
In the Supreme Court
State of North Dakota

No. 20190098

James Broten,

Plaintiff-Appellant

v.

Ralph Carter; Carter, McDonagh & Sandberg, PLLP; and Carter Law Firm,

Defendants-Appellees

**Appeal from Order granting Summary Judgment entered February 25, 2019,
and Order entered on May 1, 2019, granting costs and disbursements in favor of
Appellees; Grand Forks County District Court, Northeast Central Judicial
District, No. 18-2017-CV-02343**

**SECOND AMENDED BRIEF OF APPELLEE
ORAL ARGUMENT REQUESTED**

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I. STATEMENT OF ISSUES

[¶1] Whether the district court erred in granting summary judgment in favor of Ralph Carter; Carter, McDonagh & Sandberg, PLLP; and Carter Law Firm on the basis the applicable two-year statute of limitations barred Appellant James Broten's Complaint.

[¶2] Whether the district court abused its discretion in awarding costs and disbursements to Ralph Carter; Carter, McDonagh & Sandberg, PLLP; and Carter Law Firm in the amount of \$32,303.05.

II. STATEMENT OF CASE AND COURSE OF PROCEEDINGS

[¶3] This is an appeal from the district court’s order granting the Appellees’ motion for summary judgment, entered on January 23, 2019; order for judgment and judgment, entered February 25, 2019; and order awarding Ralph Carter; Carter, McDonagh & Sandberg, PLLP; and Carter Law Firm (collectively “Carter”) costs and disbursements in the amount of \$32,303.05 dated May 1, 2019.

[¶4] This matter concerns Carter’s representation of Appellant James Broten (“Broten”) in probate litigation in Barnes County, North Dakota, case number 02-2011-CV-00042. The factual background of the probate litigation is thoroughly outlined in two North Dakota Supreme Court cases. See Broten, et al. v. Broten, 2015 ND 127, 863 N.W.2d 902; Broten et al. v. Broten, 2017 ND 47, 890 N.W.2d 847.

[¶5] On January 14, 2016, Broten served a Summons and Complaint on Carter. (App. 6-12). In his Complaint, Broten alleged legal malpractice against Carter related to Carter’s representation of Broten in the probate litigation. Id. On May 31, 2018, Carter moved for summary judgment arguing the applicable two-year statute of limitations barred Broten’s Complaint and Broten is unable to prove the “case-within-the-case” doctrine as a matter of law. (Docs. #23-24). On December 17, 2018, the district court held a hearing on Carter’s motion for summary judgment. On January 23, 2019, the district court entered an order granting Carter’s motion for summary judgment. (App. 96-103).

[¶6] On February 25, 2019, Carter submitted a Statement of Costs and Disbursements requesting \$32,303.05 be taxed against Broten. (App. 104-105). The Notice of Entry of Judgment was entered on February 26, 2019. (App. 107). Broten filed an objection arguing the costs and disbursements were unreasonable. (Docs. #116-117). On April 30, 2019, the district court held a hearing concerning Carter’s requested costs and

disbursements. On May 1, 2019, the district court issued its order awarding Carter \$32,303.05 in cost and disbursements. (App. 123-125).

III. STATEMENT OF THE FACTS

A. Background on James Broten and Contract for Deed.

[¶7] James Broten is the son of Olaf and Helen Broten. Olaf and Helen had four children: Linda Schuler, Louise Broten, Judith Legge and James Broten. In approximately 1942, Olaf purchased approximately three quarters (480 acres) of land in Barnes County consisting of farmland and a residence which became known as the farmstead. (App. 96).

[¶8] In 1979, Broten entered into a written Contract for Deed with his father, Olaf, to purchase the 480 acre farmstead in Barnes County (the “Contract for Deed”). (App. 96). The Contract for Deed reserved a life estate in the southeast quarter for Olaf and his wife, Helen. Ralph Carter had no involvement with the Contract for Deed.

[¶9] The Contract for Deed set the purchase price as \$200,000 with payments to be made as follows:

The sum of \$200,000.00 together with interest thereon calculated at the rate of six per cent (6%) simple interest payable annually as follows:

Interest only shall be due and payable in the amount of \$12,000.00 per year, commencing December 1, 1980, and continuing thereafter for the next six (6) years, i.e. – December 1, 1981, 1982, 1983, 1984, 1985, and 1986;

Commencing December 1, 1987, equal annual principal and interest payments shall be due and payable in the amount of \$17,436.00, and continuing thereafter on December 1st of each and every year until entire principal and interest are paid in full and/or until December 1, 2006.

(Doc. #28).

B. Broten Claims the Contract for Deed is Orally Modified.

[¶10] The Contract for Deed required Broten to make an annual payment to his father on December 1 from 1980 until 2006. (Doc. # 28). Broten failed to make these

payments. Instead, Broten testified the Contract for Deed was orally modified in 1980 such that Broten would pay for his parents' expenses including insurance, utility bills, and repairs and help his father out until he died. (Doc. #26 – Trial Transcript from underlying probate litigation, p. 124, ll. 19-25; p. 125, ll. 7-15; p. 126, l. 16 – p. 127, l. 12). Broten testified the payments for the 480 acres of land were made “in-kind.” (Id. at p. 171, ll. 8-23).

C. Olaf Passes Away and Broten, as Personal Representative, Deeds the 480 Acres of Land to himself.

[¶11] At the same time the Contract for Deed was executed, Olaf and Helen also executed wills. (Docs. #29-30). Olaf's Will named Helen as the personal representative. Id. Olaf passed away in 1998. (App 96). Despite Olaf's Will designating Helen as personal representative of Olaf's estate, Broten obtained waivers from Helen and his siblings and was thereby appointed personal representative of Olaf's estate. Broten, in his capacity as personal representative and without notice to his sisters, executed a Deed of Personal Representative which conveyed the 480 acres of farmland to himself granting his mother a life estate in the house located on the farmland. (Doc. #31 – Deed; App. 96).

D. Helen Broten Passes Away and Sisters Learn of Wrongdoing.

[¶12] Helen Broten passed away on June 16, 2010. (App. 96). After Helen's death, Broten's sisters (Louise Broten and Linda Schuler) sought appointment as co-personal representatives of their mother's estate. (App. 96). Upon securing appointment as personal representatives of Helen's estate, Louise and Linda became aware that Broten, in his capacity as personal representative of Olaf Broten's Estate, had conveyed the farmland to himself.

E. The Sisters Commence Litigation against James.

[¶13] Louise and Linda commenced litigation against James by a Complaint dated December 24, 2010. (App. 97; Doc. #32). The sisters, as individuals and co-personal representatives of the Estate of Helen Broten, sued Broten individually and as the personal representative of the Estate of Olaf Broten. Id. The sisters' Complaint alleged breach of fiduciary duty and conversion among other theories. Id. The sisters' primary complaint was Broten's actions in executing the personal representative deed granting the subject farmland to himself. Id.

F. Broten Retains Ralph Carter.

[¶14] Broten hired Carter to represent him in the action brought by his sisters. Carter prepared an Answer which was served on the sisters. The case was filed with the district court by the sisters on February 7, 2011. On March 25, 2011, Ralph filed a Claim against the Estate in the amount of \$91,613 on behalf of Broten. The Claim alleged Broten was owed for "financial obligations paid by Broten for the time period 1998 through 2010," including utilities, insurance, and repairs. (Doc. #34). The parties exchanged discovery and Broten was deposed on November 29, 2011.

G. Sisters Seek Proof of Payments on the 1979 Contract for Deed.

[¶15] At his deposition, Broten testified regarding his claim that the Contract for Deed was orally modified and indicated he had evidence to support his claim regarding amounts paid for his parents' various expenses. As such, his sisters served a second set of document requests in December 2011 specifically requesting documentation of the payments Broten claimed were made for the insurance premiums, household and farm expenses and repairs, vehicle transactions and other items on behalf of his parents. The requests were clear and understandable. Additionally, Carter described to Broten the type

of evidence needed to support the claim he had paid his parents “in kind” and Carter made repeated requests to Broten for the documents evidencing such payments. (Doc #35).

H. The Trial is Continued Multiple Times.

[¶16] The trial was originally set to commence on June 25, 2012, but was continued due to the death of one of the sisters in the action, Linda Schuler. (App. 97). The trial date was then rescheduled for September 10, 2012. Id.

[¶17] The night before the trial was to commence, Carter visited Broten at his home. At this meeting, Broten showed Carter numerous boxes of documents which Broten claimed supported his claim. Carter informed Broten it was unlikely they could present documents not previously turned over in discovery and they had the choice between requesting a continuance or proceeding with trial without using the additional documents. Broten was in favor of requesting a continuance. The district court granted the request for a continuance and rescheduled the trial for December 2012. The district court also ordered Broten produce all documents he intended to use at trial by September 28, 2012. (Doc. #36). In compliance with the Court order, Carter produced all additional documents provided to him by Broten before the September 28, 2012 deadline. (Doc. #37).

I. Events of Winter 2012/2013.

[¶18] The sisters served a summary judgment motion dated October 31, 2012. As the December trial date approached, Broten’s health substantially deteriorated due to the disease of alcoholism. As such, Carter contacted the district court and informed the court he was unable to proceed with the December trial date. With the assistance of the Serkland Law Firm, Broten drafted and filed a brief opposing the motion for summary judgment.

J. March, April and May 2013 Events.

[¶19] Carter, with the consent of Broten, secured substitute counsel for Broten. Specifically, attorneys Kim Brust and Douglas Murch, of Conmy Feste, Ltd. were substituted as counsel. The hearing on the motion for summary judgment was heard on April 19, 2013, and argued by the attorneys from Conmy Feste. At the hearing, the issue of additional undisclosed documents came up. Broten asked the Court to permit him to produce these documents to his sisters and offer them as exhibits at trial. The Court allowed Broten to offer any yet to be disclosed documents as exhibits at trial as long as they were disclosed by April 30, 2013. This was all after Carter had ceased his representation of Broten.

K. June 2013 Trial.

[¶20] In June 2013, the matter was tried as a bench trial. Broten was represented at the trial by the Conmy Feste law firm. Early on in the trial, the district court granted Broten's motion to consider additional exhibits not previously disclosed as the Court recognized a "trial on the merits is favored." (Doc. #36 – Trial transcript, at p. 8, ll. 2-7). Thereafter, all of the exhibits offered by Broten were entered into evidence. (App. 98).

[¶21] The district court issued its Findings of Fact, Conclusions of Law and Order on August 15, 2013. (App. 55-66). The district court determined Broten had violated his fiduciary duty while acting as the personal representative of Olaf Broten's estate. Id. Additionally, the district court determined the Deed of Personal Representative used by Broten to convey the real property was a conflict of interest not authorized by the Will or approved by any court and secured without the consent of his sisters. Id. As to the Contract for Deed, the district court found the parties mutually abandoned the terms of the Contract for Deed, Broten's testimony was not credible, and Broten failed to produce evidence of

an oral contract to purchase the land by clear and unequivocal evidence. Id. The district court then ordered a hearing to determine exact amount of damages Broten was liable for.

Id.

L. Damages Hearing.

[¶22] On November 27, 2013, the district court held a hearing on the appropriate amount of damages. In his pre and post-hearing briefs, Broten advocated the amount of damages should be \$423,720. (Appellees' App. 3-27). Specifically, Broten argued:

James has previously argued the appropriate measure of damages in this case should be \$423,720, which is the total amount of principal and interest due under the 1979 Contract for Deed. This is the remedy and calculation of damages requested by Louise during the course of this litigation prior to trial. Given the court's broad equitable powers in fashioning a remedy under the probate code and trust code and given Louise's prior election and calculation of damages, the court would be well within its discretion to respect Louise's affirmance of the 1979 Contract for Deed and award damages of \$432,720. This amount would also take into account the benefit received by Olaf and Helen of the estimated \$342,054 James paid to or for the benefit of his parents over thirty years. For these reasons, James incorporates by reference his previous arguments on this issue and asks that the court limit the damages award to \$432,720.

(Appellees' App. 19-20).

[¶23] Following a hearing on damages, the district court issued a Memorandum Opinion and Order for Judgment dated January 21, 2014. (App. 67-71). The district court determined Broten owed his mother's estate damages in the amount of \$103,054 for use of the land since his mother's death on June 16, 2010, as well as \$1,197,000.00, for the current value of the property as of December, 2013 for damages totaling \$1,300,054.00. Id.

M. Broten's Two Appeals.

[¶24] Broten filed his first appeal to the North Dakota Supreme Court arguing the district court erred in finding no oral contract existed and failed to properly address payments Broten claimed he provide to his parents for their living expenses. Broten et al.

v. Broten, 2015 ND 127, 863 N.W.2d 902. On May 27, 2015, this Court affirmed in part and reversed in part. Id. This Court remanded back to the district court to address Broten’s claims against the estate. Id. On December 18, 2016, the district court held a hearing to address the issues on remand and determined no damages or offsets were owed to Broten. Broten then appealed for a second time. Broten et al. v. Broten, 2017 ND 47, 890 N.W.2d 847. On March 7, 2017, this Court reduced the award against Broten to \$985,210. Id.

IV. STANDARD OF REVIEW

[¶25] This Court has held the standard of review for a district court’s grant of summary judgment is well established:

[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 can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law.

Maragos v. Newfield Production Company, 2017 ND 191, ¶ 7, 900, N.W.2d 44.

[¶26] Broten also appeals the district court’s determination to award costs and disbursements to the Appellees in the amount of \$32,303.05. A trial court’s decision on fees and costs under N.D.C.C. § 28–26–06 will not be overturned on appeal unless an abuse of discretion is shown. Wahl v. Northern Imp. Co., 2011 ND 146, ¶ 13, 800 N.W.2d 700. “A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner.” Id.

V. LAW AND ARGUMENT

A. The District Court Correctly Determined the Applicable Two-Year Statute of Limitations Barred James Broten's Complaint as a Matter of Law.

[¶27] In this matter, Broten alleges Carter negligently failed to provide him legal services by, including, but not limited to: (1) failing to properly investigate and effectively present Broten's claim in a timely fashion; (2) failing to review over 60 boxes of documents which allegedly supported Broten's claims/defenses; (3) failing to communicate with Broten regarding evidence required to prove his claims/defenses; (4) causing multiple continuances of trial; (5) withdrawing from representation without allowing adequate time for subsequent counsel to properly prepare for trial; and (6) failing to disclose various documents which would have proven Broten's claims/defenses. It is Broten's position that, but for Carter's failure to discover/review/disclose the 60 boxes of documents, Broten would have prevailed at trial.

[¶28] In North Dakota. The statute of limitations for a legal malpractice action is two years. Larson v. Norkot Manufacturing, Inc., 2002 ND 175, ¶ 10, 653 N.W.2d 33 (citing N.D.C.C. § 28-01-18(3)). As such, under N.D.C.C. § 28-01-18(3), a legal malpractice action must be commenced within two years after the cause of action accrues. Riemers v. Omdahl, 2004 ND 188, ¶ 6, 687 N.W.2d 445.

[¶29] The North Dakota Supreme Court has adopted the discovery rule for legal malpractice actions. Larson, 2002 ND 175, ¶ 10, 653 N.W.2d 33. The discovery rule tolls the statute of limitations until the plaintiff knows, or with reasonable diligence should know, of the injury, its cause, and the defendant's possible negligence. Id. The discovery rule employs an objective standard of knowledge, and a plaintiff need not be subjectively convinced of the injury and that the injury was caused by the defendant's negligence. Wall

v. Lewis, 393 N.W.2d 758, 761 (N.D. 1986). It is not necessary for the plaintiff to fully appreciate the potential liability, or even be convinced of an injury; as the objective standard requires only that the plaintiff be aware of facts that would place a reasonable person on notice that a potential claim exists. Larson, 2002 ND 175, ¶ 13, 653 N.W.2d 33.

[¶30] There is no dispute that the present action was not commenced until January 14, 2016. As such, there is no dispute that any claim for legal malpractice which accrued before January 14, 2014, is barred by the applicable statute of limitations. The crux of this appeal is the date when the statute of limitations began to run on Broten's claim for legal malpractice against Carter. Carter's position is that, at the very latest¹, the statute of limitations began to run on August 15, 2013, when the district court entered its Findings of Fact, Conclusions of Law, and Order which substantively found against Broten on all claims in the underlying litigation. Broten argues the statute of limitations did not begin to run until January 21, 2014, when the district court entered an Order setting the precise amount of damages owed by Broten.

¹ It is Carter's position the statute of limitations began to run before August 15, 2013, as a matter of law. This Court has stated a person suffers damages when he has to pay attorney's fees necessitated by his attorney's negligence. Larson v. Norkot Mfg., Inc., 2002 ND 175, ¶ 12, 653 N.W.2d 33 (citing Sirott v. Latts, 6 Cal.App.4th 923, 8 Cal.Rptr.2d 206, 209 (1992)("A client suffers damage she he is compelled, as a result of attorney error, to incur or pay attorney's fees). Broten alleges Carter was negligent in failing to adequately prepare for the September 2012 trial date which resulted in a continuance of the trial. Broten also claims Carter's negligence caused a continuance of the December 2012 trial date and that his negligence necessitated the retaining of the Conmy Feste Law Firm. Broten's position that Carter's negligence caused two trial continuances and the necessity of hiring substitute counsel all resulted in additional legal fees. Assuming for purposes of summary judgment that Carter's negligence resulted in additional legal fees, the statute of limitations began to run long before January 14, 2014, and at the very latest, began to run on April 4, 2013, when Conmy Feste became attorneys of record.

[¶31] The district court properly concluded that, at “the absolute latest,” the statute of limitations began running on August 15, 2013. The district court held:

[T]he latest Broten should have been on notice of the existence of a potential claim was August 15, 2013, the date of issuance of the Findings of Fact, Conclusions of Law, and Order for Judgment. These Findings, Conclusions and Order outlined that Broten had breached his fiduciary duty as personal representative, voided the land transfer, and set a hearing to determine the full extent of damages. As a matter of law, Broten was injured when the trial court ruled against him substantively on the issues. The fact that the full extent of the damages were not known is immaterial. “It is not necessary for the plaintiff to fully appreciate the potential liability, or even be convinced of an injury.” Riemers, 2004 ND 188, ¶ 8, 687 N.W.2d 445.

(App. 101). As such, the district court concluded that only one reasonable conclusion can be drawn from the facts of this case: Broten should have been aware a claim existed against Carter, by the very latest, August 15, 2013. (App. 102). As August 15, 2013, is more than two years prior to January 14, 2016 (the date this matter was commenced), the district court properly concluded the present claims are barred by the applicable statute of limitations. (App. 102).

[¶32] The district court properly relied upon Binstock v. Tschider in determining the statute of limitations barred Broten’s Complaint. Binstock v. Tschider, 374 N.W.2d 81 (N.D. 1985). In Binstock, the defendant attorney drafted transactional documents related to a land transfer, including an option agreement to which the plaintiff (Binstock) did not agree. Id. at 82. The option was eventually exercised. Id. This Court found Binstock was injured when the option was created, not when it was exercised. Id. This Court stated “[t]he fact that greater damage was suffered when the option was exercised does not alter the fact that substantial damage was suffered when the option was created.” Id. at 85. As such, an injury is suffered when the legal status of the party in question is changed, not when the total damage is affixed. (App. 101).

[¶33] On appeal, Broten argues he did not know of his alleged injury until January 21, 2014 – the date the district court issued a memorandum opinion assessing damages against Broten in an amount totaling approximately \$1,300,000. Broten argues he was not injured on August 15, 2013, because he still had the opportunity to reduce or offset damages at a hearing on damages in November 2013. Specifically, Broten alludes to language in the August 15, 2013, Findings which discusses Broten’s improvements to the land. Broten appears to be implying it was possible he would not have to pay any damages despite the August 15, 2013, Findings and therefore it was still possible he was not damaged. This is incorrect.

[¶34] To be clear, after August 15, 2013, there can be no dispute Broten understood he was going to be liable to pay damages – the only issue was the precise amount of damages owed for Broten’s breach of his fiduciary duty. This is evidenced by Broten’s pre-hearing and post-hearing briefs submitted to the district court on the issue of damages. (Appellees’ App. 3-27).

[¶35] In Broten’s post-hearing brief (dated December 20, 2013), Broten argued the appropriate measure of damages is \$423,720. Specifically, Broten stated:

James has previously argued the appropriate measure of damages in this case should be \$423,720, which is the total amount of principal and interest due under the 1979 Contract for Deed. This is the remedy and calculation of damages requested by Louise during the course of this litigation prior to trial. Given the court’s broad equitable powers in fashioning a remedy under the probate code and trust code and given Louise’s prior election and calculation of damages, the court would well be within its discretion to respect Louise’s affirmance of the 1979 Contract for Deed and award damages of \$432,720. This amount would also take into account the benefit received by Olaf and Helen of the estimated \$342,054 James paid to or for the benefit of his parents over thirty years. For these reasons, James incorporated by references his previous arguments on this issue and asks that the court limit the damages award to \$432,720.

(Appellees’ App. 19-20).

[¶36] In the alternative, Broten argued if the Court were to award rescission damages, a judgment against him in the amount of \$621,000 should be awarded based on the 2010 fair market value of the farmland. (Appellees’ App. 22). Notably, this \$621,000 amount incorporated providing him a reduction of approximately \$500,000 due to alleged improvements he made to the farmland. Id. As such, even if Broten was entitled to all claimed improvements, he still admitted he owed, at a minimum, \$621,000 in rescission damages. Id. If the Court were to use the 2013 fair market value of the farmland, Broten argued the judgment should be in the amount of \$1,177,000 (this also incorporated a reduction for alleged improvements). (Appellees’ App. 25).

[¶37] In short, there can be no dispute, that at the very latest, Broten knew by August 15, 2013, he had suffered an injury as a result of Carter’s alleged negligence. Broten argued to the district court in written briefing well before January 14, 2014, that the amount of judgment awarded against him should range between \$432,720 to \$1,177,000.

[¶38] The statute of limitations begins to run when Broten sustains any appreciable harm – even if the full extent of that harm may not be known until a future event. See Riemers, 2004 ND 188, ¶ 7, 687 N.W.2d 445; Ronald Mallen & Jeffrey Smith, 3 *Legal Malpractice* § 23:26 (2018 Ed). “[A]n injury does not disappear or become suspended while a more final adjudication of the result is sought.” Riemers, 2004 ND 188, ¶ 10, 687 N.W.2d 445 (quoting 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 18.11, p. 45 (3rd Ed.)). This Court has stated:

The cause of action arises, however, before the client sustains all, or even the greater part, of the damages occasioned by his attorney’s negligence...Any appreciable and actual harm flowing from the attorney’s negligence conduct establishes a cause of action upon which the client may sue.

Riemers, 2004 ND 188, ¶ 7, 687 N.W.2d 445 (citations omitted). When a client suffers any appreciable injury, the statute of limitations begins to run, even if the client later suffers much greater damage. See Binstock v. Tschider, 374 N.W.2d 81, 84-85 (N.D. 1985).

[¶39] In cases concerning legal malpractice, and specifically when the statute of limitations begins to run for a claim for legal malpractice, this Court has consistently cited to the legal malpractice treatise of Ronald E. Mallen & Jeffrey Smith². The current version of the treatise provides: “[t]he prevailing rule is that there only need be the fact of an injury, which includes the loss or diminution of a right or remedy.” Ronald Mallen & Jeffrey Smith, *3 Legal Malpractice*, § 22:36 (2018 ed). “Thus, there need not be a specific quantity of damage, and significant damages may not occur or be ascertained until the future, if ever.” Id. “The use of ‘injury’ to complete a cause of action recognizes that the full extent of damages may not be known until a future event.” Id. Such a rule is required in order 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.

[¶40] Here, there was a bench trial in the underlying probate matter in June 2013 in which Broten argued he should not have to pay any damages to his sisters. Before and during trial, Broten provided testimony regarding Carter’s alleged poor representation of him. (Doc. #26, pg. 134:4-7; 236:12-15; Doc. #89 – Affidavit of Broten). On August 15, 2013, the district court entered its Findings of Fact, Conclusions of Law, and Order

² See e.g. Riemers v. Omdahl, 2004 ND 188, ¶ 10, 687 N.W.2d 445; Larson v. Norkot Mfg., Inc., 2002 ND 175, ¶ 57, 653 N.W.2d 33; Wall v. Lewis, 393 N.W.2d 758, 762 (N.D. 1986); Jacobsen v. Haugen, 529 N.W.2d 882, 886 (N.D. 1995); Olson v. Fraase, 421 N.W.2d 820, 828-29 (N.D. 1988); Nesvig v. Nesvig, 2004 ND 37, ¶ 20, 676 N.W.2d 73; Dan Nelson Const. Inc. v. Nodland & Dickson, 2000 ND 61, ¶ 15, 608 N.W.2d 267; and Vastvedt v. Vaaler, 430 N.W.2d 561, 565 (N.D. 1988).

providing that Broten breached his fiduciary duty, Broten failed to prove the existence of an oral contract, the personal representative deed was void, and a subsequent hearing would take place to determine the precise amount of damages he owed. (App. 55-66). Broten's position is he would have prevailed at the June 2013 trial but for Carter's alleged negligence in failing to discover/review/disclose sixty boxes of documents supporting Broten's claims/defenses. The subsequent hearing on damages was held on November 27, 2013. In his pre-hearing and post-hearing briefs (submitted December 20, 2013), Broten acknowledged he owed significant damages and requested the Court award damages against him in the amount ranging from \$432,720 to \$1,177,000. (Docs. ##87-88).

[¶41] In sum, Broten's argument he did not know he suffered an injury until January 21, 2013, is without merit. As the district court concluded, Broten knew, at the absolute latest, he suffered an injury due to Carter's alleged legal malpractice on August 15, 2013, and this is the date the statute of limitations began to run. As Broten failed to timely commence this action within the statute of limitations (i.e., before January 16, 2014), the district court properly determined the statute of limitations barred his Complaint.

B. The District Court Did Not Abuse its Discretion in Awarding Costs and Disbursements Totaling \$32,303.05.

[¶42] Carter submitted a Statement of Costs and Disbursements seeking \$32,303.05. (App. 104-105). The vast majority of this amount (\$29,065.32) concerned expert witness fees. *Id.* After briefing and a hearing, the district court awarded Carter \$32,303.05 in costs and disbursements. (App. 123-125). On appeal, Broten challenges the district court's determination that Carter was entitled to expert witness fees totaling \$29,065.32.

[¶43] An award of costs, including expert witness fees lies within the sound discretion of the district court. Hager v. City of Devils Lake, 2009 ND 180, ¶ 57, 773 N.W.2d 420. District courts have seven non-exclusive factors to consider when awarding reasonable expert witness fees:

- (1) The common-law area of expertise;
- (2) education and training that is required to provide expert insight that is sought;
- (3) prevailing rates of other comparably respected available experts;
- (4) nature, quality, and complexity of discovery responses provided;
- (5) the fee actually being charged to the party who retains the expert;
- (6) fees traditionally charged by the expert on related matters;
- (7) any other factor likely to be of assistance to the court in balancing the interests implicated.

North Dakota Dep't of Transp. V. Rosie Glow, LLC, 2018 ND 123, ¶ 19, 911 N.W.2d 134.

[¶44] Here, Broten retained and disclosed Pamela Reiter, an attorney from Sioux Falls, to serve as his expert witness. As a result of Broten's expert disclosure, Carter retained Duane Lillehaug, an attorney from Fargo, as an expert witness on the issues of legal malpractice, and Mark Larson, a certified public accountant from Fargo, to rebut the claims that the more than sixty boxes of documents supported Broten's underlying claim. The district court reviewed the parties briefs, affidavits from Mr. Lillehaug and Mr. Larson, and their billing records. The district court concluded Mr. Lillehaug's and Mr. Larson's expert witness fees were reasonable under the various non-exclusive factors.

[¶45] On appeal, Broten does not argue the hours expended or hourly rates are unreasonable. Instead, Broten argues that because Carter was granted summary judgment on the basis of the statute of limitations, neither Mr. Lillehaug's nor Mr. Laron's expert fees should be allowed to be taxed against him. This was one of the arguments raised by Broten to the district court. The district court concluded the argument was without merit stating:

The Plaintiff's other various arguments are without merit. The experts were not explicitly relied upon in obtaining the summary judgment ruling, but the question remains within the Court's discretion to determine whether those expert witness fees are reasonable. Given that both experts would have been necessary in the event of trial, the taxing of the fees is reasonable.

(App. 125).

[¶46] Broten commenced this legal malpractice action seeking significant damages. Broten retained an expert witness whose opinion was Carter committed legal malpractice, by among other things, failing to review thousands of documents contained in 65 boxes which supported Broten's claims in the underlying matter. Carter needed to secure expert witnesses to (1) provide expert testimony on the duty owed to Broten and whether Carter breached that duty; and (2) to review and rebut Ms. Reiter's testimony regarding the 65 boxes of documents supporting Broten's claims in the underlying matter. If this matter had gone to trial, Mr. Lillehaug and Mr. Larson would have provided expert testimony and been central to Carter's defense. Broten cannot commence an action which requires Carter to retain expert witnesses and then complain about paying their reasonable costs because Broten failed to comply with the statute of limitations.

[¶47] Plaintiff cites Estate of Dittus for its proposition that Carter should not be able to tax his expert's costs in this matter. See Matter of Estate of Dittus, 497 N.W.2d 415 (N.D. 1993). Estate of Dittus concerns a request for costs of \$1,571.80, part of which concerned a non-testifying expert witness. Id. at 420. In Estate of Dittus, the estate had an expert document examiner present at trial in case the opposing party offered documents which the estate claimed were not genuine. Id. These documents were never offered at trial. Id. The North Dakota Supreme Court criticized the estate for failing to prepare an appropriate stipulation or otherwise try to determine if the expert would be required for trial. Id. The Court stated the fact the party did not offer the documents demonstrated it was likely it would have signed a

stipulation. Id. Under these specific facts, the North Dakota Supreme Court upheld the denial of expert costs. Id. These facts are not comparable to the present case. Additionally, the North Dakota Supreme Court has affirmed award of expert costs for non-testifying expert witnesses. Pratt v. Heartview Foundation, 512 N.W.2d 675, 679 (N.D. 1994).

[¶48] Broten has cited no authority that a party cannot tax the costs of expert witnesses because it prevails on summary judgment on the basis of statute of limitations. Here, Mr. Lillehaug and Mr. Larson would not have been non-testifying experts at trial. Rather, both Mr. Lillehaug and Mr. Larson's testimony would have been required and would be central to Carter's defense at trial

VI. CONCLUSION

[¶49] For the aforementioned reasons, the Appellees respectfully request this Court affirm the district court's granting of summary judgment and award of costs and disbursements in the amount of \$32,303.05.

VII. REQUEST FOR ORAL ARGUMENT

[¶50] The Appellees respectfully join Broten in his request for oral argument in this matter. For the same reasons outlined in Broten's request, the Appellees respectfully assert oral argument would be beneficial for the Court.

Dated this *16th* day of July, 2019.

/s/ Ronald H. McLean

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CERTIFICATE OF COMPLIANCE

[¶51] The undersigned, as attorney for the Appellees Ralph Carter; Carter, McDonagh & Sandberg, PLLP; and Carter Law Firm, in the above-entitled matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a)(5) and (7)(a) of the North Dakota Rules of Appellant Procedure, that the above Second Amended Brief of Appellee was prepared with proportional typeface and the total number of pages in the above Brief, excluding the certificate of service and this certificate of compliance, totals **23**.

Dated this *18th* day of September, 2019.

/s/ Ronald H. McLean
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**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

<p>James Broten,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>Ralph Carter; Carter, McDonagh & Sandberg, PLLP; and Carter Law Firm,</p> <p style="text-align: center;">Defendant.</p>	<p>Court File No. <u>20190098</u></p>
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CERTIFICATE OF SERVICE

STATE OF NORTH DAKOTA
COUNTY OF CASS

I hereby certify that on September 17, 2019, the following document:

SECOND AMENDED BRIEF OF APPELLEE
(with corrected page numbers)

was filed electronically with the Clerk through the North Dakota Supreme Court E-Filing Portal for electronic service through the E-Filing Portal on the following:

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