of a contract right through abandonment may be established by 'affirmative conduct' of a contract party and, [g]enerally, the existence of an intent to forgo such a right is a question of fact." (internal quotation marks and citation omitted)); *Amerisure Mut. Ins. Co. v. Global Reinsurance Corp. of Am.*, 399 Ill. App. 3d 610, 927 N.E.2d 740, 747, 340 Ill. Dec. 1 (Ill. App. Ct. 2010) (HN6 "Waiver of a contract term may occur when a party conducts itself in a manner which is inconsistent with the subject clause, thereby indicating an abandonment of its contractual right." (citation omitted)). We have said that "the existence or absence of waiver is generally a question of fact." ***Savre*, at ¶ 20** (quoting *Sanders*, 2008 ND 161, ¶ 10, 755 N.W.2d 826).
>
> *Tschider v. Tschider*, 2019 ND 112, ¶ 26, 926 N.W.2d 126, 133-34

**[¶8]** In *Nat'l Union Fire Ins. v. Schwing Am., Inc.*, 446 N.W.2d 410 the Minnesota Supreme Court stated a condition precedent is:

> A condition precedent, as known in the law, is one which is to be performed before the agreement of the parties becomes operative. A condition precedent calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which its obligation is made to depend. *Lake Co. v. Molan*, 269 Minn. 490, 498-99, 131 N.W.2d 734, 740 (1964) (quoting *Chambers v. Northwestern Mutual Life Insurance Co.*, 64 Minn. 495, 497, 67 N.W. 367, 368 (1896)). When a contract contains a condition precedent, a party to the contract does not acquire any rights under the contract unless the condition occurs. *Aslakson v. Home Savings Association*, 416 N.W.2d 786, 789 (Minn. Ct. App. 1987).
>
> *Nat'l Union Fire Ins. v. Schwing Am., Inc.*, 446 N.W.2d 410, 412 (Minn. Ct. App. 1989)

**[¶9]** The legal significance of the March 22, 2012, agreement between the Feltman plaintiffs and the banking/lender defendants to resolve and finally bring to an end the long-running, underlying federal court litigation was to ensure that the Feltmans would fully recognize and receive the benefits of the bargain before the federal action was to be dismissed.[1] See, the "Confidential Settlement and Release Agreement", at **[App 102, Doc. 121].**

**[¶10]** Vitally important and highly material to the Feltmans were six (6) paragraphs appearing at ¶¶ 2 through 6, and ¶8, appearing on pages 4 through 6 of the document. *Id.* at [**App. 105-107**].

**[¶11]** Prior to Gaustad signing and filing the stipulation to dismiss the federal action Feltman expressly notified Gaustad that he was not comfortable

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[1] *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).

dismissing the lawsuit as there were ongoing issues with Chase. [**APP 118, Doc. 159**] - Affidavit of Roger Feltman, at ¶52.

**[¶12]** 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**].

**[¶13]** 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.

**[¶14]** 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]**.

**[¶15]** 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.

**[¶16]** Feltman was well aware of the futility of litigation against Chase Bank even if he had the right to do so which he did not as explained above. The importance of requiring the full performance of the Settlement Agreement prior to dismissing the federal action cannot be over stated under the facts of this case.

B. **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.**

**[¶17]** 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.

**[¶18]** In the face of a record which clearly reflects Gaustad's full and complete knowledge of the continued issues that had been the subject matter of the prior eight years of litigation that prompted the Feltmans' feeling that settlement was the only way out of the financial ruin imposed upon them. 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**].

**C. Negligent Infliction of Emotional Distress**

**[¶19]** Gaustad erroneously attempts to fashion the emotional distress claim as that of a pure negligent infliction of emotional distress claim citing *Hysjulien v. Hill Top Home of Comfort, Inc.*, 2013 ND 38, 827 N.W.2d 533 (N.D. 2013). This is not the state of the emerging national case law related to emotional distress in a malpractice claim.

**[¶20]** Since the 1990's there has been a changing view regarding the award of damages for the emotional distress in malpractice actions as noted by the conclusion of a Fordham Law Review Note:

> Traditionally, an attorney has been insulated from liability for negligently inflicting emotional distress on his client. Absent physical injury or egregious conduct, most decisions hold that the harm caused is insufficient to support damages for emotional distress. This rule is too restrictive and provides little protection for important personal interests.
>
> An emerging trend, however, allows a client to recover for emotional distress where the attorney's negligence injures a personal interest. This trend reflects the view that emotional distress naturally results when such interests are harmed. Although no injury is shown, the genuineness of the claim can be guaranteed by the surrounding circumstances. Where limitations are to be placed on emotional distress damages, the determination should turn on the nature of the plaintiff's interests and not the nature of the defendant's negligence.
>
> Courts have recognized that substantial emotional harm results when a personal interest is injured. Allowing emotional distress damages in these situations would fully compensate those victimized by attorney negligence.
>
> NOTE: AN ATTORNEY'S LIABILITY FOR THE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS., 58 Fordham L. Rev. 1309, 1326 (1990)

**[¶21]** Gaustad had actual knowledge of the likely emotional harm and effects to Feltman's physical health and immense credit and reputation problems were at the very heart of the representation. The Settlement and Release Agreement ¶¶ 2-6 were core needs of the Appellants'. The very evidence compiled by Gaustad and contained in the record below supports the award of reputation and emotion distress damages.

## [¶22] CONCLUSION

**[¶23]** 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 15th day of November, 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 12 pages, including footnotes and endnotes but excluding any addendum, which is within the limit of 12 pages.

Dated this 15th day of November, 2019,

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## CERTIFICATE OF SERVICE

I hereby certify that on the following documents:

1. **Reply Brief of Appellant**

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:

**Peter W. Zuger** pzuger@serklandlaw.com

Dated this 15th day of November, 2019,

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