

Nos. A07-740 and A07-742

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State of Minnesota  
**In Court of Appeals**

In re: A Purported Financing Statement in the  
District Court of Ramsey County, Minnesota

Camille Bohlke, moving party,  
*Respondent (A07-740),*

and

Bradley Parker, moving party,  
*Respondent (A07-742),*

vs.

Kevin E. Giebel,

*Appellant.*

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**APPELLANT'S REPLY BRIEF**

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Zenaida Chico (#0299674)  
Kevin E. Giebel (#164112)  
GIEBEL, GILBERT, WILLIAMS &  
KOHL, P.L.L.P.  
2277 Highway 36 West, Suite 220  
St. Paul, MN 55113  
(651) 332-8555

Mark E. Gilbert (#0202149)  
MARK E. GILBERT LAW OFFICES  
1601 Maxwell Drive, Suite C  
Hudson, WI 54016  
(715) 381-2700

*Attorney for Respondents*

Gene H. Hennig (#0044143)  
RIDER BENNETT, LLP  
33 South Sixth Street, Suite 4900  
Minneapolis, MN 55402  
(612) 340-8900

*Attorneys for Appellant*

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## RESPONSE TO RESPONDENTS' STATEMENTS OF FACTS

As noted below and in Appellant's Motion To Strike, Respondents' uncited "Statement of Facts" and numerous uncited "facts" in Respondents' "Argument" section violate the Rules, are improper, and must be stricken. During the motions which are the subject of this appeal, the District Court refused to accept any evidence from either party, testimonial (including Minnesota Secretary of State witnesses on behalf of Appellant), documentary or otherwise, in favor of making a summary determination based solely upon the pleadings of record under Minnesota Statute §545.05. (A.1-7). All of Appellant's efforts to discover facts alleged by Respondents, including those known to their attorney, were summarily denied. (A.2-3). After ignoring all discovery requests of Appellant, and in light of the District Court's refusal to permit fact discovery of Respondents and his legal counsel, Respondents now seek to press a perceived advantage by interposing extensive, unsworn and personal witness testimony and opinions of their legal counsel, all under the guise of a "Statement of Facts".<sup>1</sup> Further Respondents' offer numerous other uncited facts and laws that are contained absolutely nowhere in the record, in either this Court or the District Court.

This effort is designed to draw the reader from the true issues in this matter – the correct application of Minn. Stat. §481.13 to Appellant's Statutory Attorneys' Liens – a common occurrence in the balance of Respondents' Brief as well. Respondents chose not to order the transcript of the hearing in this matter, and therefore cannot support their

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Neither Respondent attended the motion hearing in this matter.

attorney's alleged facts or newly cited statutes. These factual and statutory allegations are further irrelevant and immaterial to these proceedings, and, in addition to existing wholly outside of the record in this matter, were categorically rejected by the District Court in its Order.

Unfortunately, Appellant is prohibited by the same rules and lack of relevance to engage in a responsive recitation of unsworn, personal and irrelevant factual arguments that cannot be supported without a transcript or document in the current Record on Appeal. Suffice it to say that Respondents' counsel's personal "testimony" is knowingly false, as is each and every one of his insulting "allusions" of Appellant having stolen and/or misappropriated client file materials. (*See* Respondents' Br., p. 3).

### **ARGUMENT**

#### **I. RESPONDENTS' UNCITED "STATEMENT OF FACTS" AND UNCITED "FACT" IN THEIR ARGUMENT, MUST BE STRICKEN.**

##### **A. The Record on Appeal.**

The record on appeal consists of "[t]he papers filed in the trial court, the exhibits, and the transcript of the proceedings." Minn. R. Civ. App. P. 110.01. It is the duty of both parties to order transcripts, or portions thereof, where they deem them necessary. Minn. R. Civ. App. P. 110.02, subd. 2. Minn. R. Civ. App. P. 110.02 subd.1 further provides in relevant part:

Within 10 days after filing the notice of appeal, the Appellant shall: (a) pursuant to subdivision 2 of this rule, order from the reporter a transcript of those parts of the proceedings not already part of the record which are deemed necessary for inclusion in the record; or (b) file a notice of intent to proceed pursuant to Rule 110.03 or Rule 110.04; or (c) notify the respondent in writing that no transcript or statement will be ordered or prepared.

\* \* \*

If the respondent deems a transcript of other parts of the proceedings to be necessary, respondent shall order, within 10 days of service of the . . . notice of no transcript, those other parts from the reporter, pursuant to subdivision 2 of this rule, or serve and file a motion in the trial court for an order requiring the appellant to do so.

Minn. R. Civ. App. P. 110.02, subd. 1.

Material assertions of fact in a brief must be supported by a cite to the record. Minn. R. Civ. App. P. 128.02, subd. 1(c) (stating that “each statement of a material fact shall be accompanied by a reference to the record”); Minn. R. Civ. App. P. 128.02, subd. 2 (requiring respondents’ brief to conform to the requirements of Rule 128.02, subdivision 1); Minn. R. Civ. App. P. 128.03 (stating that wherever a reference is made to part of the record, including evidence in the transcripts, the transcript must be referenced); *Hecker v. Hecker*, 543 N.W.2d 679, 681 n. 2 (Minn. Ct. App. 1996) (citation omitted), *aff’d*, 568 N.W.2d 705 (Minn. 1997). This Court “will strike documents included in a party’s brief that are not part of the appellate record.” *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. Ct. App. 1992), *aff’d*, 504 N.W.2d 758 (Minn. 1993).

1. Respondents' Uncited "Statement of the Facts" and Uncited "Facts" in Their "Argument" Are Not Part of the Record on Appeal, and Must Be Stricken.

In the present appeal, Appellant chose not to order the District Court transcript as it was not necessary or relevant to the issues on appeal. (See Appellant's Statement(s) of the Case). It is undisputed that Respondents also did not order the District Court transcript, logically signifying Respondents did not deem the District Court transcript necessary as well. See Minn. R. Civ. App. P. 110.02, subd. 1 (stating that respondent shall order the transcripts if deemed necessary). Notwithstanding this fact, Respondents submit a four (4) page "Statement of Facts" and allege numerous "facts" in their Argument, all without any reference whatsoever to any District Court transcript or the Record on Appeal. (See Respondents' Br., pp. 3-6). In fact, Respondents cite to the true record before this Court only eight times<sup>2</sup> in their "Statement of the Facts" and not at all in their Argument "facts". (See Respondents' Br.). In addition, most of the uncited statements made by Respondents' counsel in their Statement of the Facts relate to the alleged history of a partnership relationship between Appellant and Respondents' counsel, Mark E. Gilbert, as recalled by Mr. Gilbert only. (Respondents' Br., pp. 3-6).

Therefore, this Court should strike as improper and unsustainable all uncited portions of Respondents' Brief that references any matters regarding what may have occurred at the

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While Respondents' Statement of the Facts contains 10 Footnotes, in Footnotes 8 and 9 Respondents do not specifically cite the record.

hearing without a transcript.

2. Respondents' Uncited "Statement of the Facts", and Uncited "Facts" in Their "Argument", were Specifically Excluded From The Hearing and The District Court's Determination.

The District Court's Findings of Facts and Conclusions of Law are devoid of any findings regarding the partnership agreement in any respect, and clearly devoid of the Facts alleged by Respondents' counsel. (A.1-7). In fact, the District Court categorically refused any "attempt to expand the scope of this hearing to include issues relating to the partnership agreement between Respondent and movant's attorney". (A.2, 6). The District Court further found that it was making "no finding as to any underlying claim of the parties involved and expressly limits its Findings of Fact and Conclusions of Law herein." (A.2,6). As such, any of Respondents' partnership allegations were specifically excluded from the hearing by the District Court in favor of a strict, summary §545.05 determination based solely upon the parties restricted statutory pleadings without any discovery, evidentiary hearing or right of direct or cross examination. (*See* (A.1-7); Minn. Stat. §545.05 (2006)).

If the Respondents truly considered their factual allegations outside of the record to be relevant, they should have either ordered the transcript, moved to compel Appellant to do so or appealed the District Court's determination. Presently, Respondents' purported uncited facts are not relevant or otherwise eligible for consideration. *See* Minn. R. Civ. App. P. 110.02, subd. 1 (stating that respondent shall order the transcripts if he deems them necessary); Minn. R. Civ. App. P. 106 (stating that "a respondent may obtain review of a

judgment or order entered in the same action which may adversely affect respondent”). Respondent failed to take any of these proper steps.

3. Respondents’ Uncited “Statement of the Facts”, and Uncited “Facts” in Their “Argument”, Are Not Evidence.

Lastly, what Respondents represent to this Court as “Facts”, are nothing more than statements/arguments of counsel. It is well-settled that arguments of counsel are not evidence. *State v. Young*, 710 N.W.2d 272, 280 (Minn. 2006)(“the arguments of attorneys [are] not evidence”); *State v. McCoy*, 682 N.W.2d 153, 158 (Minn. 2004) (same); *State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994) (same); *In Re: Welfare of DDR*, 713 N.W.2d 891, 904 (Minn. Ct. App. 2006) (same).

Respondents’ “Statement of Facts” is clearly nothing of the sort. Further, it is undisputed that none of Respondents’ counsel’s representations appear anywhere in the documentary record in this appeal. In Respondents’ attempt to create facts outside of the true record, their counsel proceeds to offer his own, personal and unsworn testimony under the auspices of a “Statement of Facts” and Argument “facts”. This attempt must be rejected. Appellant respectfully requests that this Court strike all uncited allegedly factual portions of Respondents’ Brief as improper and unsustainable in this appeal.

**II. RESPONDENTS’ VARIOUS REQUESTS FOR “DISMISSAL” CITE AN ERRONEOUS STANDARD OF REVIEW, AND ARE OTHERWISE WITHOUT RECORD SUPPORT OR MERIT.**

**A. Respondents’ Standard of Review is Erroneous.**

It is undisputed in this appeal that the District Court made a Minn. Stat. §545.05

determination summarily, without any evidentiary hearing or trial whatsoever. The District Court made summary factual “findings” as a matter of law based solely upon the parties’ pleadings, the scope and content of which were strictly mandated by Minn. Stat. §545.05. (A.1-7). The standard Respondents’ erroneously cite to relates to a **trial court’s** determination upon evidence adduced during a trial or other evidentiary hearing, wherein the court has the opportunity to assess the credibility of the witnesses and evidence. *See Kornberg v. Kornberg*, 542 N.W.2d 379, 385 (Minn. 1996) (stating that “where witnesses give their testimony in the presence and hearing of the trial judge he thereby is better able to determine the worth and weight of the testimony than one who has not seen or heard the witnesses on the stand.”).

Here, there were no witnesses, trial evidence, testimony or other evidentiary hearing procedures or evidence permitted. There was no trial. Appellant was permitted only to address a summary motion and decision, which is, in effect, a Summary Judgment or judgment on the pleadings. In this regard, the standard of review is more akin to summary judgment on appeal: “[o]n an appeal from summary judgment, [this Court] ask[s] two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). “On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio*, 504 N.W.2d at 761 (citations omitted). Since there were no “facts” permitted to be offered, the Court is left with

a de novo legal determination based upon the pleadings. The favorable view of the evidence for Appellant, however, remains.

Respondents cite to “credibility” as being an important feature of their purported standard of review. (Respondents’ Br., p. 7). Here, there were no witnesses for the judge to observe for credibility purposes. Noone was put under oath, asked to take the stand or otherwise subjected to direct and/or cross-examination. The arguments of counsel are simply that – arguments; they are not and cannot be evidence. Simply stated, the **trial** court evidentiary standard of review cannot logically exist without any evidence being adduced, or where a trial was not conducted. There is no “trial” court as used by Respondents herein.

The District Court erred in its interpretation of Minnesota Statute section §545.05. As noted in Appellant’s Principal Brief, the interpretation of a statute is a question of law. *Carousel Auto., Inc. v. Gherity*, 511 N.W.2d 472, 475 (Minn. Ct. App. 1994). For purposes of brevity, Appellant respectfully reincorporates the de novo standard of review and discussion recited in Appellant’s Principal Brief in lieu of further argument on this topic.

**B. Respondents’ Requests for “Dismissal” are Based Solely Upon Yet Further Uncited Facts of Respondents’ Counsel.**

There were absolutely no adverse or inconsistent “Admissions” made by Appellant at the hearing, as once again represented to this Court by Respondents’ uncited statements. (See Respondents’ Br., p. 8). Respondents’ counsel again improperly alleges uncited “admissions” by Appellant, all without any transcript reference. *Id.* Respondents cannot answer nor even identify a number of what the alleged “admissions” were. *Id.*

Notwithstanding these failures, such statements are categorically false – no such admission(s) was made by Appellant, and the issues remain contested as evidenced by these proceedings. Appellant at all times argued consistently with the contents of Appellant’s Principal and Reply Briefs in this matter.

**C. Respondents Were Required to Obtain a Motion Transcript to Assert Their “Sufficiency of the Evidence” Request for “Dismissal” of Appellant’s Appeal, Which They Failed To Do.**

As noted above, it was Respondents obligation to order the transcript if they deemed the transcript necessary. They failed to do so, even after being reminded by this Court in an Order wherein Respondents were given additional time<sup>3</sup> to order the transcript. (Court of Appeals Order, May 10, 2007). Respondents still failed to order a transcript or move to compel Appellant to do so, even with an extended deadline. *See id.*

Appellant submits that the documents currently in the record conclusively establish that Appellant asserted Statutory Attorneys’ Liens pursuant to Minn. Stat. §481 et seq. (A.18-25). This fact is clearly stated in every document prepared by Appellant in the Record on Appeal, including the Notice Letters and Financing Statements themselves. (*Id.*). Appellant was and is entitled to proceed to enforce them pursuant to the provisions of Minn. Stat. §481 et seq. The District Court’s application of Minn. Stat. §545.05 is a clear error of law, entitling Appellant to the appropriate de novo legal review by this Court on that issue.

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Respondents had failed to obtain the transcript or move to compel within the 10 days mandated by Minn. R. Civ. App. P. 110.02, subd. 1.

(See Appellant's Principal Brief). Once again, it is undisputed that the District Court did not permit an evidentiary hearing. Rather, the District Court made a summary determination, factually and legally, in the nature of a *demurrer*, Judgment on the Pleadings, and/or a summary judgment.

Respondents, on the other hand, have the burden to obtain the transcript to assert that Appellant's appeal must be "dismissed" based upon "sufficiency of the evidence" grounds:

Appellant did not need a transcript to support his argument on appeal and he notified [respondents] that no transcript would be ordered in his statement of the case. *See* Minn. R. Civ. App. P. 110.02, subd. 1(c). [Respondents'] arguments for dismissal of the . . . claim are more than an alternate basis for the trial court's decision, they are a request for relief unrelated to the issue raised by appellant. As the party raising the sufficiency of the evidence argument, [Respondents are] the "appellant" for purposes of providing a trial transcript. *See id.* (respondent must order transcript it deems necessary within 10 days of service of notification of no transcript by appellant)(citations omitted).

*Oelschlager v. Magnuson*, 528 N.W.2d 895, 903 (Minn. Ct. App. 1995).

Here, Respondents seek "dismissal" of Appellant's entire appeal based upon a their own "sufficiency of evidence" argument. (Respondents' Br., p. 8). Aside from the fact that Respondents argue lack of evidence using a non-existent transcript that contains no evidence, Respondents chose not to satisfy their burden to order the transcript if they truly wished to seek dismissal of Appellant's appeal. *See Oelschlager*, 528 N.W.2d at 895.

In the *Stringer* decision cited by Respondents, the trial court conducted a hearing in which **evidence** was adduced, not a summary Minn. Stat. §545.05 hearing where an evidentiary hearing was denied. *See Stringer v. Minnesota Vikings Football Club, L.L.C.*,

686 N.W.2d 545 (Minn. Ct. App. 2004). Further, in *Stringer*, the reviewing court found itself unable to evaluate the evidence sufficiently without a transcript of the evidentiary proceedings. *Id.* at 553. Here, everything that is needed for reversal is in the Record on Appeal.

Respondents next cite *Noltimier v. Noltimier*, 157 N.W.2d 530, 531 (1968) for the proposition: “allowing dismissal of appeal based upon incomplete record”. (See Respondents’ Br., p. 9). *Noltimier* does not remotely support any “presumption” or “negative inference” to be taken from the appellant’s decision not to order the transcript. *Noltimier* involved a pro se divorce litigant who failed to provide **trial evidence** to the reviewing court.

The *Noltimier* court held:

[t]he district court file has not been transmitted nor does the record presented here contain exhibits, affidavits, a transcript of testimony, or other material which the trial court might have had before it, including evidence bearing upon the fitness of the parties to have custody or the financial circumstances of plaintiff husband.”

*Noltimier*, 157 N.W.2d at 531. The reviewing court further noted in *Noltimier*: “ [t]he inadequate record prevents us from applying two recent significant decisions of this court relating to the subject of civil contempt in divorce actions. *Id.*, FN1.

Here, the evidentiary Record on Appeal is complete without the transcript, and will be reviewed by this Court. None of the missing *Noltimier* evidence even exists in the present hearing transcript. The motion transcript contains only summary motion arguments of counsel. Nowhere in the *Noltimier* decision does the court say that when a transcript is not ordered, “the reviewing court must assume that the findings of the district court would be

supported by what occurred at the hearing” as Respondents falsely assert. (*See* Respondents’ Br., p. 8).

Lastly, Respondent cites *Godbout v. Norton* for the proposition: “reviewing court can not consider a sufficiency-of-evidence claim without a transcript”. (Respondent’s Br., p. 9). First, it is axiomatic that a sufficiency of the evidence claim must rely on the evidence to determine its sufficiency. Once again however, *Godbout* bears no resemblance to the issues in the instant appeal except Respondents’ “sufficiency of the evidence”/dismissal defense. In *Godbout*, the Plaintiff appealed a legal malpractice action which was dismissed after he presented evidence in his case-in-chief. *Godbout v. Norton*, 262 N.W.2d 374, 375 (Minn. 1977), *rehearing denied* (Minn. Feb. 16, 1978). On appeal, Appellant sought a new trial upon two claimed trial errors: (1) Requiring expert legal testimony to establish defendant's negligence and (2) failing to advise plaintiff, appearing pro se, of his right, under Rule 43.02, Rules of Civil Procedure, to call and cross-examine defendant during plaintiff's case-in-chief. *Id.* at 376. “A failure of proof as to any one of the enumerated elements defeats recovery. The trial judge specifically based dismissal upon plaintiff's failure to prove both the second and fourth elements.” *Id.* The Plaintiff’s appeal in *Godbout* relies entirely upon **evidence adduced at trial** to prevail in his appeal. *See id.* “Plaintiff challenges only the ruling as to the second element and does not challenge the ruling concerning the deficiency of his proof of a recoverable action against the airplane manufacturer. Further, he did not furnish a **trial transcript** as part of the record submitted for review.” *Id.* (emphasis added).

Again, there is no such missing evidence in the present case – no such evidence was allowed by the District Court interpreting Minn. Stat. §545.05. Appellant’s prayer for reversal of the District Court’s decision is based solely upon the current Record on Appeal, upon which the District Court ruled. There is no other trial evidence, evidentiary evidence or other evidence whatsoever that exists outside of the current Record on Appeal. Respondents’ unsubstantiated and unsupported “request” to dismiss for lack of a motion transcript must fail.

**III. THE DISTRICT COURT’S ORDER MUST BE REVERSED AS THE DISTRICT COURT RULED UPON APPELLANT’S §481.13 STATUTORY ATTORNEY’S LIENS UTILIZING THE WRONG STATUTE - MINN. STAT. §545.05.**

In their next Argument section, Respondents argue: “the issues briefed by Appellant were not decided by the District Court” and “the district court orders in this case do not even mention an attorney’s lien or the attorney lien statute.” (Respondents’ Br., at p. 9). Herein lies the gravamen of Appellant’s appeal – the District Court did indeed fail to properly identify Appellant’s Statutory Attorneys’ Liens, and failed to consider the attorney lien statute, Minn. Stat. §481.13, in any of its analysis or in its Order. (A.1-7). Appellant respectfully submits that Minnesota law **required** the District Court to do so. Having failed to do so, the District Court erred as a matter of law, and the District Court’s decision must be reversed.

**A. The Record Reflects That Appellant Asserted Statutory §481 Attorneys' Liens.**

To perfect a statutory attorney lien claimed on personal property, as was the case here, “notice must be filed in the same manner as provided by law for filing of a security interest.” Minn. Stat. §481.13, subd. 2(b) (2006). Appellant complied with all of these statutory requirements.<sup>4</sup> Respondents confuse the terms “perfect” and “enforce”. Perfection gives the claimant the right to enforce a statutory attorney’s lien under the provisions of Minn. Stat. §481.13. In like fashion, Minn. Stat. §481.13 empowers the lien claimant to **enforce** the statutory attorney lien, and a respondent the procedures to **challenge** the enforceability of a statutory attorney lien (including proper perfection). Respondents agree that Minn. Stat. §481.13 **governs** the perfection and enforcement of the statutory attorney lien, not Minn. Stat. §545.05. (Respondents’ Br., pp. 10-11).

Despite agreeing that Minn. Stat. §481.13 governs, Respondents flatly conclude without a Minn. Stat. §481.13 determination that “appellant never possessed a ‘personal’ attorney lien”, never “perfected” an attorney lien, and therefore no statutory attorneys’ liens can exist. (*See* Respondents’ Br., pp. 9-10). This is simply false, as Respondents’ personal “findings” remain to be litigated.

Here, the District Court made absolutely no Minn. Stat. §481.13 findings, legal or

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Contrary to Respondents’ representations to this Court, Appellant even gave written notice to Respondents, specifically claiming Statutory §481.13 Attorneys’ Liens. (*See* Respondents’ Br., p. 12; (A.18-23.).

factual, regarding any of these issues as the Minn. Stat. §481.13 Statutory Attorneys' Liens were never considered by the District Court. (A.1-7). Respondents simply conclude these questions adverse to Appellant without the legal analysis or determination they admit must be made under Minn. Stat. §481.13. (*See* Respondents' Br., pp. 9-10).<sup>5</sup>

Fortunately, Respondents' counsel is not the summary determiner of Appellant's Statutory Attorneys' Liens – that jurisdiction is with the District Court, properly applying Minn. Stat. §481.13. (*See* Respondents' Br., p. 11). The law specifically excepts these determinations from a Minn. Stat. §545.05 motion, and Respondents unwittingly admit this: “. . . Minn. Stat. §481.13 still requires that to ‘perfect’ such a lien, the law for the filing of a security interest must be followed.” (Respondents' Br., p. 11). This is true. It is also true that Minn. Stat. §481.13 was followed by Appellant, and Appellant has a right to enforce or defend under Minn. Stat. §481.13. The District Court did not follow or even consider Minn. Stat. §481.13 in summarily invalidating Appellant's Statutory Attorneys' Liens. (A.1-7).

Despite requesting a Minn. Stat. §481.13 hearing in response to Respondents' rush to a summary five-day Minn. Stat. §545.05 motion, Respondents vehemently opposed, via another motion, Appellant's request for a Minn. Stat. §481.13 determination. (*See* Motion to Strike Respondents Giebel Response and to Quash Subpoena and/or other Discovery, December 20, 2006, in the District Court Record). The District Court ultimately refused to

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Appellant respectfully requests that these continuing improper “facts” be stricken as above set forth. In addition, they are otherwise simply not true.

hear any Minn. Stat. §481.13 matters.

Next, Respondents' counsel proceeds to allege more uncited, non-existent transcript "memories", including more false partnership "facts" and false "admissions" (e.g., "[c]onsent was admittedly never obtained in this case"). (Respondents' Br., p. 12). Respondents' counsel even goes so far as relating what the District Court allegedly "saw" during the hearing, and how the District Court must have "felt" during the motion. *Id.* Respondents' counsel attempts to testify without any foundation or basis in fact or the Record on Appeal, how the "searchable data bases" at the Minnesota Secretary of State operate, how a person's credit is affected or not affected, and other "facts" about as far outside of the Record on Appeal as one can reach. (Respondents Br., pp. 12-13). These inappropriate statements speak for themselves. They are also false. These uncited "facts" must also be stricken as noted above.

Respondents then proceed to raise a host of other Minnesota statutes, for the first time, which have absolutely nothing to do with the issues in this appeal. (Respondents' Br., p.13). Respondents' counsel's inappropriate efforts in this regard once again speak for themselves, and have no place in this proceeding. At most, these attempts serve to highlight Respondents' disregard for the Rules of Appellate Procedure, and to promote a defense strategy designed to misdirect and cloud the true issues before this Court.

**IV. APPELLANT CLEARLY SERVED AND FILED STATUTORY ATTORNEYS' LIENS IN ACCORD WITH MINNESOTA STATUTE SECTION 481.13.**

**A. Appellant Followed The Mandates of §481.13.**

As noted in Appellant's Principal Brief, "[a]n attorney has a lien for compensation where the agreement for compensation is expressed or implied". Minn. Stat. §481.13, subd. 1(a) (2006). When this lien is claimed on personal property, the claimant must perfect the lien by filing notice of the lien "in the same manner as provided by law for filing of a security interest." *Id.* at. subd. 2(b). A "security interest" is defined as "an interest in personal property or fixtures which secures payment or performance of an obligation." Minn. Stat. §336.1-201(a)(35)(2006). Minnesota Statutes also provides that "[e]xcept as otherwise provided in subsection (b), if the local law of this state governs perfection of a security . . . the office in which to file a financing statement to perfect the security interest . . . is . . . the central filing system operated by the office of the secretary of state." Minn. Stat. §336.9-501 (a)(2)(2006).

Respondents' final arguments confuse Minn. Stat. §481 Statutory Attorney's Liens with strict UCC Liens. (*See* Respondents' Br., p. 14). If Minn. Stat. §481.13 does not require consent of the debtor for validity, Respondents' entire argument in this regard fails. Respondents' position on consent completely ignores the plain and unambiguous language of Minn. Stat. §481.13 to the contrary, and seeks to render the terms of Minn. Stat. §481.13 superfluous and meaningless.

First, Respondents admit that Minnesota Statute §481.13 applies to: the **perfection**

of a Minn. Stat. §481.13 Statutory Attorney's Lien (Respondents' Br., p. 11), the **establishment** of a Minn. Stat. §481.13 Statutory Attorney Lien (Respondents' Br., p. 10), and the **enforcement** of a Minn. Stat. §481.13 Statutory Attorney Lien (*Id.*). Respondents simply claim that since there has not yet been a confirmation/enforcement or challenge to the Statutory Attorneys' Liens pursuant to §481.13, they cannot exist. (Respondents' Br., pp. 10-11). This argument is clearly premature and conclusory, without any support in law or in fact, as the Minn. Stat. §481.13 legally remains pending. There have been no Minn. Stat. §481.13 proceedings whatsoever to date, the District Court having rejected same in favor of an erroneous Minn. Stat. §545.05 decision. The original District Court proceedings should have been Minn. Stat. §481.13 proceedings. Upon reversal of the District Court's erroneous legal Minn. Stat. §545.05 determinations, Respondents will surely get their chance to test all of their conclusory theories and opinions as to the perfection, enforcement and validity of Appellant's Statutory Attorneys' Liens in a proper Minn. Stat. §481.13 hearing. All parties to this appeal appear to need and desire such a proceeding to assert their respective positions. Until that time however, Respondents' and their legal counsel's prognostications will remain unsupported, undetermined and conclusory opinions.

Respondents' claim that "[i]t is undisputed that [Respondent] had never actually established any such lien via a proceeding reference under Minn. Stat. §481.13" is circular. (*See* Respondents' Br., p. 4). As noted above, this fact is based solely upon the District Court's failure to apply the correct statute. At the very least, the District Court was without

the necessary language of Minn. Stat. §481.13 to guide the Court in unambiguously identifying Appellant's Statutory Attorneys' Liens.

**B. Appellant's Statutory Attorneys' Liens Were Not UCC Liens, Filed Under Article 9 of the UCC.**

Contrary to Respondents' suggestion, "UCC financing statement" is not synonymous with a statutory attorney's lien filed under Minn. Stat. §481.13. Appellants' Statutory Attorneys' Liens were not filed under Article 9 of the UCC. (A.18-25). Minnesota Statute §545.05 governs UCC, Article 9 liens, which are subject to consent requirements. *See* Minn. Stat. §545.05, subd. 2 (stating that Section 545.05 applies only to financing statements filed under Article 9 of the UCC). "UCC financing statement" is not the label given to solely to a UCC security interest, but rather, is merely the name of the document that must be filed with the Secretary of State to file *any* security interest, such as Minn. Stat. §481.13 statutory attorneys' liens. (*See* A.24-25).

The fact that an individual files a UCC financing statement does not automatically mean one is filing a UCC lien. The "UCC financing statement" referenced by the district court's order is exactly that—a statement—and it is the content of the "UCC financing statement" that determines its nature, UCC or statutory. (*See id.*). This is evident by the fact that the "UCC financing statement" form provides a section to describe the collateral and includes a section to elect alternative designations, including "non-UCC filing"<sup>6</sup>.

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While Appellant did not formally check off the non-UCC box in its UCC Financing Statement, Appellant unequivocally stated in the statement that it was filing the financing

Here, the “UCC financing statements” referenced by the District Court clearly state that they were being filed “pursuant to M.S.A. §481, et seq.”, the attorney’s lien statute. (A.24-25.). This is the same statutory lien language Appellant specifically notes in all notice letters sent to Respondents and interested parties. (See A.18-23.). Therefore, to impute a consent required on the attorneys’ liens filed in this case was an error of law, as the consent requirement of Minn. Stat. §545.05 does not apply to statutory attorney’s liens. (See Appellant’s Principal Brief).

Respondents’ claim that their affidavits makes it “obvious” that Appellant did not have a personal attorneys’ lien, is conclusory, and simply not true. The District Court never issued any findings supporting these allegation. (See A.1-7). Because the District Court did not find that Appellant did not have a personal attorneys’ lien, Respondents’ are in essence asking the Court to adopt this finding, which places this Court in the unattainable position of issuing findings. *Peterson v. Johnson*, 720 N.W.2d 833, 839 (Minn. Ct. App. 2006) (the role of the court of appeals is to correct errors, not find facts). Accordingly, this Court cannot rely on this allegation, or numerous other conclusory “findings” by Respondents in deciding this appeal.

Finally, Respondents allege that is “undisputed” that Appellant never represented Respondents and therefore can never establish a personal attorney lien. This allegation is not

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statement pursuant to section 481. It should have been clear to the district court that Appellant intended to file an attorneys’ lien, and any legal or factual determinations otherwise is reversible error.

only false<sup>7</sup> and unrelated to the issue on appeal, but once again, Respondents are attempting to avoid addressing the issue on appeal by injecting statements through their Brief that are not part of the record on appeal and were never addressed by the district court in its Findings of Fact and Conclusions of Law.

V. CONTRARY TO RESPONDENTS' ASSERTION, APPELLANT "PERFECTED" HIS ATTORNEYS' LIENS PURSUANT TO MINN. STAT. §481.13.

In the alternative, Respondents claim that Appellant failed to perfect his attorneys' liens because by filing the UCC Financing Statement with the Secretary of State he was required to provide notice and obtain the consent of the parties. (Respondents' Br., p. 7). Respondents claim that Appellant did not perfect his attorneys' liens because he did not get the consent of Respondents as required by Sections 336.9-509, 336.9-510 and 545.05 incorrectly presumes that consent is required when filing an attorneys' lien. (*See* Respondents' Br., pp. 7, 12). Consent is not required.

Contrary to Respondents' claim, Sections 336.9-509 and 336.9-510 or Article 9 for that matter, do not apply in this case, where Appellant filed an attorney's lien. Attorney's liens, which are statutory in nature, are carved out of Article 9, and therefore, the consent requirements of Article 9 and §545.05 do not apply. *See* Minn. Stat. §545.05, subd. 2 (providing that Minn. Stat. §545.05, subd. 1 applies to financing statements "filed under

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It is undisputed that Appellant both personally, and as Respondents' counsel's former law partner, provided legal services directly and indirectly to both Appellants.

sections 336.9-101 to 336.9-709", Article 9 of the U.C.C.); *Williams v. Dow Chemical Co.*, 415 N.W.2d 20, 26, FN 1 (Minn. Ct. App. 1987) (stating that "Minn. Stat. §336.9-104 (c)<sup>8</sup> expressly excludes statutory liens from the scope of Article 9"); *see also* Minn. Stat. §336.9-109(d)(2)(stating that Article 9 does not apply to statutory liens for services). In the interest of brevity and to avoid duplication of arguments, Appellant respectfully refers this Court to Appellant's principal Brief, pages 8-13, for a thorough analysis of this issue.

Next, Respondents argue that, upon filing a UCC Financing Statement, the statement automatically becomes a UCC lien. Respondents are clearly mistaken. Where an attorneys' lien is claimed for personal property, the lien must be filed "in the same manner as provided by law for filing of a security interest." Minn. Stat. § 481.13, subd. 2(b). This means filing a UCC Financing Statement<sup>9</sup> with the Minnesota Secretary of State. Minn. Stat. §481.13 does not explicitly state or even imply that by filing the lien "in the same manner as a "security interest" Appellant was required to get consent of the debtor. In fact, such an interpretation is inconsistent with the law because not all "security interest" require consent before filing. There are several types of security interests, and some, such as the ones listed in Section 336.9-109, are carved out of Article 9 and Section 545.05, and therefore do not

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Effective July 1, 2001, Article 9, relating to secured transactions, was repealed and a new Article 9 was enacted, also relating to secured transactions. No substantive changes were made to Minn. Stat. §336.9-104, but it was renumbered Minn. Stat. §336.9-109.

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Contrary to Respondents' claim, this is the only form available to file an attorneys' lien where there is a claim for personal property.

require consent. (*See* Appellant's Principal Brief, pp. 8-13.).

**VI. MINNESOTA STATUTE §545.05 AND THE UCC DO NOT APPLY TO STATUTORY ATTORNEYS' LIENS.**

Respondents claim that because Appellant filed UCC financing statements, and the statements do not reference the word "attorneys liens", Appellant did not file an attorneys' lien.<sup>10</sup> These claims are without merit. As discussed *supra*, the UCC Financing Statements filed by Appellant clearly identify themselves as Minn. Stat. §481.13 Statutory Attorneys' Liens. Notwithstanding this fact, the "UCC financing statement" form itself provides a section to describe the collateral and includes a section to elect alternative designations, including "non-UCC filing". Clearly, not all UCC financing statements filed are UCC liens. Respondent even acknowledges that it is possible to file a UCC Financing Statement without filing a UCC lien. (*See* Respondents' Br. pp.15-16).

Respondents also suggest that because Appellant did not check the non-UCC filing designation or specifically referenced "attorney's liens" in the UCC Financing Statement, Appellant did not intend to file an attorneys' lien and he waived his right to his right to argue that the consent requirement do not apply to his liens. This argument is without merit. While Appellant did not check off the "non-UCC" box in its UCC Financing Statement,

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Respondents also argue, in Footnote 13 to their Brief, that the financing statements wrongly list Appellant personally as a secured party. The district court did not make a finding as to this issue, and therefore cannot be considered on appeal. *Peterson v. Johnson*, 720 N.W.2d 833, 839 (Minn. Ct. App. 2006) (the role of the court of appeals is to correct errors, not find facts).

Appellant's intent to file an attorneys lien was clear, as Appellant unequivocally stated in the Statement that he was filing the financing statement: "pursuant to M.S.A. §481, et. seq.". (A.24-25). Appellant went further than checking a "box", Appellant described in detail that Minn. Stat. §481.13 statutory Attorneys' Liens were being filed. (A.24-35). Appellant's intent to file an attorneys' lien, rather than a UCC lien, is even more clear than if Appellant had simply checked the "non-UCC filing" box, which does not indicate the type of lien being filed in any event, and does not state "attorney's Lien". *Id.* Respondents have no basis for alleging waiver, and in fact, cite no case law supporting their argument regarding such waiver. Accordingly, this argument should not be addressed by this Court. *Ganguli v. University of Minnesota*, 512 N.W.2d at 918, 919 n. 1 (Minn. App. Ct 1994)(stating that this Court declines to address allegation unsupported by legal analysis or citation).

### CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the District Court's decisions, and conclude as a matter of law that Appellant's Statutory Attorneys' Liens were properly reviewable under Minn. Stat. §481 et seq., and not under inapplicable Minnesota Statute §545.05, subd. 1.

Moreover, Appellant respectfully requests that this Court grant its Motion to Strike.

Dated this 18<sup>th</sup> day of June, 2007.

Respectfully Submitted,

**GIEBEL, GILBERT, WILLIAMS & KOHL, P.L.L.P.**



By: ~~Zenaida~~ Chico (No. 0299674)  
Kevin E. Giebel (No. 164112)  
Roseville West Building  
2277 West Highway 36, Suite 220  
Roseville, MN 55113  
(651) 332-8555 (v)  
(651) 639-1551 (f)

Gene H. Hennig (#0044143)  
RIDER BENNETT  
33 South Sixth Street, Suite 4900  
Minneapolis, MN 55402  
(612) 340-8900 (v)

*Attorneys for Appellant*

**RULE 132.01 CERTIFICATE AS TO WORD COUNT**

STATE OF MINNESOTA)  
  )SS:  
COUNTY OF RAMSEY )

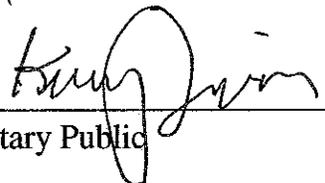
Zenaida Chico, being first duly sworn, does upon his oath, herein states and alleges as follows:

1. Your Affiant submits this Certificate in accord with Rule 132.01, of the Minnesota Civil Appellate Rules.
2. Your Affiant used Word Perfect X3 Office word-processing software in the creation of Appellant Kevin E. Giebel's Reply Brief in this matter.
3. Appellant Kevin E. Giebel's Reply Brief complies with the typeface requirements of Rule 132.01 and the number of words in the Brief (6303 words of 7,000 permitted) in accord with the Word Perfect software reported word count.

**FURTHER YOUR AFFIANT SAYETH NOT.**

  
\_\_\_\_\_  
Zenaida Chico, Esq.

Subscribed and sworn to before me  
this 18th day of June, 2007

  
\_\_\_\_\_  
Notary Public

