

NO. A07-0358

State of Minnesota
In Court of Appeals

Dorsey & Whitney LLP,

Lien Claimant/ Respondent,

v.

Andrew C. Grossman and ABCO Research, LLC,

Appellants.

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Dorsey & Whitney (“Dorsey”) contends that an attorney who contributes legal services as his capital contribution to a joint venture can, when he is unhappy with his joint venture distributions, suddenly insist that he is a vendor of services to the venture and, because those services are legal in nature, does not have to sue for breach of contract, but can “summarily” obtain an attorneys’ lien for whatever he claims. Such opportunism, not surprisingly, is not available to any joint venturer. The attorney joint venturer is in the same position as his partners—they can bring an action at law if they are not treated properly.

The attorneys’ lien statute applies to “compensation,” not joint venture distributions. Compensation for lawyers is traditionally a simple exchange—legal work for money (or less commonly other property rights). But here, virtually uniquely, Dorsey agreed to be paid from proceeds generated by the Patents, *whether Dorsey’s work had anything to do with the proceeds or not*. This is not “compensation” for legal work in the nature of a debt; it is a sharing of profits.

If profits arise solely out of litigation the lawyer works on, it is a classic contingent fee that gives rise to lien rights, but that is not the case here.

The second fundamental error made in the Dorsey brief is the contention that a lien claimant has a right to an *in personam* judgment against a lien respondent, with all the post-judgment tools that allow the judgment creditor to take non-exempt assets of

the judgment debtor. But since the lien statute creates an *in rem* proceeding and since caselaw does not allow the respondent in such a proceeding to assert breach of contract defenses or counterclaims, the lien statute also does not allow the claimant an *in personam* judgment against the respondent.

ARGUMENT

I. The Attorney Lien Statute Does Not Apply to the 1999 Agreement

A. An Attorneys' Lien Applies Only to Recoveries Obtained By An Attorney's Own Efforts

Dorsey contends that Minn. Stat. § 481.13 (2006) (“Attorney Lien Statute”) applies to *any* agreement regarding legal fees.¹ But that is a distortion of what the statute actually says.

The Attorney Lien Statute provides that “[a]n attorney has a lien for compensation . . . (1) upon the *cause of action* from the time of the service of the summons in the action . . . and (2) upon *the interest of the attorney’s client in any money or property involved in or affected by any action or proceeding in which the attorney may have been employed . . .*” Minn. Stat. § 481.13, sub. 1(a) (emphasis added).

Dorsey never sought a lien on any cause of action; Dorsey never sought a lien on proceeds of any action *in which it was employed*. Dorsey, on the contrary, sought a lien on *all* the proceeds of the Patents pursuant to the 1999 Agreement which expressly

¹ See Brief and Appendix of Respondent Dorsey & Whitney, LLP (“Dorsey Brief”), p. 11.

granted Dorsey a percentage of those proceeds (minus certain expenses) *whether or not Dorsey was employed in the action or proceeding.*²

Because the Attorney Lien Statute “applies only to an attorney’s charges for services in connection with the *particular action or proceeding* involved” in those services, Crolley v. O’Hare Int’l Bank, 346 N.W.2d 156, 159 (Minn. 1984) (quotation omitted), Dorsey is not entitled to an attorneys’ lien under the statute.

Citing Thomas A. Foster & Assoc., Ltd. v. Paulson and N. States Power Co. v. Gas Svcs., Inc., Dorsey contends that in 2002, the legislature abolished the requirement that an attorneys’ lien be limited to the proceeds generated by an attorney’s services in a specific case.³ This argument is a distortion of the caselaw. Neither Foster or N. States Power Co. support this proposition, which would be a sea change in the lien law.

In N. States Power Co., the issue before this Court was whether the *state* district court had jurisdiction to determine and establish attorney liens where the attorney’s fees arose from representing the client in a *federal* court action. 690 N.W.2d 362, 365 (Minn. Ct. App. 2004). The N. States Power Co. court did not even discuss, let alone hold, whether the 2002 amendment to the Attorney Lien Statute permitted a lien to attach to proceeds that resulted from a different attorney’s work, or from proceeds derived from business activity other than attorney labor. See id.

² See Appendix of Appellants (“AA”), p. AA 72, ¶ 3.

³ See Dorsey Brief, p. 18-19.

Moreover, unlike Dorsey, in N. States Power Co., the attorney did not seek to impose a lien on money recovered from court actions or proceedings in which he did not represent the client. The N. States Power Co. case is of no help to Dorsey.

The same is true of Foster. 699 N.W.2d 1, 5-7 (Minn. Ct. App. 2005) (discussing 2002 amendment to Attorney Lien Statute). Foster was attorney of record in the cause of action which gave rise to the settlement check that he liened. The Court's discussion of the 2002 amendment concerned whether an attorney could establish and enforce an attorney's lien in a summary proceeding rather than in two separate actions. Id. at 6. This Court held that the 2002 amendment abolished the distinction between establishment and enforcement of a lien, i.e., made it shorter and quicker, not that the amendment changed the scope of the statute.

While a district court may establish an attorneys' lien on proceeds that arose from multiple court actions in which the liening attorney represented the client,⁴ the Attorney Lien Statute does not grant an attorney a lien on recoveries obtained through the work of other law firms, or from the normal course of business. Yet this is precisely what the district court allowed to happen here.

⁴ See N. States Power Co., 690 N.W.2d at 365-67 (affirming lien on funds being litigated in district court and funds client received from arbitration award); but see Crolley, 346 N.W.2d at 159 (attorney may assert lien only for services relating to action in which lien is sought).

In essence what Dorsey seeks here is a lien on appellants Andrew C. Grossman's ("Grossman") and ABCO Research, LLC's (collectively "ABCO") general accounts—something the Minnesota Supreme Court has determined the Attorney Lien Statute does not permit. Crolley, 346 N.W.2d at 159 (stating Attorney Lien Statute does not apply to a client's general account); see Foster, 669 N.W.2d at 5 (Attorney Lien Statute grants an attorney a lien on a recovery "obtained through his or her efforts on behalf of a client").

Foster is good law—an attorney's lien proceeding is no place to decide whether the attorney breached his representation contract (or even committed malpractice). Foster, 699 N.W.2d at 7-8. Those issues often cannot be determined summarily. Id. But Foster is no license for a lawyer to use the summary lien proceeding to obtain an *in personam* judgment and to pay himself from the non-exempt assets of his client, just as he could if he sued for breach of contract and exposed himself to substantive defenses and counterclaims.

B. The 1999 Agreement is *Not* an Ordinary Fee Agreement

Dorsey contends that the 1999 Agreement was not a joint venture but a simple agreement for legal services.⁵ An agreement for legal services, however, is typically one of two types, either a straight hourly fee for services billed periodically to

⁵ Dorsey Brief, p. 8. When Dorsey filed its lien claim, Dorsey did not even attach the 1999 Agreement that sets forth the details of the business relationship at issue here.

the client (perhaps with a retainer), or a contingency fee arrangement where the attorney is paid a fixed percentage of any recovery for legal services *the attorney* provides. Under neither arrangement is the attorney entitled to payment or a lien based on work that another law firm has provided to the client. See Minn. Stat. §481.13 (providing for attorneys' lien upon client's interest in money or property involved in action in which the attorney was employed).

The 1999 Agreement is significantly different from a typical contingency fee arrangement because under the 1999 Agreement, Dorsey is paid not from money derived from Dorsey's efforts in a particular case. Rather, Dorsey is paid from a percentage of the royalties of the Patents regardless of *whether Dorsey performs the work that generates the royalties or not*. See 1999 Agreement, p. AA 70-73. This is not an irrelevant nuance as Dorsey suggests.⁶ It fundamentally changes the character of the bargain from a contingent fee to a contribution of labor to an enterprise that exploits specific patents.

The facts in evidence establish that firms other than Dorsey were involved in the proceedings which ultimately resulted in licensing agreements and royalties from the Patents.⁷ While the 1999 Agreement allows Dorsey to benefit from its own work, the

⁶ Dorsey Brief, p. 10.

⁷ See e.g., Dorsey's Mem. In Support of Mot. to Establish Amount of Attorneys' Liens, p. AA 119 (stating "[t]he disputed deductions are for attorneys fees paid to other law firms not acting as local counsel. . ."); Dorsey's Reply Mem. in Support of Mot. to Establish Amount of Attorneys' Liens, p. AA 175 ("Dorsey agrees that Faegre & Benson

Attorney Lien Statute does not allow Dorsey to obtain a lien on proceeds that arose from other law firms' work. Minn. Stat. §481.13, subd. 1(a)(2). This distinction demonstrates very clearly why the Attorney Lien Statute does not apply to the 1999 Agreement.

C. The 1999 Agreement is a Joint Venture Agreement

Dorsey contends that it did not share in the profits or have mutual control over the subject matter of the joint venture and therefore the 1999 Agreement is not a joint venture as a matter of law.⁸ See Powell v. Trans Global Tours, Inc., 594 N.W.2d 252 (Minn. Ct. App. 1999) (setting forth elements of joint venture).

Let us step back from the fray for a moment and consider the nature of a lien. Minnesota, like all the states, has many lien statutes that generally are codifications of common law lien rights.⁹ These liens, at least today, are in the nature of statutory mortgages that give a worker an interest in land or other property to secure a debt a customer (and owner of the property) owes the worker for his labor in regard to that land or property.¹⁰ So if the customer does not pay for the work, the worker has collateral, so to speak, to fall back on.

was hired to represent [ABCO] in litigation with Ivoclar when Dorsey declined to do this work").

⁸ See Dorsey Brief, p. 12-13.

⁹ See Generally, Minn. Stat. §514.01-15 (mechanic's lien); Minn. Stat. §514.17 (miner's lien); Minn. Stat. §514.40 (lumberman's lien).

¹⁰ Marquette Nat'l Bank of Minneapolis v. Mullin, 287 N.W. 233 (Minn. 1939).

But the genesis of lien rights is always a debt owed the worker. Here the 1999 Agreement creates no debt between ABCO and Dorsey, it simply creates an *opportunity* for Dorsey to be paid *if* the Patents generate proceeds for Dorsey to share in. (That is also why the claim against Grossman makes no sense). And, as we noted earlier, this is not a contingent fee arrangement because the source of repayment is the royalties of the Patents, not money derived from Dorsey's efforts on any particular case.

Had Dorsey sought - necessarily long ago - to lien *proceeds* from its own work for ABCO, some of which was successful, this would be a harder case, but that is not what Dorsey did. What Dorsey is really doing here is turning its back on the 1999 Agreement, starting in late 2005, and stepping to the head of the line for distribution of Patent proceeds by abusing the Attorney Lien Statute.¹¹

¹¹ From time immemorial joint venturers, when things have gone awry, have tried to find a way to get paid from the venture ahead of their co-venturers, and the courts have uniformly held that unless the contract of joint venture itself specifically provides for some sort of preferential payment to one venture, all the venturers have is a right to share in profits, e.g., Anderson v. Prop. Developers Inc., 555 F.2d 648, 652 (8th Cir. 1977) (Minnesota law, citing cases). The way the Uniform Partnership Act deals with this phenomenon is to presume that a distribution from a partnership is a sharing in profits "unless the profits were received in payment . . . of a debt . . . [or] for services as an independent contractor . . . [or] of wages to an employee." Minn. Stat. §323A.0202(c)(3).

1. Facts in the Record Demonstrate Dorsey Exercised Joint Control Over the Venture

Dorsey's insistence in participating in the negotiations of royalty fees with Ivoclar—despite having refused to represent ABCO in that litigation—demonstrates that Dorsey exercised a level of joint control over the venture and the Patents. See Duxbury v. Spex Feeds, Inc., 681 N.W.2d 380, 389 (Minn. Ct. App. 2004) (stating existence of joint venture is ordinarily a question of fact), review denied (Minn. Aug. 25, 2004). Dorsey submitted extensive affidavits to support its lien claim but never denied participating in the Ivoclar settlement.

The tax cases cited by Dorsey in an attempt to recast the 1999 Agreement as one between principal and agent and not a joint venture,¹² do not hold that a joint venture can never exist between an attorney and client as Dorsey would lead this Court to believe. See Comm'r v. Banks, 125 S.Ct. 826, 832 (2005); Kenseth v. Comm'r, 259 F.3d 881, 883 (7th Cir. 2001).

In both Banks and Kenseth, the client sought to avoid tax liability on settlement proceeds and argued that the contingent fee arrangement each had with his attorney should be considered a joint venture for *tax purposes* so that the client would pay tax only on that portion of the settlement proceeds that he retained. Banks, 125 S.Ct. at 828; Kenseth, 259 F.3d at 882. Both the Seventh Circuit and the Supreme Court rejected the argument, finding that each of the contingent fee agreements was not a joint venture.

¹² Dorsey Brief, p. 13-14.

Banks, 125 S.Ct. at 833; Kenseth, 259 F.3d at 882-83. But in neither case was the fee agreement at all similar to the 1999 Agreement, wherein Dorsey is paid out of proceeds whether Dorsey performed the work that generated the proceeds or not.

2. The 1999 Agreement Granted Dorsey 40% of the Profits Generated by the Patents.

Dorsey contends that the 1999 Agreement granted Dorsey 40% of all money received by ABCO attributable to the Patents *without regard to profit*.¹³ One wonders whether Dorsey read the 1999 Agreement before it made that statement.

Under the 1999 Agreement, if the Patents generate royalties then certain expenses are deducted off the top. The remainder is, by definition, profit and it is from this amount that Dorsey was granted a 40% share. See Black's Law Dictionary 1226 (7th ed. 1999)(defining "profit" as the "excess of revenues over expenditures in a business transaction").

Dorsey's 40% share was not from the top line of ABCO's profit and loss statement—it was from a net figure after expenses, i.e., a profit.

Citing Duxbury v. Spex Feeds, Inc., Dorsey also contends that because its share amount was "fixed" at 40%, a joint venture does not exist.¹⁴ 681 N.W.2d at 390. But the Duxbury court explained that there was no joint venture if the amount was fixed *regardless of the success or failure of the enterprise*. Id. That is not the case here. Under

¹³ See Dorsey Brief, p. 13.

¹⁴ See Dorsey Brief, p. 13.

the 1999 Agreement, if the Patents generated no royalties, Dorsey would receive nothing and have no claim for fees from ABCO or Grossman regardless of how much work it did or how successful that work was. See 1999 Agreement, p. AA 70-73. It is true that Dorsey's fees are capped under the 1999 Agreement, but the cap is so far in excess of the hourly rate that it is hard to conclude Dorsey's interest is anything other than profit sharing.

II. The Attorney Lien Statute Does Not Permit Dorsey to Obtain an *In Personam* Judgment Against ABCO and Grossman

A. Minnesota Caselaw Squarely Holds That an *In Personam* Judgment May Not Be Obtained By an Attorney Seeking a Lien Under Minn. Stat. § 481.13

The Attorney Lien Statute provides that after a lien is established and the amount determined by the court, “[j]udgment shall be entered . . . adjudging the amount due.” Minn. Stat. § 481.13, subd. 1(c).

There are many statements of law in the Dorsey brief without citation and one of our favorites is that “Judgment [in Section 481.13] obviously means the entry of an enforceable money judgment against the Clients.”¹⁵ That is not what the word “judgment” in section 481.13 authorizes the Court to enter.¹⁶

¹⁵ Dorsey Brief, p. 16.

¹⁶ Generally, “[a] judgment is the final determination of an action and has the effect of ending the litigation.” 2 Minnesota Practice § 54.4 (1998); see Minn. R. Civ. P. 54.01 (same).

First, courts essentially exercise civil authority over three things: persons, property and status.¹⁷ Personal judgments are court rulings recorded by administrators that expose the non-exempt assets of the judgment debtor to collection remedies provided by law in favor of the judgment creditor. See U.S. v. Casey, 444 F.3d 1071, 1075 (9th Cir. 2006) (stating an *in personam*, or a personal judgment, is defined as one “that imposes personal liability on a defendant and that may therefore be satisfied out of *any* of the defendant’s property within judicial reach”)(citing Black’s Law Dictionary 861 (8th ed. 1999) (emphasis added)).

A judgment *in rem*, on the other hand, is conclusive as to interests in the subject property, but “[d]oes not bind anyone with respect to a personal liability.” Restatement (Second) Judgments, § 30(2).

Second, section 418.13 is—and always has been considered—an *in rem* statute that provides a right to assert a property claim against a “cause of action,” or the proceeds of a cause of action, e.g., Akers v. Akers, 46 N.W.2d 87 (Minn. 1951) (attorneys’ liens are either general, promissory, retaining or charging liens); Empro Corp. v. Scotland Hotels, 449 N.W.2d 734 (Minn. Ct. App. 1990) (lien attaches to client’s interest in property; not to property itself); Boline v. Doty, 345 N.W.2d 285, 288 (Minn. Ct. App. 1984), *superceded by statute on other grounds* by Minn. Stat. § 481.13 (charging lien remains, other liens abolished, and attorney lien rights are now exclusively statutory).

¹⁷ Restatement (Second) Judgments, §§ 5-7.

The statute does *not* provide for a personal money judgment against a client. Boline, *supra*, (a lien “is a hold or claim on the property as security for a debt or charge. It is a property right.”). The statute directs the district court to enter judgment following the summary proceedings “*adjudging the amount due.*” Minn. Stat. § 481.13, subd. 1(c). It does not direct entry of a money judgment. See Gaughan v. Gaughan, 450 N.W.2d 338, 344 (Minn. Ct. App. 1990) (“[a]n attorneys’ lien is not a money judgment”), review denied (Minn. Mar. 16, 1990).¹⁸

By parallel reasoning, this Court has held that a mechanic’s lien does not confer an unqualified personal judgment against the owner of the property. Carolina Holdings Midwest, LLC v. Copouls, 658 N.W.2d 236, 241 (Minn. Ct. App. 2003)(stating “[t]he judgment in a [mechanic’s lien] case is not an ordinary personal judgment against the owner or party personally liable for the debts, so as to be a lien upon other real estate of the owner. . .”) (quoting Karl Krahl Excavating Co. v. Goldman, 208 N.W.2d 719, 721 (Minn. 1973)).

Not surprisingly, this Court has already held that a personal judgment is not the proper way to enforce an attorneys’ lien. In Robb Gass Constr., Inc. v. Dropps, No. A03-88, 2003 WL 22889811 (Minn. Ct. App. Dec. 9, 2003),¹⁹ this Court was confronted

¹⁸ Consistent with the *in rem* nature of a lien proceeding, an attorneys’ lien may attach, for example, to exempt disability insurance benefits which the attorney’s work generated, but which would not be exposed to an *in personam* judgment. Cont’l Cas. Co. v. Knowlton, 232 N.W.2d 789 (Minn. 1975).

¹⁹ The Robb Gass Constr. case is found on page AA 299.

with a multi-faceted construction dispute involving a residence. The homeowners were tenacious litigants and the case had already been to this Court once. On remand, among other things, the district court had ordered a personal judgment against the homeowners for the fees of their attorney at trial who had asserted an attorney lien. Id. at *2.

This Court noted that under Boline, the district court “determines the method of enforcement,” Robb Gass Constr., at *6. Then this Court said:

The court must determine which property is subject to the lien and how the lien is to be enforced. For example, a court could order a sale of certain property and put a mortgage on other property. . . . No alternative method is provided, and the method prescribed must be taken as exclusive. A party who proceeds voluntarily under Minn. Stat. § 481.13 must be deemed to have accepted its procedures.

The record fails to demonstrate that the district court determined which property was subject to the lien or how it was to be enforced against that property; instead, the court issued an unqualified personal judgment against the Dropps. *An unqualified personal judgment is ineffective to enforce an attorneys’ lien.*

Robb Gass Constr., at *6 (emphasis added) (citations and quotations omitted).²⁰

A second case is Gaughan, a divorce case involving a large attorney fee. 450 N.W.2d at 338. A discharged lawyer for one of the parties asserted an attorneys’ lien and the district court ordered over \$30,000 “charged against [the party’s] property.” Id. at

²⁰Along the same lines in Kubu v. Kabes, 172 N.W. 496 (Minn. 1919), the Supreme Court held that the solvency or insolvency of the client is irrelevant to a lien claim, which is a claim against property.

341. The district court also ordered a personal judgment for the same amount against the client on a separate “contract claim” by the attorney. Id.

This Court said the touchstone in attorneys’ lien cases - in part because of their summary nature - is “due process and fair play.” Id. at 343. Such actions cannot be “consolidated” with a parallel contract action that is “governed by different procedural rules.” Id. The essential ruling is that it was improper to adjudicate the contract case, which sought an *in personam* judgment, in the summary attorney lien proceeding,²¹ which sought an *in rem* judgment.

And this dichotomy only makes sense, given the summary nature of the proceedings under which an attorneys’ lien is established. Foster, 699 N.W.2d at 6-7. By definition a “summary proceeding” narrows the scope of the proceeding. Foster, 699 N.W.2d at 6-7. For example, this Court has held that a client does not have a right to present certain defenses in an action to establish an attorneys’ lien even if those defenses may be relevant to determining the amount of the lien. Id. at 7-8.

We challenged Dorsey to explain why, if the lien statute works as Dorsey contends it does (and Judge McShane ruled it does), any lawyer would “ever sue a client

²¹ The Gaughan court also held that prejudgment interest was not allowed in an attorneys’ lien action because “[a]n attorneys’ lien is not a money judgment, but rather is a hold or claim on the property as security for a debt or charge. Prejudgment interest is authorized only for money judgments.” Gaughan, 450 N.W.2d at 344 (citations and quotations omitted).

for unpaid fees and risk a malpractice defense or counterclaim?”²² Dorsey had no response to this challenge, because there is none. If the district court’s ruling is good law, and is a fair extension of Foster, then lawyers are a favored class who can summarily obtain *in personam* judgments for their fees and face no fact-based defenses or counterclaims. This is not what this Court meant to do in Foster.

We need to be clear here: if this Court determines that the 1999 Agreement is not one of joint venture, then an attorneys’ lien may attach to 40% of that part of the net proceeds from the Patents arising from Dorsey’s efforts *on a going-forward basis* from November 15, 2005, the date lien rights were first asserted. But any claim for proceeds already disposed of by ABCO before that date—and not held on hand by ABCO—can only be pursued by summons and complaint.

B. The Authority Dorsey Cites Does Not Authorize an *In Personam* Judgment Under Minn. Stat. § 481.13

Citing Foster, Dorsey insists that a money judgment²³ is the proper method of enforcement of its liens because, Dorsey claims, the subject of its liens has been converted to cash.²⁴

²² Appellants’ Brief, p. 40.

²³ A money judgment is a “judgment for damages subject to immediate execution, as distinguished from equitable or injunctive relief.” Black’s Law Dictionary 848. (7th ed. 1999)

²⁴ Dorsey Brief, p. 14-15. Dorsey also cites Schuler v. T.M. McCord Co., 81 N.W. 547 (Minn. 1900) and Fischer-Hansen v. Brooklyn Heights R. Co., 66 N.E. 395 (N.Y. 1903). Neither of these cases stand for the rule that an attorney is entitled to a personal

This argument misconstrues how liens operate. If, for example, a client improperly cashed a settlement check and did not honor a lawyer's contingent fee, and if the client then deposited the proceeds in an account and the attorney liened the account for his share, the Attorney Lien Statute would aid the attorney. But if a great deal of time had passed—as here—and the client had spent the disputed funds in the normal course of business, and then the attorney asserted lien rights, the lien statute would not give rise to a lien *on other dollars in the account*. Dorsey simply misunderstands the proper use of the lien statute.

In Foster, this court cited a 1903 New York case, Fischer-Hansen v. Brooklyn Heights R. Co., for the proposition that a “money judgment follows ‘enforcement’ of [an] attorney lien because foreclosure is unnecessary when [the] subject of [the] lien has been converted into money.” Foster, 699 N.W.2d at 6 (citing Fisher-

money judgment upon the establishment of an attorneys' lien.

In Schuler, which does not concern an attorneys' lien but a laborer's lien acquired on a wheat crop in North Dakota, the issue was whether a lienholder from another state could intervene and assert his right to proceeds of the crop which were paid into a Minnesota court. 81 N.W. at 548. The supreme court held that a lienholder could intervene and the trial court determine the rights of the parties to the fund. Id. The court noted the lienholder was not seeking to foreclose on the lien because the funds had been paid into the court. Id. These are entirely different facts that are present here.

In Fischer-Hansen, as noted *infra*, the issue before the New York court was whether an attorney had a claim against a party who was not the attorney's client, but who had notice of a lien the attorney had on a personal injury cause of action in which the party was a defendant. 66 N.E. at 395-96. The court held that under New York law, a party with actual notice of an attorneys' lien is liable to the attorney for the amount of the lien when the party pays the attorney's share of the settlement fund to the attorney's client behind the attorney's back. Id. at 398.

Hansen, 66 N.E. 395, 398 (N.Y. 1903)). But Fisher-Hansen did not hold that a money judgment *always* follows the establishment of a lien. 66 N.E. at 398. Rather, Fisher-Hansen stated in dicta that “[a] money judgment *may* . . . follow [actions to establish and enforce liens], as a foreclosure is unnecessary when the subject of the lien has already been converted into money.” Id. (emphasis added).

In Fisher-Hanson, the attorney’s client, a personal injury plaintiff, secretly settled with the defendant railroad and absconded to Norway with the funds without paying his attorney. Id. at 395. The attorney filed suit against the defendant, not his client, based on a statutory lien the attorney had on the personal injury cause of action, a lien to which the defendant had notice. Id. at 395-96. The trial court held the claim did not state a cause of action against the railroad. Id. at 395.

On appeal, the Fisher-Hanson court determined that the attorney did have a cause of action against the railroad, *subject to the railroad’s counterclaims*, because the railroad had notice of the lien and under New York law, a duty to retain the lien amount for the attorney, and may have violated that duty. Id. at 398. Importantly, enforcement of the lien was not established by a summary proceeding. Id. at 398.

The holding in Fisher-Hanson was not that a personal money judgment follows enforcement of an attorneys’ lien where the claim is against the client, and not some other person with notice of the lien, but that, under New York law, a party with actual notice of an attorney’s lien is liable to the attorney for the amount of the lien when

he pays the attorney's share of the settlement fund to the attorney's client and creates the circumstances where the client can cheat the attorney out of his share. Id. These are very different facts than are present here.

At best, Fisher-Hanson is authority for Dorsey obtaining a "proceeds" lien on amounts paid by ABCO to others—not Dorsey—of 40% of the "recovery" (as that term is used in the 1999 Agreement), and only to the extent the proceeds arose from cases on which Dorsey worked *from November 15, 2005, the date Dorsey first asserted lien rights.* Had Dorsey sought such a much narrowed remedy, we would not be here.

III. Grossman Cannot be Personally Liable Following a Summary Proceeding to Establish an Attorneys' Lien

Without citation to any caselaw, Dorsey asserts that it is entitled to a personal judgment against Grossman.²⁵ Dorsey cannot cite to case law for this proposition because there is none.

Following the district court's Jan. 8, 2007 Order,²⁶ Dorsey took aggressive action typical of a judgment creditor to enforce the court's personal judgments against Grossman and ABCO. For example, Dorsey served garnishment summonses on ABCO's bank accounts and on Grossman's personal bank and securities accounts and filed a lien on Grossman's real property, including his home.

²⁵ See Dorsey Brief, p. 15-16.

²⁶ Jan. 2007 Order, AA 193.

Dorsey also obtained two Writs of Execution which the Hennepin County Sheriff served on ABCO and Grossman.²⁷

Dorsey agreed to reverse the collection steps it took against Grossman personally only after the district court issued its Feb. 9, 2007 amended order clarifying that the judgment against ABCO and Grossman, jointly and severally, was limited to proceeds from the Patents.²⁸

That, however, did not stop Dorsey from moving to appoint a receiver to collect the unsatisfied judgments from Grossman and ABCO.²⁹ An attorneys' lien and *in rem* judgment obtained following a summary proceeding cannot give rise to such drastic collection measures.³⁰ No other lien statute permits a lienholder to foreclose on a lien in such a summary fashion. See Minn. Stat. § 514.11 (require service of summons and complaint to foreclose on mechanic's lien). Ryan Contracting, Inc. v. JAG Investments, Inc., 634 N.W.2d 176, 181 (Minn. 2001) (discussing requirements for commencing a mechanic's lien action); see also Schroeder, Siegfried, Ryan & Vidas v. Modern Elec.

²⁷ See June 1, 2007 Aff. of Perry M. Wilson, III, Ex. A (Writ of Execution), AA 269.

²⁸ Feb. 9, 2007 Amended Order ("Am. Order"), AA 207.

²⁹ See Dorsey's Mot. and Mem. Of Law in Support of Mot. to Appoint Receiver, AA 255-65.

³⁰ To avoid appointment of a receiver, the parties stipulated that ABCO would provide Dorsey with copies of ABCO's general ledger, which ABCO has done. Dorsey now seeks all of ABCO's revenues less certain legal fees attributable to work on the Patents, office rent, and a portion of ABCO's office manager's salary.

Products, Inc., 295 N.W.2d 514 (Minn. 1980) (law firm brought *suit* to foreclose on attorneys' lien on patent owned by defendant and following *trial*, court ordered patent sold to satisfy lien).³¹ And such steps are not allowed under the Attorney Lien Statute either.

IV. The 1999 Agreement Does Not Limit Deductible Expenses to Those Incurred Solely by Dorsey

As previously set forth in appellants' initial brief, the 1999 Agreement permits ABCO to deduct certain expenses and services charges from the patent proceeds prior to paying Dorsey its fees that were subject to a 3.33 multiplier (effectively paying Dorsey hourly rates over \$1,000 for partner time).³²

Dorsey contends that the only expenses that are deductible from the Patent proceeds are "out-of-pocket" expenses paid by Dorsey.³³

But no where in the 1999 Agreement does it state that the deductible expenses and service charges are limited solely to those expenses incurred by Dorsey. Nor does such an arrangement make economic sense when the agreement is considered as a

³¹ Dorsey misstates the holding in Schroeder by implying that the supreme court affirmed the district court's order as regards the sale of a patent to satisfy attorneys' fees. See Dorsey Brief, p. 14. While the Minnesota Supreme Court affirmed the trial court's order, the issue on appeal was *solely* whether work before the United States Patent Office permitted an attorney to obtain a lien pursuant to Minn. Stat. §481.13. Schroeder, 295 N.W.2d at 515. Schroeder does not "sanction" the entry of a personal money judgment following a summary procedure as Dorsey suggests on page 14 of its brief.

³² See 1999 Agreement, AA 72.

³³ Dorsey Brief, p. 23.

whole. Stiglich Constr., Inc. v. Larson, 621 N.W.2d 801, 803 (Minn. Ct. App. 2001) (contracts must be construed as a whole to harmonize all provisions), review denied (Minn. Mar. 27, 2001).

The purpose of the 1999 agreement was to exploit the Patents while minimizing ABCO's out-of-pocket legal fees and expenses until the Patents were profitable. Dorsey agreed to forbear on its fees until (and if) the Patents generated income, at which time Dorsey stood to be handsomely rewarded with a 40% share of the Patent proceeds. To the extent ABCO was made to pay out-of-pocket expenses incurred in enforcing, litigating and licensing the Patents, the agreement permitted ABCO to deduct those expenses prior to splitting the Patent proceeds with Dorsey.³⁴

The disputed expenses consist largely of attorney fees ABCO paid to law firms other than Dorsey after Dorsey refused to continue to represent ABCO under the terms of the 1999 Agreement.³⁵ Under Dorsey's theory, ABCO must bear the sole brunt of Dorsey's abandonment out of its share of the proceeds, while Dorsey reaps the benefit of not only its own work, but that of other law firms as well. Dorsey fails to address this argument in its brief because it cannot explain how this makes any economic sense.

But even under Dorsey's theory, the Danville litigation fees are a legitimate out-of-pocket expense because they were paid by ABCO in connection with litigation in

³⁴ See 1999 Agreement, AA 72.

³⁵ See Grossman Jan. 2006 Aff., Ex. B, ¶¶ 15-16, AA 63-64.

which Dorsey represented ABCO. Having initially advised ABCO to file a complaint against Danville, Dorsey subsequently advised ABCO to move for dismissal of certain claims.³⁶ The fees were an expense imposed by the court as a condition of dismissal.³⁷ Had Dorsey properly advised ABCO in the first instance, ABCO would not have incurred the fees.

V. Dorsey's Objections to Appellants' Facts.

Dorsey takes issue with four aspects of ABCO's recitation of the facts of this dispute.³⁸ ABCO addresses three of the four issues here. The remaining issue, the nature of the parties' relationship, is addressed at pages 5-11, *supra*.

A. Dorsey's Withdrawal from Representation of ABCO

First, Dorsey contends that it did not "withdraw" from representing ABCO in August 2002 and points to the bills it sent ABCO after that time.³⁹ But whatever term is used to describe Dorsey's refusal to represent ABCO in the action against Ivoclar or any other infringer, the effect was the same: ABCO was forced to retain legal counsel elsewhere to address its substantial and continuing legal problems with infringers. In so

³⁶ See Grossman Nov. Aff., ¶ 12, AA 168.

³⁷ Hasel v. Danville, Nov. 18, 2002 Order, AA 135-37.

³⁸ Dorsey Brief, p. 6.

³⁹ Dorsey Brief, p. 6.

doing, ABCO incurred significant out-of-pocket legal expenses. Those expenses need to be accounted for before Dorsey receives any payment.

The major advantage to ABCO of the 1999 Agreement was Dorsey's promise that ABCO would not have to pay for legal services until the patents generated income. While Dorsey may have billed ABCO for legal work it performed after August 2002, those bills were subject to the delay provision in the 1999 Agreement.

ABCO was also billed—and was required to pay—other law firms for the work Dorsey refused to do. This is not something the parties contemplated at the time they entered into the 1999 Agreement. The whole idea of the agreement was that ABCO would not be responsible for attorneys' fees related to the enforcement, exploitation and licensing of the Patents until the Patents generated income—if at all. Certainly ABCO did not contemplate paying attorney fees on a net-30 basis as it was forced to do when Dorsey abandoned ABCO.

B. ABCO Was Not Given the Opportunity to Present its Defenses Prior to the Court Entering an *In Personam* Judgment

Next Dorsey takes issue with what it calls ABCO's "implication" on page AA 38 of ABCO's initial brief that ABCO was not permitted to challenge the amount of Dorsey's fees.⁴⁰ Dorsey misconstrues ABCO's argument. ABCO did challenge the amount of Dorsey's fees—and still does.

⁴⁰ See Dorsey Brief, p. 7.

What ABCO was not permitted to do was present its defenses, primarily that Dorsey itself breached the 1999 Agreement, to the *application* of the attorneys' lien in light of the 1999 Agreement. Instead the district court, relying on Foster, summarily entered an *in personam* judgment against ABCO.⁴¹ The Foster ruling does not authorize trial courts to grant *in personam* judgments while refusing to entertain the defendants' defenses because of the "summary" nature of the proceedings.

C. Dorsey Breached the 1999 Agreement

Finally, Dorsey contends that it did not breach the 1999 Agreement because it was not obligated to provide services to ABCO under the agreement.⁴²

The 1999 Agreement states that "Nothing in this agreement shall obligate the Clients to undertake, or [Dorsey] to represent the Clients in connection with, any specific litigation or other enforcement effort."⁴³ But this language does not permit Dorsey to withdrawal from representing ABCO simply because the going got tough—nor, by the way, do most contingent fee agreements.

Dorsey ignores the provision of the 1999 Agreement which limits the circumstances under which Dorsey could withdraw from representation of ABCO. Under

⁴¹ The district court later amended its order, stating the judgment against ABCO and Grossman "is a lien limited to the proceeds from the 'Hasel Patents,'" but the judgment against ABCO for \$126,236.23 is "not limited to the proceeds of the 'Hasel Patents' or in any other way." See Am. Order, AA 207.

⁴² Dorsey Brief, p. 8.

⁴³ See 1999 Agreement, AA 71.

paragraph 5 of the 1999 Agreement, Dorsey can only withdraw from representing ABCO for reasons set forth in Rule 1.16(a) or (b) of the Minnesota Rules of Professional Conduct.⁴⁴ Dorsey has never suggested that its reasons for withdrawing from the 1999 Agreement were related to the Rules of Professional Conduct—and does not do so now. Instead, Dorsey is simply ignores this provision of the agreement.

Withdrawal from the agreement for purely economic reasons as Dorsey did, is a clear breach of the 1999 Agreement and precludes Dorsey from obtaining a lien.⁴⁵

CONCLUSION

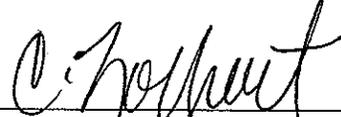
For the reasons set forth in this brief and our previous brief, the judgments below should be vacated, Grossman should be dismissed as a party, and the Court should rule that the Attorney Lien Statute does not apply to the 1999 Agreement. Finally, the Danville and other litigation expenses should be held to come under the 1999 Agreement as deductible expenses from the Patent proceeds.

⁴⁴ See 1999 Agreement, AA 72.

⁴⁵ Dorsey's suggestion that this Court can affirm the district court on the alternative grounds that there was no breach of contract is contrary to established law. See Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) (appellate court will generally not consider issues that were not decided by the court below).

Dated: August 2, 2007.

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STATE OF MINNESOTA
IN COURT OF APPEALS

Dorsey & Whitney LLP,

Case No. A07-0358

Lien Claimant/Respondent,

v.

**CERTIFICATION OF
BRIEF LENGTH**

Andrew C. Grossman and ABCO Research,
LLC,

Appellants.

I hereby certify that this brief conforms to the requirements of Minn. R.
Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The
length of this brief is 6,836 words. This brief was prepared using WordPerfect Office 12.

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