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JULY 17, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

James Broten, Appellant, vs. Ralph Carter; Carter, McDonagh & Sandberg, PLLP; and Carter Law Firm, Appellees.	)	Supreme Court No. 20190098 Grand Forks County No. 18-2017-CV-02343

ON APPEAL FROM SUMMARY JUDGMENT ENTERED FEBRUARY 25, 2019 IN FAVOR OF APPELLEES AND ORDER ENTERED MAY 1, 2019 GRANTING COSTS AND DISBURSEMENTS IN FAVOR OF APPELLEES, FROM THE DISTRICT COURT FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT, GRAND FORKS COUNTY, NORTH DAKOTA, THE HONORABLE STEVEN E. MCCULLOUGH, PRESIDING.

REPLY BRIEF OF APPELLANT
ORAL ARGUMENT REQUESTED

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North Dakota State Cases

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[¶1] **ARGUMENT**

[¶2] **I. The District Court Erred in Granting Summary Judgment in Favor of Ralph Carter; Carter, McDonagh & Sandberg, PLLP; and Carter Law Firm, Based on the Applicable Statute of Limitations, the Result of Which Dismissed James Broten's Claim for Malpractice.**

[¶3] In the Brief of Appellee, Carter argues the discovery rule is when the underlying court issues an adverse ruling against the malpractice plaintiff, as was done in the Barnes County case on August 15, 2013. What Carter refuses to acknowledge, though, is that the Barnes County court did not make a clear injury against Broten. Although the Barnes County court found Broten breached his fiduciary duties as a personal representative, the issue of damages, the actual injury incurred by Broten, did not happen until order of judgment, which was January 21, 2014.

[¶4] Broten did not suffer an appreciable injury due to Carter's legal malpractice until judgment was entered against Broten on January 21, 2014. Carter argues there can be no dispute Broten knew he would be liable for damages once the Barnes County court entered its order on August 15, 2013. This is incorrect for two reasons. First, Broten did not believe he would be assessed any damages even though the trial court found he breached his fiduciary duty. During Broten's deposition as part of the malpractice case, he stated "I never imagined that I'd lose." Deposition Transcript of James Broten, July 3, 2018, 149:18; Appendix of Appellant, 78. Second, and more important for this Court, a reasonable person in Broten's situation would not have believed he would be assessed damages for breach of fiduciary duty based on the language of the Barnes County court's order dated August 15, 2013.

[¶5] In order to prevail on summary judgment for the statute of limitations,

Carter must be able to show that a reasonable person in Broten's situation would unequivocally know he had suffered an injury as of August 15, 2013. However, the Barnes County court's own language in its order does not allow a reasonable person to make such an affirmative belief:

> [¶49] James has made *substantial improvements* on the family farmstead, and is *entitled to compensation or an offset for the value of those improvements* in the division and distribution of Olaf and Helen Broten's estate among the heirs.
>
> . . .
>
> [¶51] A further hearing shall be set to determine the current state of the title to the Land, *the measure of damages*, and/or other appropriate remedy for the breach of fiduciary obligations by James Broten.

Appendix of Appellant, at 66 (emphasis added).

[¶6] Carter attempts to use Broten's briefs before and after the Barnes County court's hearing on damages to show Broten was aware he would incur damages before the court's order for judgment. Carter ignores the entire argument made by Attorney Murch in favor of cherry picking language from Attorney Murch's brief to show Broten was aware he would incur damage. In reality, "Defendant's Post-Hearing Remedies Brief" (Amended Appendix of Appellee, 11-27) puts forth an argument that Broten's damages should be no greater than $432,720. Id., 19. This figure is calculated as the total amount of principal and interest due under the 1979 contract for deed between Broten and his parents. Id. This would be the amount of damages Broten would pay to the estate of his parents to fully satisfy his obligations of the contract for deed. This amount does not take into account the improvements Broten made to the property. Broten includes two mitigating factors for the amount of the damages. The first is $342,054, the amount of restitution paid by Broten for the benefit of his parents over thirty years. Id., 20. The

second is $499,000, the value of improvements, as estimated by Kyle Nelson, made by Broten to the farmstead. Id., 15, n. 2. These amounts, when taken together, offset Broten's damages to zero. Reasonable persons could disagree on the amount of damages Broten would have suffered even after the damages hearing. It is not until the order entered January 21, 2014 that Broten's injury became appreciable.

[¶7] The knowledge of a malpractice plaintiff is generally a question of fact. Duncklee v. Wills, 542. N.W.2d 739, 742 (N.D. 1996). "[S]ummary judgment is rarely appropriate on the issue of when the plaintiff should have discovered there was a potential malpractice claim." Id. In Duncklee, the plaintiff in an underlying divorce action alleged she did not know her attorney omitted a claim for the plaintiff's husband's military pension until after the husband retired. Id. The attorney told the plaintiff that she would receive a portion of the military pension, even though this was not included in the divorce decree. Id. The plaintiff's deposition testimony supported these allegations. Id. The attorney's omission of language for the divorce decree occurred several years before the husband retired. Id. The plaintiff would not know she suffered an injury until the point when she did not receive retirement benefits. Id. The Court determined the plaintiff's statements created a question of material fact on the statute of limitations of when the plaintiff knew or should have known of her attorney's malpractice. Id. The district court's order for summary judgment was reversed. Id.

[¶8] A reasonable person would not know Broten was damaged until the trial court entered its order for judgment because Broten argued he had enough improvements and restitution to offset any purported damages claimed by his sisters. "[T]he fact of

damage, rather than the amount, is the critical factor." Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal.4th 739, 752, 958 P.2d 1062, 1071 (1998). Broten would not know of an actual injury until the court entered its order assessing actual monetary damages against Broten. It is acknowledged that actual injury doesn't necessarily require a judgment entered against Broten. See, id., 18 Cal. 4th at 755; 958 P.2d at 1073. Yet even then, the particular case may lead to actual injury only when judgment is entered. Id. This conflicting analysis creates a genuine issue of material fact and makes summary judgment of Broten's malpractice claim inappropriate.

[¶9] Summary judgment is appropriate only when the client's injuries are immediate. Truong v. Glasser, 181 Cal.App.4th 102, 113, 103 Cal.Rptr.3d 811, 820 (2009). "The allegations of attorney error in a particular case's factual setting may lead to a finding that actionable injury occurred only when a related action was adjudicated." Jordache, 18 Cal.4th at 755, 958 P.2d at 1073. A reasonable person would not know of Broten's injury due to Carter's malpractice until the Barnes County court entered monetary damages against Broten.

[¶10] Broten's case is analogous to Jones v. Westbrook, 379 P.3d 963 (Alaska 2016). In Jones, the client hired the attorney to draft documents to finance the sale of a business corporation and secure the buyer's debt with corporate stock and an interest in the buyer's home. Id., 964. The client learned seven years later the IRS imposed tax liens on the corporation's assets because the attorney failed to record the security interest. Id. The Jones Court walked through when the client would have suffered an appreciable injury. The Court determined the client did not suffer an appreciable injury in 2004 when

the documents were drafted. Id., 969. The Court determined the client did not suffer an appreciable injury in October 2005 when the buyer missed a payment because the client and buyer agreed to an alternative arrangement rather than foreclose on the debt. Id. The appreciable injury occurred in 2011 when the IRS recorded liens. Id. It was at this time, according to the Court, that Jones lost a legal right–his ability to acquire anything greater than junior lienholder status. Id. This was a clear appreciable injury. Id.

[¶11] Carter and the district court rely on the language of Riemers v. Omdahl, 2004 ND 188, 687 N.W.2d 445, to support the claim that Broten should have known of Carter's malpractice as of August 15, 2013. "[I]ssues of fact may become issues of law if reasonable persons could reach only one conclusion from the facts[.]" Id., ¶ 8. If reasonable persons can only draw but one conclusion from the evidence, the plaintiff's knowledge of a claim is an issue of law. Id. The issue in Riemers was an argument to toll the statute of limitations pending appeal of the underlying case. This argument was rejected, citing Jacobsen v. Haugen, 529 N.W.2d 882 (N.D. 1995). The Jacobsen Court stated, "Filing a lawsuit within two years of the entry of an adverse judgment is not unduly burdensome." Id. at 885. While Jacobsen and Riemers do not set a bright line rule for discovery of injury, these cases do illustrate the Court's nod to a final demarcation for the discovery rule.

[¶12] The discovery rule tolls the statute of limitations until "plaintiff knows, or with reasonable diligence should know, (1) of the injury, (2) its cause, and (3) defendant's possible negligence." Jacobsen, 529 N.W.2d at 885 (citing Phillips Fur & Wool Co. v. Bailey, 340 N.W.2d 448, 449 (N.D. 1983)). "The purpose of the discovery

rule is to prevent the injustice of barring a claim before the plaintiff could reasonably be aware of its existence." Wall v. Lewis, 393 N.W.2d 758, 761 (N.D. 1986). For Broten, this discovery occurred when a monetary judgment was entered against him, not the moment the trial court made an adverse ruling against Broten. This interpretation of the discovery rule also satisfies Carter's own exasperation to "avoid the absurd result of parties always claiming that their damages are on-going and/or not yet fully determined in order to avoid statutes of limitations." Brief of Appellee, July 8, 2019, ¶ 39. The August 15, 2013 ruling by the Barnes County court is an order; it is not a judgment. The order does end the case; it moves the case along. The order does not take away a right or remedy from Broten. The judgment, issued January 21, 2014, ends the case for Broten. This is the moment Broten is injured to include the loss or diminution of a right or remedy. This is the time when a reasonable person would discover an injury has occurred due to Carter's malpractice.

[¶13] Imposition of monetary damages against Broten is critical to this case. If Broten is not assessed any monetary damages, despite a finding that he breached his fiduciary duty, then there is no appreciable injury to bring a cause of action against Carter for malpractice. A reasonable person would not know Broten was damaged until the trial court entered its order on January 21, 2014 because the trial court allowed Broten to put forth evidence to offset the damages owed to his sisters and Broten did in fact put forth evidence that would have offset the damages owed to his sisters. Broten's claim of malpractice against Carter between August 15, 2013 and January 21, 2014 would not be ripe. Carter's defense during this time would have been that Broten had not yet suffered

an injury–the imposition of monetary damages and an essential element of a malpractice claim–because Broten was still entitled to offsets.

[¶14] CONCLUSION

[¶15] For the reasons stated herein and for the reasons stated in the principal Brief of Appellant, Broten respectfully prays this Court reverse the district court's order granting summary judgment in favor of Carter and remand this case for further proceedings before the district court. Broten respectfully prays this Court reverse the district court's award of costs and disbursements to Carter.

[¶16] Dated this 17th day of July, 2019.

/s/ Lee M. Grossman

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[¶17] **CERTIFICATE OF COMPLIANCE**

[¶18] The undersigned, as attorneys representing Appellant, James Broten, and authors the Reply Brief of Appellant, hereby certify that said reply brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that the number of pages from cover page to certificate of compliance totals 11 and does not exceed 12. This count is automatically calculated by electronic document.

[¶19] Dated this 17th day of July, 2019.

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	)	
Appellant,	)	Supreme Court No.
	)	20190098
vs.	)	
	)	
Ralph Carter; Carter, McDonagh & Sandberg, PLLP; and Carter Law Firm,	)	Grand Forks County No.
	)	18-2017-CV-02343
	)	
Appellees.	)	

ON APPEAL FROM SUMMARY JUDGMENT ENTERED FEBRUARY 25, 2019 IN FAVOR OF APPELLEES AND ORDER ENTERED MAY 1, 2019 GRANTING COSTS AND DISBURSEMENTS IN FAVOR OF APPELLEES, FROM THE DISTRICT COURT FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT, GRAND FORKS COUNTY, NORTH DAKOTA, THE HONORABLE STEVEN E. MCCULLOUGH, PRESIDING.

CERTIFICATE OF SERVICE

[¶1] I, Lee M. Grossman, an attorney licensed in the State of North Dakota, hereby certify that on **July 17, 2019,** the following documents were filed with the North Dakota Supreme Clerk of Court:

1. **Reply Brief of Appellant; and**
2. **Affidavit of Service**

[¶2] Copies of these documents were served electronically on all separately represented parties at the e-mail addresses listed below:

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[¶3] This service has been made pursuant to N.D.R.App.P. 25 and N.D.R.Ct. 3.5.

[¶4] Dated: July 17, 2019.

_/s/ Lee Grossman_____
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