

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Bismarck Financial Group, LLC; Gary)	Supreme Court
Berube, in his capacity as a Member of)	Case No: 20200005
Bismarck Financial Group, LLC; Doug)	
Buehler, in his capacity as a Member of)	
Bismarck Financial Group, LLC; Bob)	
Johnson, in his capacity as a Member of)	
Bismarck Financial Group, LLC; Matt)	
Puetz, in his capacity as a Member of)	
Bismarck Financial Group, LLC; and Larry)	
Souther, in his capacity as a Member of)	
Bismarck Financial Group, LLC)	
)	
Plaintiffs,)	
)	
vs.)	
)	
James "Jay" Caldwell,)	
)	
Defendant.)	

APPEAL FROM ORDER GRANTING DEFENDANT'S MOTION TO DISMISS
ENTERED DECEMBER 4, 2019,
IN THE DISTRICT COURT, SOUTH CENTRAL JUDICIAL DISTRICT,
BURLEIGH COUNTY, NORTH DAKOTA,
THE HONORABLE DAVID REICH,
CIVIL NO. 08-2019-CV-01793

BRIEF OF APPELLANTS – ORAL ARGUMENT REQUESTED

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶ 1] Whether the district court erred in dismissing Bismarck Financial Group, LLC's and its members' claims against Caldwell for wrongful dissociation under N.D.C.C. s. 10-32.1-47.

[¶ 2] Whether the district court erred in dismissing Bismarck Financial Group, LLC's and its members' claims against Caldwell for breach of statutory duties under N.D.C.C. § 10-32.1-41.

II. STATEMENT OF THE CASE

[¶ 3] Relevant to this appeal, Plaintiffs/Appellants Bismarck Financial Group, LLC ("BFG") and its five remaining members ("BFG Members") commenced this civil action through service of the *Summons* and *Complaint and Jury Demand* (App. 7-19) on May 7, 2019 upon Defendant/Appellee James "Jay" Caldwell ("Caldwell") seeking damages caused by Caldwell's wrongful dissociation from BFG pursuant to North Dakota Century Code Section 10-32.1-47, and other applicable law. On June 6, 2019, Caldwell filed a motion to dismiss the complaint pursuant to North Dakota Rule of Civil Procedure 12(b)(6) (index #13), and BFG and BFG Members resisted the motion (index #21). On December 4, 2019, the Honorable David Reich, Judge of the District Court, entered his *Order Granting Defendant's Motion to Dismiss* (App. 91-108) dismissing all claims in this action. BFG and BFG Members timely appealed therefrom. (App. 109-111.)

[¶ 4] The district court's dismissals of BFG and BFG Member's claims against Caldwell for breach of statutory duties owed by Caldwell under N.D.C.C. § 10-32.1-41, and for wrongful dissociation under N.D.C.C. § 10-32.1-47 were in error. The district court's *Order Granting Defendant's Motion to Dismiss* did not discuss or explain why the

breach of statutory duties claim was dismissed, and the district court erroneously disposed of all of BFG's and BFG Member's claims on the basis of a lack of written agreement by Caldwell to be responsible for the damages claimed by BFG and BFG's Members. BFG's and BFG Member's statutory claims are not contingent upon the existence of any contractual agreement between the parties in relation to the damages being claimed.

III. STATEMENT OF THE FACTS

A. The Parties

[¶ 5] Plaintiff/Appellant Bismarck Financial Group, LLC ("BFG") is a limited liability company organized and existing under the laws of the State of North Dakota for general business purposes. (App. 7 at ¶ I.) Plaintiffs/Appellants Gary Berube, Doug Buehler, Bob Johnson, Matt Puetz, and Larry Souther ("BFG Members") have been at all relevant times herein members of BFG. (App. 7-8 at ¶ II.) Defendant/Appellee James "Jay" Caldwell ("Caldwell") is an individual and a former member of BFG. (App. 8 at ¶ III.)

B. Facts Relevant To Appeal

[¶ 6] On September 18, 2015, Caldwell as Buyer entered in that certain *Asset Purchase Agreement* (the "Asset Purchase Agreement") with then Bismarck Financial Group Member Farrel Carlson as Seller, whereby Caldwell purchased Carlson's Book of Business, among other assets identified therein ("the Book of Business"). (App. 9 at ¶ IX; App. 21-24 [Asset Purchase Agreement].) The Book of Business that was purchased by Caldwell is made up of multiple client accounts containing various investment and insurance products. Some of the Book of Business is profitable for the financial advisor and other aspects of the Book of Business are not generally profitable and create significant

ongoing administrative and other work. Some of the Book of Business provides ongoing revenue which helps defray the costs associated with servicing the needs of the clients. Other aspects of the Book of Business are the result of product sales that produce no ongoing revenue for the financial advisor.

[¶ 7] Caldwell essentially replaced Carlson as a Member of BFG, and on January 2016, all of the then members of BFG, including Caldwell and BFG Members, executed and/or entered into those certain *Articles of Organization, Bylaws of Bismarck Financial Group, LLC, Bismarck Financial Group, LLC Operating Agreement* (the "Operating Agreement"), and that certain *Bismarck Financial Group, LLC Written Action By Governors*. (App. at ¶¶ XIII-XVI; App. at 72-90 [BFG Governing Documents].) Pursuant to its governing documents and applicable law, BFG is a limited liability company subject to Chapter 10-32.1 of the North Dakota Century Code. Section 3.03 of the Operating Agreement states:

Allocation of Net Income and Net Losses. Net Income and Net Losses shall be allocated annually among the Members based on their Percentage Interests as reflected on Schedule A.

(App. 76 at § 3.03.) Caldwell and the other five BFG Members are financial advisors under agreements with broker Diversified Wealth Management ("DWM"). (App. 9 at ¶ X.)

[¶ 8] Effective July 14, 2017, BFG as Tenant, entered into that certain *Riverwood Office Building Lease* ("the Lease") with Riverwood Partners, LLLP ("Riverwood Partners") as Landlord. (App. 10 at ¶ XVIII.) The Lease identifies the Premises as Suite 102, encompassing 2,067 Square Feet on the main floor in the Riverwood Building located at 419 Riverwood Drive, Bismarck, North Dakota 58504-6217. (App. 11 at ¶ XIX; App. 46 [Lease] at Section 1.1.) The Lease identifies the Lease Term as Ten (10) Years in two

5-year rate schedules, commencing November 1, 2017. (App. 11 at ¶ XX; App. 46 [Lease] at Section 1.1.) The Lease provides an Expiration Date of October 31, 2027 with 6-month prior notice to renew or terminate the Lease. (App. 11 at ¶ XXI; App. 46 [Lease] at Section 1.1.) BFG entered in the Lease, and performed a build out of the leased premises to suit the needs of BFG's members, with the full knowledge, agreement, and prior written consent of Caldwell. (App. 11 at ¶ XXIII; App. 64-66 [Caldwell Email Consent].)

[¶ 9] On February 4, 2019, Caldwell communicated his wish to dissociate himself as a Member of BFG, at which time he took his Book of Business and associated stream of income with him, and wrongfully and unjustifiably left his fellow members to pay his share of BFG's losses and expenses into the future. (App. 11-12 at ¶ XXIV.) When Caldwell left BFG, he did not take the entire Book of Business with him. Rather, he only took with him the clients and relationships which brought ongoing revenue for him with little or no administrative burden. What he left behind, for the remaining BFG Members to manage, was 126 mostly elderly clients which require a higher level of service. Elderly clients require a higher duty of care due to problems associated with declining health and diminished capacity. They also have a higher likelihood of requiring death claims, which tend to be paperwork intensive. The amount of administrative work and other work by the financial advisor is essentially the same for a revenue producing versus a non-revenue producing account, and for a high dollar revenue account versus a low dollar revenue account. So not only did Caldwell renege on his agreement to pay lease expenses and other overhead expenses to BFG, he also left his member partners with a financial and administrative burden in relation to his Book of Business. BFG was formed to create and manage a service center for all of its clients. The members of BFG made a commitment to

share the costs associated with ongoing service to clients. Prior to leaving BFG, Caldwell was fully responsible for handling these accounts, some of which carry with them greater administrative burden.

[¶ 10] Prior to and at the time BFG entered into the Lease, Caldwell was an active Member of BFG, and executed various official documents on behalf of BFG. (App. 12 at ¶ XXVI.) Caldwell was also personally present for and participated in several regularly scheduled member meetings of BFG wherein discussions were had regarding the issues and negotiations related to the Lease prior to its execution. (App. 12 at ¶ XXVIII.) In 2016 and 2017, Caldwell received certain tax and income benefits because of the Lease, including but not limited to his member's share of income, deductions, and credits, among other benefits. (App. 12 at ¶ XXIX.)

[¶ 11] BFG was and remains obligated to pay Lease Rents and various related expenses to Riverwood Partners for at least the full ten (10) year lease term. (App. 13 at ¶ XXX.) From and after his February 4, 2019 wrongful dissociation from BFG, Caldwell has refused to pay any amount of the Rents and related rental expenses. (App. 13 at ¶ XXXI.) BFG has continued to make all required Lease Rent payments and related rental payments under the Lease, including Caldwell's share. (App. 13 at ¶ XXXII.) BFG fully anticipates continuing to pay these Rents and related expenses into the foreseeable future as provided for by the Lease in order to avoid irreparable harm to BFG. (*Id.*)

[¶ 12] Caldwell owes BFG a total of at least \$24,436.53 for the remaining 35 months of the first term five-year term of the Lease for rent and various related expenses. (App. 13-14 at ¶ XXXIV.) Caldwell also owes BFG a total of at least \$45,336.20 for a second five-year term of the Lease for rent and various related expenses. The total of said

Lease rent obligations Caldwell owes to BFG is at least \$69,772.73. (*Id.*)

[¶ 13] In addition to Lease Rents, net losses include but are not limited to general office overhead expenses of BFG related to the Lease as well as other common business overhead. Caldwell was and remains obligated to pay BFG a 1/6th share of such general office overhead expenses, which he categorically refuses to pay. (App. 14 at ¶ XXXVI.) BFG has been paying Caldwell's share of the general office overhead expenses and will be required to pay his share into the foreseeable future in order to avoid irreparable harm to BFG. (App. 14 at ¶ XXXVII.) Caldwell owes BFG a total of at least \$15,328.62 for general office overhead expenses. (App. 14 at ¶ XXXVIII.)

[¶ 14] Caldwell is also obligated to pay salary and other related costs for BFG employee Cindi Gaylord ("Gaylord"). (App. 14 at ¶ XXXIX.) BFG has been paying Caldwell's share of Gaylord's salary and related expenses, including Caldwell's share, and will be required to continue paying these expenses into the future in order to avoid irreparable harm to BFG. (App. 14-15 at ¶ XL.) Caldwell owes BFG a total of at least \$52,778.20 for Gaylord's salary and related expenses. (App. 15 at ¶ XLI.) Caldwell and wrongfully and unjustifiably refused to pay such amounts to BFG and has indicated he will not pay any further amounts at all. (App. 15 at ¶ XLI.) Caldwell is currently obligated to his fellow Members of BFG in the total amount of at least \$137,879.55, exclusive of interest, late fees, and any applicable penalties. (App. 15 at ¶ XLII.)

[¶ 15] Although the Operating Agreement authorizes members to assign their interests to either another member, or a third-party with the unanimous written consent of the remaining members, the Operating Agreement does not authorize an outright abandonment of member interests. (App. 79 [Operating Agreement] at Section 6.01.)

Caldwell made no such assignment. He simply walked away from his member interests in BFG, took his Book of Business with him, and left the remaining BFG Members to absorb his previous share of the long-term contractual obligations of BFG. At the time of Caldwell's dissociation, BFG was still bound to more than eight more years of lease payments under the Lease, as well as other lease related expenses and staff salary obligations, as described above.

C. Wrongful Dissociation Claim At Issue

[¶ 16] Caldwell's actions in leaving BFG on or about February 4, 2019 and his continued refusal to meet his responsibilities and other financial obligations to BFG and the remaining BFG Members constitutes wrongful dissociation under North Dakota law. (App. 18 at ¶ LVI.) Caldwell wrongfully dissociated from BFG on February 4, 2019 and Caldwell remains obligated to pay his share of BFG's allocation of losses incurred on or before February 4, 2019, and into the future until Caldwell's allocation of losses ends. (App. 18 at ¶ LVII.)

D. Breach of Statutory Duties Claim At Issue

[¶ 17] As a Member of BFG, Caldwell owed BFG and his fellow Members certain statutory and contractual duties, including but not limited to paying his share of BFG's allocation of net losses, duties of care and loyalty, as well as other fiduciary duties. (App. 16 at ¶ XLVI.) Caldwell was a Member of BFG at the time BFG entered into the Lease with Riverwood Partners. Caldwell agreed to and consented to enter into the Lease as a Member of BFG, and Caldwell benefited directly from such Lease for a period of many months. (App. 16 at ¶ XLVII.) He was a Member of BFG when BFG became obligated to pay other lease related expenses, business overhead expenses, employee salary and

related expenses, and other net losses, all of which are discussed above. (*Id.*) Caldwell breached and continues to be in breach of his Member and fiduciary duties as well as his statutory obligations to BFG and to his fellow Members, which has directly harmed BFG and the remaining BFG Members. (App. 16 at ¶ XLIX.) Caldwell's breach of duties is the direct and proximate cause of damages to BFG in an amount to be proven at trial but not less than \$137,879.55 exclusive of interest, late fees, and other applicable penalties. (App. 16-17 at ¶ L.)

IV. ARGUMENT

A. Applicable Standard of Review

[¶ 18] This Court has summarized the applicable standard of review of a district court's dismissal of a complaint under Rule 12(b)(6) as follows:

Rule 12(b)(6) of the North Dakota Rules of Civil Procedure provides that a party may move to dismiss a complaint on the ground that such a complaint fails to state a claim for which relief can be granted. A motion to dismiss a complaint under N.D.R.Civ.P. 12(b)(6) tests “the legal sufficiency of the statement of the claim presented in the complaint.” *Ziegelmann v. DaimlerChrysler Corp.*, 2002 ND 134, ¶ 5, 649 N.W.2d 556. On appeal from a dismissal under N.D.R.Civ.P. 12(b)(6), “we construe the complaint in the light most favorable to the plaintiff, taking as true the well-pleaded allegations in the complaint.” *Id.* at ¶ 5. Under N.D.R.Civ.P. 12(b)(6), a “complaint should not be dismissed unless ‘it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted.’ ” *Id.* (quoting *Lang v. Schafer*, 2000 ND 2, ¶ 7, 603 N.W.2d 904). “We will affirm a judgment dismissing a complaint for failure to state a claim if we cannot ‘discern a potential for proof to support it.’ ” *Id.* (quoting *Towne v. Dinius*, 1997 ND 125, ¶ 7, 565 N.W.2d 762). “We review the district court's decision granting judgment on the pleadings under N.D.R.Civ.P. 12(b)(6) de novo.” *Brandvold v. Lewis and Clark Public School Dist. No. 161*, 2011 ND 185, ¶ 6, 803 N.W.2d 827.

Limberg v. Sanford Med. Ctr. Fargo, 2016 ND 140, ¶ 7, 881 N.W.2d 658, 660.

[¶ 19] A complaint need only provide “a short and plain statement of the claim showing that the pleader is entitled to relief.” N.D.R.Civ.P.8(a)(1). The complaint “must

be sufficient to inform and notify the adversary and the court of the pleader's claim.”
Erickson v. Brown, 2008 ND 57, ¶ 16, 747 N.W.2d 34.

B. The District Court Erred In Dismissing Bismarck Financial Group, LLC's And Its Members' Claims Against Caldwell For Wrongful Dissociation Under N.D.C.C. s. 10-32.1-47.

[¶ 20] BFG and BFG Members allege Caldwell dissociated from BFG by his express will, and prior to termination of BFG (BFG remains in existence to this day). (App. 11-12 at ¶ XXIV.) The district court properly conceded it had to accept these alleged facts as true for purposes of the Rule 12 motion, and that such alleged facts asserted a claim of wrongful dissociation under N.D.C.C. § 10-32.1-47. (App. 104 at ¶ 45.) That section provides, in relevant part, as follows:

1. A person has the power to dissociate as a member at any time, rightfully or wrongfully, by withdrawing as a member by express will under subsection 1 of section 10-32.1-48.
2. **The dissociation of a person from a limited liability company is wrongful only if the dissociation:**
 - a. Is in breach of an express provision of the operating agreement; or
 - b. **Occurs before the termination of the company and:**
 - (1) **The person withdraws as a member by express will;**

(bold added for emphasis). In this case, BFG and BFG Member's complaint alleges, and it is not disputed, Caldwell withdrew as a member of BFG by express will pursuant to his letter of February 4, 2019, and that such withdrawal occurred before termination of BFG (which remains in operation to this day).

[¶ 21] Despite properly determining BFG and BFG Members alleged wrongful dissociation by Caldwell, the district court erred in concluding BFG and BFG Members did not allege they suffered any damages as a result of such wrongful dissociation.

Damages for wrongful dissociation are provided under North Dakota Century Code Section 10-32.1-47(3), which provides as follows:

A person that wrongfully dissociates as a member is liable to the limited liability company, and subject to section 10-32.1-33 [not applicable], to the other members for damages caused by the dissociation. The liability **is in addition to** any other debt, obligation, or other liability of the member to the company or the other members.

N.D.C.C. § 10-32.1-47(3)(bold added). Section 10-32.1-49(2) provides further, “[t]he dissociation of a person as a member of a limited liability company does not of itself discharge the person from any debt, obligation, or other liability to the company or the other members that the person incurred while a member.”

[¶ 22] The district court erred by concluding the damages which could potentially be caused by the wrongful dissociation of a member as referenced in the first sentence of Section 10-32.1-47(3), were limited to the dissociating members contractual debts, obligations, or other liability of the member to the company or the other members referenced in the second sentence. The second sentence does not define or limit the types of damages which could result to the company or its remaining members by a wrongful dissociation. Instead, the second sentence merely clarifies that such damages are “in addition” to such other debts, obligations or other liabilities. In other words, the scope of recoverable damages under Section 10-32.1-47(3) sustained by BFG and the BFG Members as a result of Caldwell’s wrongful dissociation is not confined to damages stemming from any sort of contractual debt, obligation or other liability owed them by Caldwell.

[¶ 23] The remaining five members of BFG did not authorize Caldwell’s dissociation. He simply unilaterally decided he would no longer be a member of BFG.

Had Caldwell assigned his interests in BFG to another member or third party as contemplated under Section 6.01 of the Operating Agreement, the person to whom he assigned his interests would have assumed Caldwell's 1/6 share of the member obligations of BFG, thereby not affecting the interests of the other five members. By not assigning his interests, and simply walking away, Caldwell caused significant actual damages to the remaining five BFG Members by immediately increasing their respective percentage share of the contractual obligations of BFG. This includes, relative to this lawsuit, with respect to long-term contractual lease obligations, other lease related expenses (office overhead), and staff salary obligations, without any corresponding increase in revenues as Caldwell took the desirable portions of his Book of Business with him when he left BFG. BFG and BFG Members are not claiming Caldwell is liable to third-parties, including the landlord on the subject Lease. Instead, BFG and BFG Members claim Caldwell is liable directly to BFG and the BFG Members for the damage he has caused each of them by wrongfully dissociating. The remaining BFG Members have clearly suffered a loss of at least \$137,879.55, exclusive of interest, due to Caldwell's wrongful dissociation from BFG. But at a minimum, whether BFG and the remaining BFG Members have suffered any such damages involves a question of fact not properly addressed on a motion to dismiss under Rule 12. The District Court failed to give BFG and the BFG Members the benefit of all favorable inferences in this regard as required in considering a motion to dismiss under North Dakota Rule of Civil Procedure 12(b)(6).

[¶ 24] The District Court's decision was also based upon a misinterpretation and misapplication of this Court's decision in *Addy v. Myers*, 2000 ND 164, 616 N.W.2d 359. In *Addy*, this Court did not address liability when a member wrongfully dissociates from a

limited liability company, or address a claim of breach of member statutory duties. *See generally Addy v. Myers*, 2000 ND 164, 616 N.W.2d 359. In *Addy* the members agreed to terminate the limited liability company, and the issues addressed pertained to whether members were individually liable for debts incurred by the company. *Id.* at ¶¶ 5-6. The Court in *Addy* held the status of being a member of a limited liability company alone does not generally make a person liable for certain actions of the company, noting there was no evidence the defendant member contractually agreed to be responsible for the debts of the company. *Id.* at ¶ 11. *Addy* is distinguishable as it did not involve a claim for damages for wrongful dissociation under N.D.C.C. § 10-32.1-47, or for breach of member statutory duties under N.D.C.C. § 10-32.1-41, as is at issue in this case. Section 10-32.1-47 was only enacted effective July 1, 2015, after the decision in *Addy*, but prior to the events forming the basis for the claims against Caldwell in this action (beginning on September 18, 2015 with Caldwell’s purchase of Carlson’s Book of Business, and replacement of Carlson as a member of BFG thereafter). *Addy* also did not include a claim of wrongful dissociation under former Section 10-32-30 (repealed eff. July 1, 2015), discussed below. *Addy* has no application to a claim based upon wrongful dissociation, or breach of member statutory duties.

[¶ 25] The enactment of Section 10-32.1-47 also evidences the Legislatures’ intent to broaden to scope of member liability for damages caused by wrongful dissociation. Prior to enactment of Section 10-32.1-47 effective July 1, 2015, member wrongful dissociation was governed by North Dakota Century Code § 10-32-30 (repealed eff. July 1, 2015). Subsection 5 thereof provided “[i]f a member resigns or retires in contravention of the articles of organization or a member-control agreement, the member who has wrongfully

resigned or retired is liable to the limited liability company to the extent damaged by the wrongful resignation or retirement.” In other words, prior to enactment of Section 10-32.1-47, damages for wrongful dissociation could only be recovered where the member resigned or retired in contravention of the articles of organization or a member-control agreement. Section 10-32.1-47 contains no similar restriction. Instead, under Section 10-32.1-47, the company and the remaining members are entitled to recover any damages caused by a wrongful dissociation, which is defined, relevant to this case, as simply a termination of member interest by express will prior to termination of the company. Counsel for BFG and BFG Members have not located any reported decisions applying or referencing Section 10-32.1-47, since it was enacted in 2015.

[¶ 26] The district court also erred in determining BFG and BFG Members’ claims are barred by N.D.C.C. § 10-32.1-26, which provides as follows:

1. The debts, obligations, or other liabilities of a limited liability company, whether arising in contract, tort, or otherwise:
 - a. Are solely the debts, obligations, or other liabilities of the company; and
 - b. Do not become the debts, obligations, or other liabilities of a member, manager, or governor solely by reason of the member acting as a member, manager acting as a manager, or governor acting as a governor.

[¶ 27] The district court concluded BFG and BFG Members’ claims were barred by this statute as they are allegedly attempting to hold Caldwell liable for the debts of the company, BFG. The district court concluded “[t]he lease at issue was signed on behalf of the LLC and bound only the business. Plaintiffs simply seek to hold Caldwell responsible for Bismarck Financial’ s obligations based on his status as a former member. This is not a legally cognizable claim as it is in direct contravention of N.D.C.C. § 10-32.1-26.” (App.

99 at ¶ 31.) The district court misconstrued the nature of BFG and BFG Member's wrongful dissociation claim, and the district court's logic and determination were in error as Section 10-32.1-26 does not encompass BFG and BFG Member's claims for damages resulting from Caldwell's wrongful dissociation under Section 10-32.1-47. Section 10-32.1-47 applies, and trumps Section 10-32.1-26 in cases involving wrongful dissociation, at least with respect to claims made by the company and its affected members. Instead, Section 10-32.1-26 generally applies to prevent claims against members for the debts of the company made by third-party creditors of the company (for whom no remedy is available for wrongful dissociation under section 10-32.1-47), and also applies to prevent claims against a member by the company and other members where the dissociation was not wrongful.

[¶ 28] As discussed above, BFG and BFG Member's damages resulting from Caldwell's wrongful dissociation are not premised upon the theory that BFG's debts, obligations, or other liabilities are the debts, liabilities or other obligations of Caldwell. Instead, the statutory remedy provided by Section 10-32.1-47 is broader than that and serves to compensate companies and members who have suffered any type of damages resulting from the wrongful dissociation, which is a "liability . . . in addition to any other debt, obligation, or other liability of the member to the company or the other members." If a member wrongfully dissociates, the company and the remaining members are entitled to recovery of any damages they sustain as a result of the wrongful dissociation, regardless of whether the dissociating member had any contractual or other obligation to be responsible for the damages at issue.

[¶ 29] The district court further erred by determining the wrongful dissociation claims of BFG and BFG Members are barred by the statute of frauds, in part, as follows:

Plaintiffs are asking Caldwell to personally guarantee a portion of Bismarck Financial's obligations, but have failed to even allege the existence of such a personal guarantee in writing. The Operating Agreement, on its face, does not constitute a personal guarantee. Because there is no allegation of a writing constituting a personal guarantee signed by Caldwell, Plaintiffs claims clearly violate the statute of frauds. Their claims to hold Caldwell personally liable for the debts and obligations of Bismarck Financial, without any allegation of such an agreement in writing, are barred by the statute of frauds and must be dismissed.

(App. 108 at ¶ 59.) The error in the district court's logic and determination is that damages for wrongful dissociation are a liability established by statute, not contract, and is therefore not governed by the statute of frauds. (App. 108 at ¶ 59.) Again, the district court failed to recognize a claim for damages for wrongful dissociation under N.D.C.C. § 10-32.1-47 need not be predicated upon any contractual debt or obligation. North Dakota's statute of frauds only pertains to the validity of contracts. *See* N.D.C.C. § 9-06-04 ("The following contracts are invalid,"); *Shong v. Farmers' & Merchants' State Bank, Hutchinson, Minn.*, 70 N.W.2d 907, 911 (N.D. 1955) (An implied "trust does not depend upon contract, but arises by operation of law and is not affected by the statute of frauds."). No written agreement by Caldwell to be responsible for the damages claimed by BFG and BFG Members in this action was necessary for liability to be imposed for wrongful dissociation under N.D.C.C. § 10-32.1-47.

C. **The District Court Erred In Dismissing Bismarck Financial Group, LLC's And Its Members' Claims Against Caldwell For Breach Of Statutory Duties Under N.D.C.C. § 10-32.1-41.**

[¶ 30] The district court's *Order Granting Defendants' Motion to Dismiss* purports to dismiss all of BFG and BFG Members' claims on the alleged basis "Plaintiffs' have not adequately pleaded their causes of action against Caldwell." (App. 108 at ¶ 61.) However,

the district court did not discuss or explain its reasoning for dismissing BFG and BFG Member's statutory duty claims against Caldwell. Instead, the district court simply focused upon an alleged lack of written agreement by Caldwell to be responsible for the damages being claimed by BFG and BFG Members as its basis for dismissing all claims.

[¶ 31] BFG is a board-managed limited liability company (App. 84 [Bylaws] at Section 2.01.) Pursuant to N.D.C.C. § 10-32.1-41(4), “[a] member in a limited liability company shall discharge the duties of a member and exercise any rights under this chapter or under the operating agreement consistently with the contractual obligation of good faith and fair dealing, including acting in a manner, in light of the operating agreement, that is honest, fair, and reasonable.” These statutory duties are not dependent upon any sort of contractual obligation owed by Caldwell to BFG or the remaining BFG Members. Caldwell's conduct of simply abandoning his 1/6 member interest in BFG (i.e. wrongful dissociation in violation of Section 10-32.1-47) after long-term contractual obligations had been entered into by BFG, with his approval and input (including in relation to the buildout of the leased space to accommodate his practice), and based upon the understanding all such expenses would be shared equally between the six members of the financial services firm, violated Section 10-32.1-41(4) as such conduct was contrary to the principals of good faith and fair dealing, contrary to the understanding of the members to equally split such expenses, and was not fair and reasonable under the circumstances. *See* N.D.C.C. § 10-19.1-01 (under North Dakota Business Corporation Act, defining “good faith” to mean “honesty in fact in the conduct of an act or transaction”); N.D.C.C. § 41-01-09(2)(t) (under North Dakota's Uniform Commercial Code, defining “good faith” as “honesty in fact and the observance of reasonable commercial standards of fair dealing.”); *Cavendish Farms*,

Inc. v. Mathiason Farms, Inc., 2010 ND 236, ¶ 14, 792 N.W.2d 500, 506 (In the context of North Dakota’s Uniform Commercial Code, “When one party to a contract has the power to make a discretionary decision without defined standards, the implied covenant of good faith and fair dealing applies to protect the parties’ reasonable expectations.”). In the present case, Caldwell’s exercise of his right to wrongfully dissociate from BFG under Section 10-32.1-47(1) when he took only on the most desirable portions of his Book of Business with him but left behind the less-desirable portions of his Book of Business, and all of the long-term contractual obligations for the remaining five BFG Members to bear, was inconsistent with his obligation to exercise such right to wrongfully dissociate under Chapter 10-32.1 in good faith, and frustrated the parties’ reasonable expectations. The Operating Agreement contemplates a transfer of member interests, not a complete abandonment thereof. *See* App. 79 [Operating Agreement] at Section 6.01 (“A Member may assign the Member’s full Membership Interest only by assigning all of the Member’s Governance Rights coupled with a simultaneous assignment to the same assignee of all of the Members Financial Rights. . . .; not providing for abandonment of a member interest). Had Caldwell transferred his member interests to another, as contemplated under the Operating Agreement, the remaining BFG Members share of the long-term contractual obligations would not have increased as a result of Caldwell’s dissociation. Whether Caldwell breached his member statutory duties under Section 10-32.1-41 is a question of fact for the jury to decide.

V. CONCLUSION

[¶ 32] For the foregoing reasons, Caldwell failed to establish with certainty the impossibility of BFG and BFG Members proving a claim upon which relief can be granted.

The district court's dismissal of the wrongful dissociation claims against Caldwell should be reversed and this case remanded to the district court for further proceedings, consistent with this Court's decision.

VI. ORAL ARGUMENT REQUESTED

[¶ 33] BFG and BFG Members request oral argument. Oral argument is appropriate on the basis this appeal is premised largely upon application of North Dakota Century Code § 10-32.1-47 pertaining to member wrongful dissociation, a statute enacted effective July 1, 2015 and which this Court has not previously had an opportunity to interpret.

[¶ 34] Dated this 13th day of April, 2020.

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CERTIFICATE OF COMPLIANCE

[¶ 35] The undersigned, as attorneys for the Appellant in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional

type face in 12-point font and equals 22 pages.

[¶ 36] Dated this 13th day of April, 2020.

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CERTIFICATE OF SERVICE

[¶37] I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLANTS – ORAL ARGUMENT REQUESTED** was on the 13th day of April, 2020, emailed to the following:

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