

NO. A06-0691

State of Minnesota
In Court of Appeals

Robert and Virginia Carlson,

Respondents,

v.

SALA Architects, Inc.,

Appellant.

RESPONDENTS' BRIEF

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STATEMENT OF RESPONDENTS' LEGAL ISSUE

- I. DID THE TRIAL COURT ERR IN DENYING THE CARLSONS REIMBURSEMENT OF THEIR ATTORNEYS' FEES UNDER THE CONTRACT AND AFTER FINDING THAT APPELLANT BREACHED ITS FIDUCIARY DUTIES?

The district court denied Respondents' motion for attorneys' fees.

Apposite authority:

- *Carlstrom Co. v. German Evangelical Lutheran*, 662 N.W.2d 168 (Minn. App. 2003);
- *Staffing America, Inc., v. Advanced Mgmt. Concepts, Inc.*, No. 2004 0524-CA, 2005 WL 2600637 (Utah Ct. App. Oct. 14, 2005);
- *Ware v. Tyler*, No. 28648-3-II, 2003 WL 21387185 (Wash. Ct. App. June 17, 2003).

STATEMENT OF THE CASE

This is an action for professional negligence and breach of contract brought by Robert and Virginia Carlson against the architecture firm of SALA Architects, Inc. ("Appellant"). The Carlsons hired Appellant to build their "dream home" in Eden Prairie, Minnesota. As Appellant's name implies, Appellant represented to them that David Wagner was in fact an architect licensed to practice in the state of Minnesota. In fact, however, it is undisputed that Wagner was not licensed as an architect in Minnesota or any other state. By Wagner's own testimony, he admits that he never informed the Carlsons that he was not an architect. Plans prepared by Wagner, among other documents, identify Wagner as an "Architect."

The Carlsons were deceived by Appellant even into the early stages of this lawsuit. They initially brought this action after Wagner refused to accept their design direction and instead sought to impose his own “west coast modern” design tastes on them. Wagner saw the Carlson’s home as an opportunity, not to serve the interests of his clients, but to generate his own portfolio on a high-end, big-dollar project where he could establish his reputation in his own architectural style. This led the Carlsons to fire Appellant and seek return of the nearly \$300,000 in architectural fees they paid for plans that were unauthorized, improper and were never used. The Carlsons eventually hired another architect who built their home in the style they desired.

At the time their Complaint was filed and served, the Carlsons still believed Appellant’s representations that Wagner was a licensed architect. In fact, Appellant in its Answer represented to the court that Wagner was an architect, admitting the Carlsons’ allegation that “David Wagner is, on information and belief, an architect employed by Defendant.” (A. 39; R.A. 96.) As it turned out in discovery, however, Appellant could not produce an architect’s license for Wagner, which led ultimately to Appellant’s admission that Wagner was not an architect.

Based in part on this new information, the Carlsons on April 7, 2005, served an affidavit of expert disclosure from licensed architect Anthony Desnick, outlining the facts and authorities establishing Appellant’s professional negligence. (R.A. 100.) This affidavit was required pursuant to Minn. Stat.

§ 544.42 (2006). The sixteen-page disclosure addressed in detail, among other things, Wagner's lack of licensure, Appellant's representations that Wagner was an architect, and asserted the Carlsons' factual and legal authority (including the Code of Ethics for Architects) demonstrating that Appellant had violated Minnesota's licensing statutes. Desnick opined that such violation constituted professional negligence. (R.A. 109-11; A. 242.) Discovery remained open in the case for two months after Appellant received the expert disclosure. Appellant has never submitted opposing expert testimony.

Instead, Appellant simply ignored the Carlsons' expert disclosure and moved for summary judgment. The basis of that motion remains difficult to discern. Much as with the Appellant's brief on appeal, Appellant in its summary judgment brief simply ignored the facts that did not support its argument, and entirely ignored the sixteen-page Desnick Affidavit. In opposing summary judgment, the Carlsons asserted the facts establishing the licensing violation, as well as Desnick's Affidavit and the other evidence of breach of contract and professional negligence. The Carlsons also moved to amend their Complaint to expressly include the unlicensed practice claim, even though, as the trial court ultimately held, the claim was encompassed in the original complaint under rules of notice pleading. Appellant then briefed, in its opposition to the Carlsons' motion to amend, the issue of whether it committed unlicensed practice. (R.A. 176-77.)

The court heard extensive oral argument on July 21, 2005. (R.A. 10-34.) It was apparent from the outset that Appellant's summary judgment was baseless, as it simply failed to address the issues in the case. The trial court questioned both counsel, however, about Wagner's unlicensed practice, and it was apparent at the hearing that there were no disputed issues of fact on that issue. The trial court raised the possibility of granting summary judgment for the Carlsons, and the parties acknowledged that such action was expressly allowed under Minn. R. Civ. P. 56.03. (R.A. 30-33.)

On August 30, 2005, the trial court issued its order granting summary judgment to the Carlsons and denying Appellant's summary judgment motion. (A. 3.) The trial court's detailed twenty-page memorandum opinion thoroughly examined the undisputed facts demonstrating that Appellant held out the unlicensed Wagner as an architect in violation of Minnesota's licensing statute. (A. 13-16.) The trial court further followed established precedent in determining that disgorgement of the "architect" fees paid by the Carlsons to Appellant was the proper remedy, and awarded the Carlsons judgment in the amount of their fees paid to Appellant—\$291,957.42. (A. 16-22.)

Appellant submitted a request for leave to move for reconsideration, which the trial court granted. The trial court thereafter granted Appellant the opportunity to further brief the licensing issue and to supplement the record. After Appellant submitted both an opening brief and a reply brief, and having provided Appellant the opportunity to submit any additional facts into the record, the trial court heard

Appellant's argument in support of its motion to reconsider on October 18, 2005. After providing Appellant this full and fair opportunity to be heard, again, on the licensing issue, the trial court issued another detailed written opinion on November 7, 2005, denying the motion to reconsider and reaffirming the court's original grant of summary judgment to the Carlsons. (A. 24.)

Appellant thereafter appealed the decision. Its appeal was dismissed because the trial court had not addressed the Carlsons' motion for attorneys' fees. The parties thereafter briefed and argued the Carlsons' motion for reimbursement of attorneys' fees, and the trial court denied that motion in an order dated February 6, 2006. (R.A. 93.) Appellant then appealed and the Carlsons submitted a notice of review of the trial court's order denying attorneys' fees.

Much of the foregoing procedural history of the case is omitted from Appellant's brief. Appellant would leave the Court of Appeals with the impression that the trial court granted summary judgment to the Carlsons, *sua sponte*, and that Appellant was deprived of a fair opportunity to be heard. To the contrary, as indicated above, the record below demonstrates that the trial court repeatedly provided Appellant a full and fair opportunity to be heard on the issue of its unlicensed practice of architecture. Despite numerous opportunities, Appellant could not overcome the undisputed facts and unquestionable authorities that mandated judgment for the Carlsons.

STATEMENT OF FACTS

This statement of facts has two sections. The first provides the overall context of the relationship between the parties, and outlines the problems with Appellant's performance that resulted in termination of Appellant by the Carlsons. The second section provides the undisputed facts pertaining to the primary issue on appeal, which is Appellant's violation of state licensing statutes.

A. Facts Concerning The Overall Relationship Of The Parties, Appellant's Breach Of Contract, And The Carlsons' Termination Of Appellant.

Appellant SALA Architects, Inc. is a prominent architectural firm that appears to have either forgotten the basic rules governing professional service firms, or considers itself above those rules. Appellant neglected to listen to its clients, failed to honor the contract it signed, and deliberately violated Minnesota's licensing regulations. Appellant's arrogance is best demonstrated by its answers to the following Requests for Admission in this case:

Request to Admit No. 5: Admit that it is vital for an architect to understand the Owner's tastes and preferences so that the architect can design a structure that will be what the Owner desires.

Appellant's Response: Denied.

Request to Admit No. 6: Admit that an architect has a duty to listen to the Owner during the initial Programming phase of the design process.

Appellant's Response: Denied.

Request to Admit No. 7: Admit that an architect would violate his duty of care to the Owner if the Architect attempted to impose his own design tastes and preferences on the Owner.

Appellant's Response: Denied.

(R.A. 117.)

Infatuated with their success and notoriety, Appellant's employees believe their clients should accept Appellant's architectural tastes and preferences on a take it or leave it basis. Unfortunately, they are not candid with their clients about this belief. In this case, Appellant ignored the contractual requirement that it confirm the Carlsons' design tastes and requirements, and that it obtain agreement on this threshold design "program" before proceeding to detailed design development and construction drawings. Appellant failed to meet this contractual obligation, and went on to ignore the Carlsons' emphatic directions that Appellant not design a contemporary house. Appellant's "architect" David Wagner saw this big-budget project as an opportunity to enhance his own portfolio. He had no interest in the Italian-style, turreted home the Carlsons wanted. He rejected (and privately ridiculed) the Carlsons' tastes. Instead, he designed a decidedly contemporary home that he liked, in a style for which he wanted to be known, but that came nowhere close to the Carlsons' desires. In the process, Wagner billed the Carlsons nearly \$300,000.

Appellant concealed its refusal to listen to the Carlsons' vision for their dream home. Wagner withheld drawings and elevations of the house he was designing—drawings that showed what the house would look like from the

outside. Trusting Appellant, and believing Wagner's assurances that he was following their design program, the Carlsons continued attending design meetings, and continued to pay the bills. It became more and more apparent over time, however, that Wagner was unwilling to follow the Carlsons' instructions. The Carlsons complained to the senior architect supposedly assigned to the project, Dale Mulfinger, on several occasions, but he did little to help. (R.A. 118-21.) When Wagner finally revealed the drawings of the outside of the clearly contemporary house, the Carlsons voiced strenuous objections—yet Wagner refused to adhere to their desires. Mulfinger tried only to convince the Carlsons that they should like the contemporary house Wagner designed. Finally, exhausting their efforts to work with the arrogant Wagner and the uninvolved Mulfinger, the Carlsons fired Appellant and started from scratch with a new architect.

Beyond ignoring the Carlsons' stylistic desires, Appellant violated state licensing statutes by misrepresenting to the Carlsons that Wagner was an architect. In fact, Wagner was not licensed as an architect in Minnesota or any other state. Yet Appellant held out Wagner as an "architect" on architectural plans and in meetings. Appellant's licensed architect, Dale Mulfinger, turned over the project to Wagner without disclosing to the Carlsons that Wagner was unlicensed, or that the design of their home would in fact be Wagner's first project (on his first day) as a non-architect employee of Appellant's firm. Thereafter, Mulfinger abdicated

the project, turning to the myriad other projects in his hectic schedule, and failed to properly supervise Wagner as required by law.

Finally, when the Carlsons sought an explanation of what work Appellant actually performed in exchange for nearly \$300,000 in fees, the Carlsons found that Appellant keeps no substantive billing records beyond the number of hours worked. Appellant thus prevented any reasonable examination of the basis of its fees.

1. The Carlsons Purchase a Lot and Engage Appellant.

In 2000, Robert and Virginia Carlson¹ purchased a lot on Beach Circle in Eden Prairie intending to build the home of their dreams. It was a beautiful lot with lakeshore frontage, and the Carlsons intended to move from their very modern and contemporary home in Edina to live in an old-world cottage style home on this lake. Having lived in a contemporary home for many years, and having had difficulty selling the home because it was contemporary, the Carlsons knew they did not want a modern or contemporary house. (A. 54 at 35; A. 154-55.) Situated on the lakeshore, they envisioned a “cottage-style,” warm and comfortable home with an old world feel. (A. 91.) They had in mind particular images of an Italian, old-world cottage-style home with a turret. (A. 59 at 55.)

¹ Appellant erroneously assumes that the Carlsons have some affiliation with Carlson Companies or the Curt Carlson family. This is untrue, and Appellant’s record citations do not support that assertion.

The Carlsons knew Talla Skogmo, an interior designer who served with Robert Carlson on the Dunwoody School Board of Trustees. (A. 143-44.) The Carlsons asked Skogmo for a referral to an architect, and she suggested Dale Mulfinger of the SALA firm. Skogmo was very clear that she was recommending Mulfinger, and not the firm generally. (A. 146.) Skogmo felt that Mulfinger had a history of designing cabins and cottages in the style the Carlsons desired. (*Id.*) Mulfinger also had designed a house in Bloomington for Skogmo's mother that very much captured the Italian cottage style the Carlsons wanted. (A. 147.) Skogmo had never heard of David Wagner.

The Carlsons interviewed Mulfinger in the summer of 2000. Ultimately they hired Mulfinger and provided him with answers to an extensive "programming questionnaire" in which they described their thoughts and desires about their new home. Among other things, the Carlsons stated in the questionnaire that they intended the Eden Prairie home to be where they would live into old age. (R.A. 133.) Appellant must not have read it, because they denied receiving such information from the Carlsons. (R.A. 116.)

2. *David Wagner Enters the Picture.*

At about the same time the Carlsons hired Mulfinger, Appellant was in the process of hiring David Wagner. Not a licensed architect, Wagner had worked for architectural firms in the state of Washington, including work with the noted architect James Cutler. (A. 119 at 10.) At the Cutler firm, Wagner had worked on a number of high profile projects, including design of a building for Bill Gates. (A.

124 at 35.) Wagner left that firm because he wanted to make a name for himself and not be under Cutler's shadow. (A. 122 at 26.) He felt he could make a name for himself at SALA. (A. 120-22.)

Wagner considered himself a disciple of Greene and Greene, northern California architects who worked in the last century and championed the arts and crafts style of modern architecture. (A. 127 at 70-71; R.A. 137.) Wagner was very interested in architectural design where the structure had "a relationship with the natural setting." (A. 121-23 at 23-24, 27-29.) He had definite ideas of what he wanted in design for his own "personal identity." (A. 122 at 26.) He viewed the Carlson project—a big budget, showcase home—as an opportunity to create a portfolio and make a name for himself. In contrast, the Carlsons did not like Greene and Greene, were not interested in the arts and crafts style of modern architecture and had no particular interest in Wagner's modern architectural agenda. (A. 92; A. 73; A. 75.)

The Carlson project was Wagner's first job at SALA and he was assigned to the project on his first day of work, when Mulfinger knew virtually nothing about him. (A. 102 at 35.) Mulfinger was busy with other projects, teaching and writing books and did not have time for the project. (A. 98-99 at 19-23.) He turned the project over to Wagner, without making that clear to the Carlsons. (A. 112 at 140.) Mulfinger still would go to meetings with the Carlsons, to maintain the pretense that he was still in charge of their project—but Wagner was handling all the design work and putting in virtually all the time. (A. 135 at 127; A. 190-

217.) By February of 2001, Wagner was billing 195 hours on the project and Mulfinger only three. (A. 204.)

There were more serious problems with this arrangement. Although both Wagner and Mulfinger knew that Wagner was not a licensed architect, they concealed that fact from the Carlsons. (A. 102 at 37; A. 108 at 104; A. 128 at 78; A. 228 ¶2.) Appellant fraudulently, and in violation of Minnesota licensing statutes, held Wagner out as an “architect” to the Carlsons and the design team. (R.A. 9; A. 168; A. 186-89.) Beyond concealing his lack of licensure, neither Wagner nor Mulfinger ever disclosed to the Carlsons that their project was Wagner’s first at SALA. (A. 101 at 35; A. 128 at 78-79.)

3. *The Contractual Requirements.*

The Carlsons and Appellant entered into a contract entitled “Standard Form of Agreement Between Owner and Architect for a Small Project.” (A. 48.) This is a contract developed by the American Institute of Architects, and Mulfinger and Appellant had frequently used this contract for residential projects. (A. 114 at 188.) The contract required the architect to learn the client’s design requirements (“program”) in the first phase of the engagement, communicate those to the owner to ensure the understanding is accurate, and obtain the client’s approval of the program. Under the contract, the architect may not proceed to phase II (design development drawings) or phase III (construction drawings) before receiving approval under Section 1.1. (A. 49.) Appellant admits that after signing the

contract it never referred to it again. (A. 125 at 45-46; A. 114 at 190-91.) Nor did Appellant ever seek to obtain the approval set forth under Section 1.1.1.

4. *Appellant's Design Diverges from the Carlsons' Desires.*

The Carlsons were adamant from the outset that they did not want a contemporary home—a fact confirmed by third parties Steven Streeter and Talla Skogmo. (A. 68; A. 162-63; A. 145, 148.) Yet Wagner denied that the Carlsons ever said such a thing. (A. 131-33.) Despite contrary testimony from the Carlsons, Streeter, and Skogmo, Wagner denied that the Carlsons wanted an Italian style home, that they wanted a wood (not glass) front door, that they wanted an office for Virginia Carlson, that they wanted a turret, that they wanted weathered shutters—the list of design elements is almost endless. (A. 131-33 at 91, 99-102; R.A. 143; R.A. 148-49; R.A. 152; R.A. 154-56; R.A. 160-62.) Appellant failed, on many levels, to confirm the design program at the outset. (A. 91-92; A. 129-30 at 83-84.) Compliance with Section 1.1 of the Contract would have precluded this type of disconnect.

The flawed implementation of the process was concealed for a considerable period of time, because Wagner withheld drawings that show what the house would look like from the outside. (A. 149, 156.) Instead, he provided them blueprints and floor plans that were indecipherable to a lay person. (A. 149, 156.) He worked in all phases at the same time, focusing the Carlsons on minute details of closets and cabinets, while avoiding entirely the subject of how the house as a

whole would look—particularly from the outside. (A. 149, 156.) The Carlsons trusted Wagner and assumed he had their interests at heart. (A. 229 ¶6.)

Midway through the design process there was a “groundbreaking” event. (R.A. 157.) The event was staged in early March, when the ground was frozen and the builder had no intention of commencing construction. (R.A. 158-59.) The “groundbreaking” was an arbitrary date that bore no relation to when the house would actually be built. (*Id.*) At the time of the “groundbreaking,” the foundation plan was not done, there was no building permit, and major elements of the design had not been addressed. (*Id.*) The Carlsons had not yet even seen a rendition of what the outside of their house was to look like. (A. 90.) On that date the parties stepped out of their vehicles, sipped some champagne, took a few pictures and left. (A. 109 at 109-10.) No ground was ever broken on Appellant’s design. (*Id.* at 111.)

5. *The Moment of Truth; Termination.*

There had been signs during design meetings that Wagner was pushing his “contemporary” agenda on the Carlsons. But no one expected that Wagner would completely disregard what the Carlsons wanted until Wagner finally unveiled his rendition of the outside of the house. (A. 172.) As Talla Skogmo remembered:

[T]hat was when sort of the cork blew . . . It was always a big deal to have the glass to the lake but she [Virginia] saw the glass door and . . . she got upset and said “I told you I never wanted a glass door.” Perhaps this was at the same meeting, and Bob said “this is a

contemporary house,” and it got very quiet in the room, and it was sort of the first time I think the true exterior of the house was discussed

(R.A. 147.)

At this point Mulfinger responded, not by admonishing Wagner to adhere to his client’s tastes, but by trying to persuade the Carlsons that they should like Wagner’s design. He wrote them in June, 2001, stating:

So the next time your [sic] playing golf and someone in your foursome asks you to describe your new house style, state that your new home is just one of those timeless SALA designs. When they ply further, describe its attributes and invite them by to experience its incredible sense of light.

(A. 185.)

Faced with a design they did not want after nine months of work and nearly \$300,000 in architecture fees from Appellant, the Carlsons were beyond words.

(A. 231 ¶ 13.) They put a halt to the project. Then the events of September 11, 2001 intervened and it was some time before they turned back to the house project. The Carlsons fired Appellant and hired Kurt Baum, another architect.

(*Id.*) Baum listened to the Carlsons, and the Carlsons moved into their new home in April 2005. It’s an Italian-style cottage with a prominent turret and a wooden front door. (R.A. 123.)

B. Facts Establishing Appellant’s Violation Of Minnesota Licensing Laws.

The design disconnect described above undoubtedly was due to Wagner’s inexperience and poor attitude, and Mulfinger’s lack of involvement. Wagner literally started the Carlson project on August 7, 2001, his first day on the job. (A.

126 at 56.) Mulfinger was busy with other projects, teaching and writing books and did not have time for the Carlsons' project. (A. 98-99 at 19-21.) He turned the design over to Wagner, without making that clear to the Carlsons. (A. 112 at 140-41.)

Appellant held out Wagner to the Carlsons as an architect, but it is undisputed that Wagner at that time was not a licensed architect, in Minnesota or any other state. (A. 228 ¶2; A. 120 at 18.). The most obvious evidence of the licensing violation is found on the plans prepared by Wagner for the Carlsons. Appellant prominently identifies Wagner as the "architect" on these plans. (R.A. 9.) Appellant also identified Wagner as an "architect" on contact sheets it prepared for the Carlsons and to the design team. (A. 168; A. 186-89.) Both Wagner and Mulfinger admitted they never disclosed to the Carlsons that Wagner was unlicensed. (A. 128 at 78; A. 108 at 104.) The Carlsons testified that at all times were led to believe he was a licensed architect. (A. 228 ¶ 2.). There is no evidence in the record that Appellant ever notified the Carlsons that Wagner was not a licensed architect. Indeed, Appellant represented to the court, in its Answer to the Complaint in this action, that Wagner was a licensed architect. (R.A. 96.)

ARGUMENT

SUMMARY OF ARGUMENT

The central issue on appeal is how Minnesota law will deal with unlicensed "architects" who violate the licensure statutes. In this case, the record is undisputed that Appellant held out an unlicensed individual, David Wagner, as an

architect on the Carlsons' project in violation of Minnesota statute. Despite the clear violation, Appellant argues it should not have to forfeit the almost \$300,000 in fees it charged the Carlsons for this unlicensed, and ultimately unusable, design work. However, Appellant ignores the obvious policy question raised by its argument. If licensing is not a condition precedent to collecting (or keeping) a fee as an architect, then licensing is meaningless. The trial court's decision gives life to the licensing statutes, effectuates legislative intent, and is consistent with established precedent.

Law and architecture are different professions, but share many relevant characteristics for this case. Both lawyers and architects are required to be licensed in this state, and similar laws preclude unlicensed persons from holding themselves out as lawyers or architects. When a professional violates a legal duty that is fundamental to performing such services (such as conflicts duties in *Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982) or licensing duties here), the violation permeates and necessarily taints all of the services performed. Wagner was not a bit player on this project—he performed virtually all of the work on the Carlsons' project and was held out as an architect.

The only remedy that gives life to Minnesota's statutory licensing requirements is a full disgorgement of fees. That is the rule not only of *Perl*, but also the rule of nearly a dozen authorities, including cases directly addressing licensing violations by architects, that were cited in the Carlsons' summary judgment papers, and which are not addressed at all by Appellant in its brief. In

keeping with Minnesota precedent and the legislative intent behind the licensing statutes, this Court should affirm the trial court's grant of summary judgment. Further, this Court should grant the Carlsons reimbursement of their attorneys' fees based both on their contract with Appellant and as a remedy for Appellant's willful breach of fiduciary duty, in accord with similar decisions in other states.

This Court should not accept Appellant's invitation to countenance and encourage violation of licensing laws. If Appellant prevails in its position, non-architects like Wagner would be free to masquerade as architects and deceive their clients with impunity.

I. APPELLANT CANNOT MEET ITS BURDEN TO ESTABLISH A MATERIAL FACT DISPUTE CONCERNING WAGNER'S UNLICENSED PRACTICE.

Appellant has the burden to establish a material fact dispute that would preclude summary judgment. *Murphy v. Country House, Inc.*, 240 N.W.2d 507, 512 (Minn. 1976). Indeed, Appellant must establish a material fact issue supported by "substantial evidence." *Id.* Evidence of material facts must be "sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Appellant cannot meet this burden because of its own numerous admissions establishing its unlawful holding out of Wagner as an architect.

Minnesota law mandates that any person practicing architecture "shall be licensed or certified." Minn. Stat. § 326.02, subd. 1 (2006). Licensure is required

whether the person practices “as an individual, a copartner, or as agent of another.” *Id.* In addition, it is illegal for any person to “use or advertise any title or description **tending to convey the impression that the person is an architect**” unless the person is licensed under Minnesota law. *Id.* (emphasis added).

The entire statute states, in relevant part:

Licensure or certification mandatory. In order to safeguard life, health, and property, and to promote the public welfare, any person in either public or private capacity practicing, or offering to practice, architecture . . . either as an individual, a copartner, or as agent of another, shall be licensed or certified as hereinafter provided. It shall be unlawful for any person to practice, or to offer to practice, in this state, architecture, . . . or to use in connection with the person’s name, or to otherwise assume, use or advertise any title or description tending to convey the impression that the person is an architect, . . . unless such person is qualified by licensure or certification under sections 326.02 to 326.15.

Minn. Stat. § 326.02, subd. 1 (emphasis added).

The trial court properly found it undisputed that Appellant “held out” Wagner as a licensed architect, “[b]y not disclosing the fact that Wagner was not licensed, allowing Wagner to perform architectural services, and promoting Wagner as an ‘architect.’” (A. 35.) During the hearing on reconsideration, the district court judge summarized the facts behind his decision to disgorge Appellant’s fees: “the basis is that [Appellant] represented that this was an architect-designed home, that Mr. Wagner was the architect, and that [in fact] he wasn’t an architect. That’s the basis.” (R.A. 49.)

This finding is clearly supported by Appellant’s admissions. Appellant held out Wagner as the “architect” on the plans it prepared for the Carlsons. (R.A.

9.) Appellant held out Wagner as an “architect” on contact sheets circulated to the Carlsons, the builder and others. (A. 186-89.) Appellant held out Wagner as an “architect” to the trial court, in its Answer. (R.A. 96.) Both Wagner and Mulfinger testified that they never informed the Carlsons that Wagner was unlicensed. (A. 128 at 78; A. 108 at 104.) Robert Carlson testified he was at all times led to believe that Wagner was a licensed architect. (A. 228 ¶2.) Unquestionably, these undisputed facts demonstrate that Appellant unlawfully took actions “tending to convey the impression that [Wagner] was an architect.” *See* Minn. Stat. § 326.02, subd. 1. Indeed, if Appellant had scrupulously avoided holding out Wagner as an architect, as asserted by its lawyers in Appellant’s brief, none of the foregoing actions could have occurred.

Despite its publication of architectural plans that clearly list Wagner as an Architect (R.A. 9), Appellant contends that reasonable minds could differ on whether Appellant held out Wagner as a licensed architect (A. Br. 35). Those plans were critical to the district court’s decision; the judge noted that Wagner is listed under the heading “architect” and that the plans are public documents, intended for city planners and other project participants. (A. 27.)² Those plans, when considered along with the contact sheets for the project, the admissions of Wagner and Mulfinger, and the undisputed affidavit of Robert Carlson, compel

² The court repeatedly questioned Appellant’s counsel regarding the plans during the hearing on reconsideration. (*E.g.*, R.A. 41.)

only one conclusion as a matter of law: that Appellant held out Wagner to the Carlsons as an architect. (R.A. 9; A. 228 ¶2; A. 168; 186-89.)

Appellant offers no “substantial evidence” that would change the inescapable conclusion that Appellant held Wagner out as a licensed architect. Appellant has never disputed the authenticity of construction plans identifying Wagner as an “Architect.” Appellant never disputed that the contact lists, designating Wagner as an “Architect,” were in fact distributed to the Carlsons and others.

Rather than address these critical facts, Appellant attempts to nibble around the edges of the issue by trying to diminish the significance of some of its representations. Appellant argues, for example, that the contact sheets “merely identify the members of the design team and their associated category in the design process.” (A. Br. 39.)³ The district court appropriately rejected this argument in the reconsideration hearing during this exchange:

[Counsel for Appellant]: There is nothing about that contact list that infers that David Wagner is an architect.

³ Appellant analogizes its listing of Wagner as an architect with the listing of Renae Keller as one of the interior designers. (A. Br. 39.) The listing of Renae Keller under the heading “Interior Design” is not probative for two reasons: 1) Appellant developed the Contact sheet, and what is relevant to the statute is how Appellant held Wagner out, not how it characterized another party; and 2) Appellant submits no record evidence establishing that Keller was not a certified interior designer, or whether Appellant’s employees creating the contact sheet believed she was.

The Court: Other than the word “architect,” underline, that appears directly above his name?

(R.A. 47.)

In its only attempt to show that it did, in fact, disclose Wagner’s unlicensed status, Appellant tries to spin the information provided on some, but not all, of its invoices sent to Robert Carlson. Appellant contends that listing Wagner as a “draftsperson” on some, but not all, of the invoices, somehow negates the clear holding out of Wagner as an architect on plans, contact sheets and elsewhere. (A. Br. 9-11, 37.) The trial court properly rejected this argument, and addressed it in detail. (A. 32.)

First, as the trial court observed, the invoices do not address licensing at all. The invoices make no mention of licensure, provide no statements about licensing, and in fact refer to none of the timekeepers (even the licensed ones) as architects. Instead, the terms listed on the invoices are references to some internal hierarchy of Appellant’s, but communicate nothing about licensure to a layperson reviewing the bills. Nothing in the invoices explains what the designations (“principal,” “associate,” “draftsperson,” etc.) mean,⁴ and the invoices cannot be relied upon for *effective* disclosure.

⁴ Consider whether a law firm client would perceive the differences between the designations “shareholder,” “associate,” “of counsel,” or “legal assistant” on invoices, and understand which persons were licensed attorneys from just that information. No professional firm, law or architecture, could properly rely on that information to convey licensure status.

Second, even if these obtuse designations on some of the invoices generally could be relied upon to convey licensure status, they cannot be deemed effective notice when Appellant was expressly identifying Wagner as an “architect” on its other communications to the Carlsons. In the face of express representations that Wagner was an architect, the trial court properly found that these indistinct and obtuse designations did not negate, or overcome, Appellant’s other representations to create an issue of fact. Indeed, the trial court observed that even the invoices list Wagner as providing “architectural services.”

Third, even if the designations were transparent and clearly addressed licensure status, they are present on only a few of the fourteen invoices submitted by Appellant. Nine of the invoices do not provide designations at all, and simply list Wagner under the title “Architectural Services.” (A. 190-217; R.A. 56-58.) As the district court observed, “[t]he designation was dropped from the bills during the period when most of the services were incurred.” (R.A. 89.)

Indeed, Mulfinger and Wagner themselves did not consider the invoices as disclosure of Wagner’s unlicensed status. Wagner and Mulfinger both testified they did not inform the Carlsons of Wagner’s unlicensed status (A. 128; A. 108), and they so testified in depositions where the invoices were on the table before them and were used as exhibits. Neither Mulfinger nor Wagner thus viewed the invoices as constituting a disclosure of Wagner’s lack of licensure, or they would have cited the invoices as disclosure in their depositions.

Finally, even if the invoices were an effective disclosure, they would not ameliorate the holding out of Wagner to persons who did not receive the bills, i.e., the builder Steven Streeter, the interior designer Talla Skogmo, building permit review officials, subcontractors, etc. and Virginia Carlson,⁵ nor would they negate the holding out of Wagner as an architect to Robert Carlson in other communications. At the very most, Appellant's argument is that it only violated the statute some of the time.

Given that Appellant listed Wagner as an architect on construction plans and contact lists, the Carlsons testified they were led to believe Wagner was licensed, and Wagner and Mulfinger admit they never told the Carlsons that Wagner was unlicensed, it remains undisputed that Appellant held out Wagner as an architect in violation of law.⁶ This Court should therefore affirm the trial

⁵ As is evident on their face, the bills were sent to Robert Carlson at his office address.

⁶ Appellant suggests that the Carlsons should have scoured its letterhead for Wagner's name and intuitively known that when his name did not appear, he was not a licensed architect. (A. Br. 37.) The licensing statutes impose no such duty on consumers; instead, the obligation is plainly on the design professional to be honest and forthright about his/her licensure and prohibits actions by Appellant "tending to convey the impression that [Wagner] was an **architect**." See Minn. Stat. § 326.02, subd. 1. Equally ludicrous is Appellant's suggestion that Wagner's hourly rate being five dollars less than that of Marcelo Valdes (A. 190, A. Br. 37) should have clearly indicated to the Carlsons that Wagner was unlicensed.

court's decision that there was no material issue of fact concerning Appellant's violation of the licensing statute.⁷

II. MINNESOTA LAW MANDATES A DISGORGEMENT REMEDY FOR APPELLANT'S VIOLATION OF LICENSURE STATUTES.

Given the undisputed facts that Appellant unlawfully held out Wagner as an architect, there are two independent legal bases for affirming the trial court's disgorgement of fees remedy. First, as the trial court held, Appellant's unlawful action constituted a breach of fiduciary duty, and controlling law establishes disgorgement as the remedy for such a breach. Second, as the Carlsons argued in the alternative before the trial court, established Minnesota law provides that the lack of licensure voids a professional services contract, and that a professional must disgorge fees obtained as a result of such unlicensed activity. This Court may affirm summary judgment on "alternative theories presented but not ruled on at the district court level." *Nelson v. Short-Elliot-Hendrickson, Inc.*, 716 N.W.2d 394, 402 (Minn. App. 2006). Both the breach of fiduciary duty and the licensing precedents support affirmance of the trial court's decision.

⁷ Appellant also points to Robert Carlson's testimony that he expected Mulfinger would use some junior employees on his project as if it created a "material issue of fact." (A. Br. 36.) This is a red herring. Carlson's acknowledgement that Mulfinger was not going to labor totally alone in designing the Carlsons' home does not mean that Carlson acquiesced to being duped about Wagner's licensure.

A. Appellant Must Disgorge Its Fees Obtained Through Breach Of A Fiduciary Duty.

The trial court found that “[w]here a fiduciary duty is breached, the appropriate remedy is disgorgement of all amounts paid by the client to whom the fiduciary duty was owed,” citing *Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982). (A. 18.) Although this issue has not been addressed by the Minnesota appellate courts, many states have determined architects are fiduciaries to their clients, and that should particularly be true in this situation, given the representations made by Appellant that it would act as fiduciary for the Carlsons.

B. Appellant Was A Fiduciary To The Carlsons.

Minnesota law broadly defines a “fiduciary relation” as existing when “confidence is reposed on one side and there is a resulting superiority on the other; and the relation and duties in it need not be legal but may be moral, social, domestic or merely personal.” *Midland Nat’l Bank v. Perranoski*, 299 N.W.2d 404, 413 (Minn. 1980); *see also Flynn v. Am. Home Prods. Corp.*, 627 N.W.2d 342, 350 (Minn. App. 2001). A “fiduciary relation” develops as a result of one party having superior knowledge and the other party placing its confidence and trust in them. *Perranoski*, 299 N.W.2d at 413. The existence of a fiduciary duty is a question of law and is appropriately determined on summary judgment. *Advanced Comm’n Design v. Follett*, 615 N.W.2d 285, 289 (Minn. 2000); *H.B. by Clark v. Whittemore*, 552 N.W.2d 705, 707 (Minn. 1996).

Homeowners hire architects because of their training, experience and ability in the complicated task of building a sound residence that meets their design tastes and desires. Most owners have no independent basis to check on the quality or accuracy of the architect's work, nor whether the amount of time they are spending is reasonable, and therefore have no choice but to place their trust and confidence in the architect. Therefore, imposing a fiduciary duty from architects to their clients is consistent with Minnesota law.

Numerous states treat architects as fiduciaries of their clients. *E.g.*, N.C. Gen. Stat. § 83A-1(5) (2006) (defining "Good moral character" for an architect as "assur[ing] the faithful discharge of the fiduciary duties of an architect to his client"); *Holy Cross Parish v. Huether*, 308 N.W.2d 575, 577 (S.D. 1981); *Baylor Univ. v. Carlander*, 316 S.W. 277, 287 (Tex. App. 1958); *Palmer v. Brown*, 273 P.2d 306, 315 (Cal. App. 1954) (citing *Barron Estate Co. v. Woodruff Co.*, 126 P. 351, 357 (Cal. 1912) and *Corey v. Eastman*, 44 N.E. 217 (Mass. 1896)); *Howard County v. Pasha*, 172 N.W. 55, 60 (Neb. 1919); *Bayne v. Everham*, 163 N.W. 1002 (Mich. 1917) (stating that "the responsibility of an architect does not differ from that of a lawyer or physician").

The *Baylor University* court held that:

Good faith and loyalty to his employer constitute a primary duty of the architect. He is in duty bound to make a full disclosure of all matters, of which he has knowledge, which it is desirable or important that his principal should learn.

Baylor University, 316 S.W. at 287. The American Institute of Architects has adopted a Code of Ethics and Professional Conduct that addresses the duties of architects. *E.g.*, AIA Ethical Rule 4.201 (stating that “[m]embers shall not make misleading, deceptive, or false statements or claims about their professional qualifications, experience, or performance”) (R.A. 126); AIA Code of Ethics E.S. 3.3 (stating that “[m]embers should be candid and truthful in their professional communications”) (R.A. 126); and AIA Code of Ethics Rule 2.101 (stating that “[m]embers shall not, in the conduct of their professional practice, knowingly violate the law”) (R.A. 125).

Appellant cites no precedential case holding that an architect is not the fiduciary of its client. Instead, Appellant cites lower court decisions from only three states and Appellant misconstrues the holdings of those courts. (A. Br. 24.) The holding of those cases is not what Appellant suggests. The New York case cited by Appellant is a one paragraph decision, holding only that the plaintiff “failed to offer proof in evidentiary form that” the architect owed a fiduciary duty. It does not foreclose the possibility that a fiduciary relationship could exist. *See Cinque v. Schieferstein*, 292 A.D.2d 197, 198 (N.Y. App. Div. 2002). The Virginia case did not decide whether the architect is a fiduciary at all, but focused its inquiry on the architect’s argument that it was the agent of the owner. *Will & Cosby & Assoc., Inc. v. Salomonsky*, 48 Va. Cir. 500, 503 (Va. Cir. Ct. 1999). Finally, the Connecticut court, in finding no fiduciary relationship between a particular architect and owner, stated that there was no allegation of fraud in the

case, suggesting that such an allegation would alter the analysis. *Routh v. Preusch*, No. CV030197042, 2004 Conn. Super. LEXIS 2469, at *5 (Conn. Super. Ct. Sept. 1, 2004). This Court should follow the seven states discussed above that find an architect has fiduciary obligations.

Beyond considering whether architects in general are fiduciaries, the trial court properly focused on Appellant's specific representations to the Carlsons in this case, which unquestionably set up an expectation of a fiduciary relation. Indeed, the unpublished case Appellant cites from the District of Minnesota acknowledges that a fiduciary relationship *could* exist between a design professional and the client if the necessary trust and confidence is present. See *Todd County v. Barlow Projects*, Civil No. 04-4218, 2005 U.S. Dist. LEXIS 8648, at *29 (D. Minn. May 11, 2005).

As the trial court found, Appellant invited the Carlsons' confidence. Appellant represented in its marketing materials on its web site that it serves as "an advocate" for its clients. (R.A. 129.) Appellant claimed its architects are "educated to help you define your needs, present options you never may have considered and help you get the most for your valuable investment." (R.A. 127.) Appellant stated that "we are very aware how important a home is to its owners, what enormous emotional energy is lavished upon it, and how unnerving it is to be at the mercy of others in the shaping or reshaping of that home." (R.A. 128.) In sum, Appellant acknowledged the fiduciary relation it has with its clients, and represented that it will use its superior understanding of the complex world of

design and construction on behalf of its clients, where the clients would otherwise be “at the mercy of others.” In fact, the Carlsons did place their trust in Appellant. (A. 229 ¶ 6.)

The trial court also properly focused on the American Institute of Architects Code of Ethics, addressed by the Carlsons’ expert architect Anthony Desnick, which clearly sets up fiduciary obligations for architects. The particular standards noted are:

- Rule 4.201: “[m]embers shall not make misleading, deceptive, or false statements about their professional qualifications, experience, or performance;”
- Standard 3.3: “[m]embers should be candid and truthful in their professional communications;” and
- Rule 2.101: “[m]embers shall not, in the conduct of their professional practice, knowingly violate the law.”

(A. 31.)

Appellant also had superior experience in designing residences than the Carlsons, and in particular, had significantly more experience than Virginia Carlson in designing and building homes, which is a factor in creating fiduciary relationships. It was Virginia, not Robert Carlson, who primarily worked on the home design with Wagner. (A. 89-90.) Virginia did not have the amount of experience with architects that Robert had, and neither one had anything close to the experience and expertise in design supposedly available at one of the most prominent architecture firms in Minnesota. (A. 54.) The fact that Robert Carlson had worked with architects in the past could not possibly place him in a position of

superiority, *vis a vis* the architects, on issue of design or licensure. Finally, the expert testimony of Anthony Desnick, opining that Appellant had fiduciary duties to the Carlsons, is unopposed in the record. If Appellant intended to create a fact dispute as to the nature of its obligations to its client, it was incumbent on Appellant to submit such testimony. In the absence of opposing expert testimony, Appellant has no grounds to challenge this basis for the trial court's ruling. There clearly was ample, undisputed evidence to support the trial court's decision.⁸

C. Disgorgement Is The Appropriate Remedy For Appellant's Breach Of Fiduciary Duty Under *Rice v. Perl*.

Having found Appellant owed fiduciary duties to the Carlsons and breached them by misrepresenting Wagner's licensure, the district court applied the *Perl* rule and ordered disgorgement of all architectural fees paid to Appellant. (A. 19.) This is a straightforward application of *Rice v. Perl*, which held that "any fiduciary[] who breaches his duty to his client forfeits his right to compensation." 320 N.W.2d 407, 411 (Minn. 1982).

The *Perl* rule was recently reaffirmed and applied by this Court in its decision in *Commercial Associates, Inc. v. Work Connection, Inc.*, 712 N.W.2d

⁸ Although not particularly relevant, Appellant states that in Minnesota doctors do not owe fiduciary duties to their patients. (A. Br. 26.) Minnesota law is not so clear. The published decision that Appellant cites really holds only that the putative class of plaintiffs could not assert fiduciary claims as a way of evading the statute of limitations and elements of malpractice claims. *D.A.B. v. Brown*, 570 N.W.2d 168, 171-72 (Minn. App. 1997). In any case, the relationship of an architect to its client is more similar to that of an attorney to its client, as both do not have the same well-defined statutory causes of action for imposing liability as do doctors.

772 (Minn. App. 2006). The *Work Connection* decision recognized a fiduciary relationship between an insurance broker and its client, and affirmed that a fiduciary who breaches its duty with fraud or bad faith must fully forfeit its fees in order to punish and deter similar conduct. *Id.* at 779-80.

Although Appellant argues that disgorgement is inappropriate in this case because “SALA did absolutely nothing improper” (A. 30), the district court disagreed and the record refutes Appellant’s contention. Violating state licensing statutes is improper. Misrepresenting an employee’s licensure status is improper. Violating professional ethical rules is improper. The district court found that “[Appellant] breached this [fiduciary] duty by holding out David Wagner as an architect, when both [Appellant] and Wagner knew Wagner did not have a license to practice architecture.” (A. 19.) The district court later noted, upon reconsideration, that Appellant’s “statutory and ethical violations . . . make the impropriety, and the appearance thereof, substantial.” (A. 35.) Those statements by the district court indicate it found Appellant’s conduct in holding out an unlicensed person as an architect constituted “fraud or bad faith.” Indeed, a violation of Minn. Stat. § 326.02, subd. 1, which involves misleading the public about the licensure status of a design professional, constitutes fraud *per se*.

Having found a violation of the architecture licensing law in Minn. Stat. § 326.02, subd.1, the district court did not err in granting full forfeiture.

D. Even Absent A Fiduciary Relationship, Disgorgement Of Fees Is An Appropriate Remedy For Violation Of State Licensing Laws.

This Court may affirm summary judgment on “alternative theories presented but not ruled on at the district court level.” *Nelson v. Short-Elliott-Hendrickson, Inc.*, 716 N.W.2d 394, 402 (Minn. App. 2006). Therefore, this Court does not need to decide the issue of whether architects are fiduciaries, but can affirm the disgorgement under Minnesota law regarding the unlicensed practice of a profession. The Carlsons argued this alternative ground for disgorgement in their opposition to the summary judgment and on reconsideration. (R.A. 205-12.) The trial court did not need to address the argument in light of its grant of relief as a breach of fiduciary duty.

“[W]here a license or certificate is required by statute as a requisite for one practicing a particular profession, an agreement of professional character without such license or certificate is ordinarily held illegal and void.” *Dick Weatherston’s Associated Mech. Servs., Inc. v. Minn. Mut. Life Ins. Co.*, 100 N.W.2d 819, 823 (Minn. 1960). Where an agreement is illegal and void, the violating party may not retain payments made under the illegal contract. See Stephen G. Walker, et al., *State-by-State Guide to Architect, Engineer, and Contractor Licensing* § 26.16 (1999).

The Minnesota Supreme Court has recognized the remedy of disgorgement of fees paid. See *Layne Minn. Co. v. Town of Stuntz*, 257 N.W.2d 295, 300-01 (Minn. 1977) (acknowledging disgorgement as a remedy for an illegal contract

where fraud (such as misrepresentation of licensing status) is involved); *Village of Wells v. Layne-Minnesota Co.*, 60 N.W.2d 621, 625-26 (Minn. 1953) (noting that a village could receive restitution, even after receiving finished work from the contractor, if the work was worthless); accord *In re Digital Resources, LLC*, 246 B.R. 357, 371 (B.A.P. 8th Cir. 2000) (citing *Village of Wells* for that proposition).

In addition, Illinois courts have recognized that recovery of fees paid is essential to uphold the remedial purpose of the licensing statutes. In *Ransburg v. Haase*, 586 N.E.2d 1295 (Ill. Ct. App. 1992), the court “recognize[d] a cause of action to recover money previously paid to defendant for architectural services which have been rendered but for which defendant was not licensed.” *Id.* at 1298. Very similar to the instant case, the *Ransburg* plaintiffs sought to recover more than \$80,000 they had paid an unlicensed architect to design a residence. *Id.* at 1296. The court found that “[t]o allow the unlicensed architect to retain the fees paid is to allow him to practice architecture in the state of Illinois without a license and to reap the rewards thereof.” *Id.* at 1300.

Many other courts and commentators agree. See, e.g., *Kansas City Cmty. Ctr. v. Heritage Indus.*, 972 F.2d 185, 190 (8th Cir. 1992) (affirming a district court’s decision under Missouri statutes to force an unlicensed contractor to return money it had received to design and construct a building); *Kowalski v. Cedars of Portsmouth Condominium Assoc.*, 769 A.2d 344, 347-49 (N.H. 2001) (affirming the disgorgement of real estate commissions by an unlicensed agent); *Mascarenas v. Jaramillo*, 806 P.2d 59, 63 (N.M. 1991) (holding that “[a]s a matter of public

policy, an unlicensed contractor may not retain payments made pursuant to a contract which requires him to perform in violation of [state licensure laws].”); *Wineman v. Blueprint 100, Inc.*, 348 N.Y.S.2d 721 (N.Y. Civ. Ct. 1973) (allowing homeowners to disgorge payment made to an unlicensed architect); *see also* Walker, *State-by-State Guide to Architect, Engineer, and Contractor Licensing* § 26.16 (1999) (stating that “if the other party to the contract was unaware that the violator was engaging in the licensed profession without being properly licensed, the violator may also be forced to forfeit any fees that have already been paid”).

Appellant violated statute, contract and duty by holding out Wagner as an architect. The district court was correct in ordering disgorgement of fees.

III. THE COURT NEED NOT ADDRESS THE “RESPONSIBLE CHARGE” ISSUE RAISED BY APPELLANT.

This Court need not address the third legal issue articulated in Appellant’s brief (A. Br. 1), as Appellant did not list that issue in its Statement of the Case submitted to this Court, and the district court did not base its decision on that finding. (A. 3-36; A. Br. 34 n.5.) In its final 13-page order of November, 2005, after granting reconsideration to Appellant, the district court concluded that:

Because Defendant has failed to raise a genuine issue of material fact on the licensure issue, the Court’s conclusion that Defendant held out Wagner as a licensed architect to Plaintiffs is appropriately made, and is supported by the record. Because Defendant is a fiduciary, and because the *Perl* remedy of disgorgement applies to fiduciaries, *Perl* is appropriately applied to this case.

(A. 36.) The trial court did not base its decision on whether or not Mulfinger adequately supervised Wagner—the decision was based on the fact that Appellant

held out Wagner as an architect, when he was not licensed. The issue of supervision is not an element of the breach of fiduciary duty analysis, nor is it germane to the case law mandated disgorgement based on breach of licensure laws.

If this Court chooses to address this issue, the Carlsons note that even if Appellant were forthright about Wagner's licensure status, it still had a strict statutory duty of maintaining "responsible charge" of the project by a licensed architect—which Appellant also failed to do in this case. Where an architectural firm has unlicensed employees assisting in providing architectural services, a licensed architect still must be in "responsible charge" of the project. The statute provides:

A corporation, partnership or other firm may engage in work of an architectural or engineering character . . . provided the person or persons connected with such corporation, partnership or other firm in responsible charge of such work is or are licensed or certified as herein required for the practice of architecture.

Minn. Stat. § 326.14 (2006).⁹ "Responsible charge" is in turn defined as, among other things, "the person whose professional skill and judgment are embodied in

⁹ Before 1945, the statute had the same language as the current version, but continued on to say "the same exemptions shall apply to corporations and partnerships as apply to individuals under sections 326.02 to 326.15." Minn. Stat. § 326.14 (1941). In 1945, that last sentence was stricken; a change that demonstrates legislative intent that exemptions available to individuals do not apply to corporations practicing architecture under Minn. Stat. § 326.14.

the plans, designs, and advice involved in the work.” Minn. R. 1805.1600, subp. 1.¹⁰

In this case, Mulfinger was licensed, but his involvement dropped off after the first meetings with the Carlsons. Mulfinger did not draw any of the dozens of drawings Appellant produced for the Carlsons. (A. 135 at 126-27.) Wagner himself was, for all practical purposes, in “responsible charge” of the project. This violation was of particular significance with respect to the Carlson project. The Carlsons were referred to Dale Mulfinger, specifically, by Talla Skogmo, their interior designer. (A. 146.) The Carlsons liked a home Mulfinger had designed for Skogmo’s mother and they were attracted to his reputation for designing “cottage style” homes and cabins. (A. 147.) They were hiring Mulfinger—not Appellant. (A. 228 ¶ 2.) Mulfinger turned the project over to Wagner, who worked essentially full time on the project for much of the next year, while Mulfinger’s involvement diminished so that, as of February 2001, Wagner billed 195 hours on the project while Mulfinger billed only 3 hours. (A. 204.)

Moreover, Appellant failed to maintain any timekeeping records to document any of the tasks performed by Wagner, Mulfinger or others on the project, so Appellant has no documentation of Mulfinger having the required level

¹⁰ In response to Appellant’s broad statement that “unlicensed employees routinely engage in a professional practice under the supervision of a licensed practitioner” (A. Br. 31), the Carlsons note that Wagner’s name on the architectural plans here is tantamount to an unlicensed attorney signing pleadings that are filed with a court—a clear violation of licensure rules.

and quality of involvement required by statute. (A. 103.) Finally, Appellant concedes it has no internal policies concerning supervision of unlicensed staff performing architectural services. (A. 115 at 244-46.) Because Wagner billed virtually all the time on the project and Appellant cannot produce any evidence that it was really Mulfinger's "professional skill and judgment" embodied in the plans, Appellant has not raised a material issue of fact regarding its violation of Minn. Stat. § 326.14.

It is not difficult to conclude that this error contributed to the ultimate failure of the project. As Virginia Carlson eventually learned,

[Wagner] knew nothing other than Green and Green [sic] because he's 28 years old or however old he is. That's the reason I hired Dale, because I wanted somebody that was seasoned, could be diverse, and wasn't just tunnel vision into a contemporary Frank Lloyd Wright homes.

(A. 92.) A licensed and more experienced architect, with a full understanding of the obligations and duties of an architect to a client, subject to the AIA Code of Ethics, would have addressed and corrected the design disconnect between the Carlsons and Wagner.

IV. THE RESIDENCE EXCEPTION DOES NOT EXCUSE APPELLANT'S "HOLDING OUT."

Again on appeal, Appellant reiterates the argument it relied on almost exclusively below: that it is not necessary to be licensed to design a residence. (A. Br. 32, 42.) The answer to this argument is simple and unquestionably correct: Minnesota law does not require an architect's license to design a residence, but

Minnesota law does require an architect's license to call yourself an architect. The trial court properly read the statute to reach this obvious conclusion. (A. 15-16, 29.)

Minnesota Statutes § 326.02 states broadly that licensing is required to practice architecture, but provides an exception for non-architects who build or design homes. After mandating that only an architect can practice architecture or use the title "architect" in the preparation of plans, the statute notes:

Nothing contained in sections 326.02 to 326.15 shall prevent persons from advertising and performing services such as consultation, investigation, or evaluation in connection with, or from making plans and specifications for, or from supervising, the erection, enlargement, or alteration of any of the following buildings:

(a) dwellings for single families, and outbuildings in connection therewith, such as barns and private garages.

Minn. Stat. § 326.03, subd. 2 (2006). Therefore, the act of designing and planning a home, by itself, does not require an architecture license under Minnesota law.

This exception allows a non-architect to design a home, but it does not authorize a non-architect to hold himself out as an architect.¹¹ There is nothing in Section 326.03, subd. 2, that authorized Wagner to call himself an architect on the Carlsons' plans, or to hold himself out as an architect to the Carlsons. This common-sense principle is articulated in a Texas case that construed a similar regulatory statute. In that case, a designer sued homeowners who hired him to

¹¹ As noted in footnote 11, the residence exception also does not exempt the Appellant from complying with Minn. Stat. § 326.14.

prepare plans for a proposed residence and then did not fully pay his fees. *Clark v. Eads*, 165 S.W.2d 1019 (Tex. Civ. App. 1942). In the pleadings, the designer alleged he was an architect, but admitted in discovery that he did not have a license. The owners contended that the contract was void because of the designer's lack of licensure, but the designer relied on a Texas statute that exempted from licensure any person "who prepares plans for the erection or alteration of any building . . . but does not in any manner represent himself, herself, or themselves to be an architect." *Id.* at 1021. The court held that the designer did not fit within the exemption, reasoning that:

It would not be lawful for a doctor to practice medicine without a license upon condition that he tell his patients that he did not have a license, or for a lawyer to try cases in court upon condition that he advise the court that he did not have a license. The purpose of the statutes is to prevent the unlicensed, unauthorized practice of such professions.

Section 16 of the statute is patently designed to permit ordinary carpenters and contractors, and other persons who make no pretense of being architects, to draw house plans and to build or supervise the building of structures. It was not intended to permit architects who generally hold themselves out as such to practice their profession without a license simply by resorting to the expedient of explaining to their clients that they had no license.

Id. at 1023.

Similarly, a New Jersey court, interpreting an exemption to licensure requirements for a person who designs a building for his own occupancy, adopted a limited reading of that statute. *New Jersey St. Bd. of Architects v. Armstrong*, 215 A.2d 51, 53 (N.J. Sup. Ct. App. Div. 1965). The unlicensed defendant

designed a combination house and tavern for himself and his wife, and was sued by the state architectural board for lack of licensure. The trial court held that, because the building was occupied by the designer, it fit the exception. The appellate court, noting the remedial purpose of the statute, adopted a broad construction that was more protective of public safety. Because members of the public would be invited into the tavern part of the building, the designer had to be licensed. *Id.*

As with the foregoing statutes, the intent of the Minnesota exemption is clearly “to permit ordinary [people]...who make no pretense of being architects, to draw house plans.” *Clark*, 165 S.W.2d at 1023. When the name of the company is SALA Architects, and the designer is held out in all respects as an architect, the “residence” exception cannot be applied to facilitate Appellant’s fraudulent representations. This is the only reasonable way to read the Minnesota statute, considering the plain language of the statute, the broad language of the licensing “holding out” restrictions, the express remedial purpose of the statute to protect consumers, and the lack of any provision in the statute expressly providing that the “residence” exception pre-empts the “holding out” licensing requirement. *See generally Alderman’s Inc. v. Shanks*, 536 N.W.2d 4, 7-9 (Minn. 1995) (noting that the violation of a protective statute is negligence per se and that a subsequent statutory provision did not exempt the defendant from liability); *Johnson v. Farmers & Merchants State Bank of Balaton*, 320 N.W.2d 892, 897 (Minn. 1982).

Appellant is not excused from the entire licensure scheme set out by the legislature each time it designs a residence.

V. **APPELLANT HAD A FULL AND FAIR OPPORTUNITY TO ADDRESS ITS LICENSING VIOLATION BEFORE THE TRIAL COURT.**

Appellant's final legal issue on appeal is that it lacked a "meaningful opportunity to oppose" the district court's grant of summary judgment to the Carlsons.¹² In fact, Appellant had ample opportunities to address these same issues before the district court and was not prejudiced in any way by the trial court's initial order, or its reaffirmance of that order upon reconsideration.

Minnesota law states:

A reviewing court will not reverse a lower court grant of summary judgment unless the objecting party can show prejudice from lack of notice, procedural irregularities, or from the lack of a meaningful opportunity to oppose summary judgment.

Septran, Inc. v. Indep. Sch. Dist. No. 271, 555 N.W.2d 915, 920 (Minn. App. 1996) (affirming a *sua sponte* summary judgment). This Court has affirmed *sua sponte* grants of summary judgment in cases, like the instant case, in which the district court gave the parties' notice of the issue upon which it was considering ruling and time to submit additional briefs. *E.g.*, *Septran, Inc.*, 555 N.W.2d at 920-21; *Fed. Land Bank of St. Paul v. Obermoller*, 429 N.W.2d 251, 255 (Minn. App. 1988); *cf. Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 419

¹² The Carlsons note that the fourth legal issue articulated in Appellant's brief (A. Br. 1) was not present in its "Statement of the Case" submitted in March of 2006.

(Minn. App. 2003) (reversing the *sua sponte* ruling because appellant “had only seven-days’ notice of a miscaptioned motion” and was never given any opportunity for reconsideration). Appellant had notice of the issues upon which the district court ruled, there were no procedural irregularities, and Appellant had a meaningful opportunity to oppose summary judgment.

Appellant had the opportunity to address the same critical issues that it now raises on appeal during at least the following eight appearances: (1) its opposition to the Carlsons’ Motion to Amend their Complaint (R.A. 176-79); (2) its opening and reply briefs in support of its Motion for Summary Judgment (R.A. 162-75); (3) oral argument on summary judgment and the motion to amend (R.A. 31-34); (4) an in-chambers discussion with the district court judge after oral argument (A. 25, n.1); (5) a follow-up affidavit (R.A. 180); (6) a letter requesting reconsideration (R.A. 190); (7) opening and reply briefs on reconsideration of the district court’s judgment (R.A. 192-204); and finally (8) oral argument on reconsideration (R.A. 36-92).

At every one of those appearances, Appellant knew that the Carlsons claimed Appellant had violated the licensure statutes. The Carlsons had served their expert disclosures, indicating that claim, in April of 2005 (R.A. 100) and the Carlsons had already moved to amend, noting that under the umbrella claim of professional malpractice, they were making the specific allegation that David Wagner held himself out as an architect when that was not the case. (A. 15.)

As of its Order in August of 2005, the district court explained that:

Defendant has had a full opportunity to present the legal issues related to Wagner's lack of licensure. . . . Defendant opposes Plaintiffs' motion with substantive legal arguments, relying primarily on the statutory provision that permits non-architects to perform architectural services on residential constructions. The level of detail and substance contained in Defendant's opposition indicates that Defendant has had the opportunity to make a strong legal argument on the issue of Wagner's lack of licensure. Defendant was first notified of the specific allegations regarding Wagner's lack of licensure in early April 2005 through Plaintiffs' Affidavit of Expert Disclosure.

(A. 12-13.) Appellant had additional opportunities to address the issues during the hearing and briefing of their motion for reconsideration, which was granted "to ensure that [Appellant] was afforded sufficient opportunity to defend against [Respondents'] professional liability claim and the [c]ourt's disgorgement remedy." (A. 26.)

Appellant's complaint about not having an opportunity to address the licensing issue in the initial summary judgment briefing and argument (A. Br. 43) rings hollow, considering that the Carlsons placed Appellant on notice of the licensing claim, and provided a detailed factual and legal disclosure of the claim, months before the summary judgment motion was heard. Appellant's decision to ignore that disclosure was its own conscious choice—there was no unfair surprise. Appellant was then afforded the opportunity to brief and argue the issues again on reconsideration. After its eight opportunities to address Appellant's violation of Minnesota licensure statutes, Appellant had a "meaningful opportunity to oppose" the summary judgment, and therefore, it should be affirmed.

VI. THE CARLSONS ARE ENTITLED TO ATTORNEYS' FEES.

As indicated in Respondent's Statement of the Case (R.A. 1), the Carlsons appeal the trial court's denial of their motion for reimbursement of attorneys' fees. (R.A. 93.) An appellate court reviews a denial of attorneys' fees to determine whether the district court abused its discretion. *Minn. Council of Dog Clubs v. City of Minneapolis*, 540 N.W.2d 903, 904 (Minn. App. 1995). Here the district court abused its discretion in denying the Carlsons their attorneys' fees because the Carlsons are entitled to reimbursement of their attorneys' fees under their contract with Appellant and common law.

A. The Contract Between The Parties Authorizes Recovery Of Attorneys' Fees.

Attorneys' fees are authorized and mandated under the contract between the Appellant and the Carlsons. Section 7.5 of the contract states:

The Architect hereby agrees to indemnify and hold the Owner harmless from all losses, claims, liabilities, injuries, damages and expenses, **including attorneys' fees**, that the Owner may incur by reason of any injury or damage sustained to any person or property arising out of or occurring in connection with Architect's negligent errors, omissions or acts.

(A. 52, emphasis added.) The district court held that Appellant was negligent. But for that negligence, the Carlsons would not have incurred \$90,961.25 in attorneys' fees to recover their architectural fees. Those attorneys' fees constitute "damages" sustained by the Carlsons arising out of Appellant's negligence. The Carlsons are entitled to attorneys' fees under the plain language of the contract. *Carlstrom Co. v. German Evangelical Lutheran*, 662 N.W.2d 168, 174 (Minn.

App. 2003) (noting, in examining a contract clause similar to that at issue here, that attorneys' fees are authorized by contract for negligence claims).

B. Attorneys' Fees Are Recoverable For A Breach Of Fiduciary Duty.

In addition, although Minnesota has not had the opportunity to consider the issue, courts around the nation have awarded attorneys' fees to plaintiffs that prevail on claims that a defendant breached its fiduciary duty to the plaintiff. *See, e.g., Staffing America, Inc., v. Advanced Mgmt. Concepts, Inc.*, No. 2004 0524-CA, 2005 WL 2600637, at *2 (Utah Ct. App. Oct. 14, 2005) (affirming an award of attorneys' fees to a party who successfully proved a breach of fiduciary duty, noting that "breach of a fiduciary obligation is a well-established exception to the American rule precluding attorneys' fees in tort cases generally") (internal citation omitted) (R.A. 213); *Hsu Ying Li v. Tang*, 557 P.2d 342, 345-46 (Wash. 1976) (affirming the trial court's award of attorneys' fees to a party who successfully proved a breach of fiduciary duty); *Ware v. Tyler*, No. 28648-3-II, 2003 WL 21387185, at *3 (Wash. Ct. App. June 17, 2003) (reiterating rule in *Tang* and affirming an award of attorneys' fees to a party due to a breach of fiduciary duty) (R.A. 215); *see also Gay v. Ludwig*, Nos. C-03064, C-03067, 2004 WL 911324, at *4-5 (Ohio Ct. App. Apr. 30, 2004) (affirming an award of over \$51,000 in attorneys' fees in a case involving a breach of fiduciary duty) (R.A. 220); *Flanary v. Mills*, 150 S.W.3d 785 (Tx. Ct. App. 2004) (affirming an award of attorneys' fees in a case involving a breach of fiduciary duty).

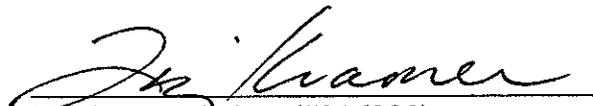
Public policy supports awarding attorneys' fees to plaintiffs that prove a breach of fiduciary duty. Primary among those is the desire to make the injured party whole, "[h]ence, the injured party is entitled to recover attorneys' fees if necessary to restore that party to his or her pre-injury status." *Bernhard v. Farmers Ins. Exch.*, 915 P.2d 1285, 1289 (Colo. 1996); *see also Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1168 (Utah 2001), *reversed on other grounds by* 538 U.S. 408 (2003). In addition, courts note that an award of attorneys' fees is appropriate because fiduciary duties are higher duties than those in other contexts, and awarding attorneys' fees provides a disincentive for breaching fiduciary duties. *Campbell*, 65 P.3d at 1168. Therefore, as indicated by case law and public policy, if this Court affirms the district court's decision that Appellant breached a fiduciary duty to the Carlsons, it should also award attorneys' fees to the Carlsons in this case.

CONCLUSION

For all the foregoing reasons, the Carlsons respectfully request that the Court affirm the trial court with respect to its orders granting summary judgment to the Carlsons and entering judgment for \$291,957.42. The Carlsons further request that this Court hold that they are entitled to recovery of their attorneys' fees at trial and on appeal, and enter further judgment accordingly.

Respectfully submitted,

Dated: September 11, 2006.


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CERTIFICATE OF COMPLIANCE

This brief, exclusive of the Table of Contents and Table of Authorities, contains 12,061 words as confirmed by the Word Count feature of Microsoft Word 2003, which word-processing software was used to prepare this brief. This brief also complies with the typeface requirements of Rule 132.01 of the Minnesota Rules of Civil Appellate Procedure as the printed material appears in 13-point proportional font.

A handwritten signature in cursive script, appearing to read "Liz Kramer", is written over a horizontal line.

Liz Kramer (#325089)

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).