

NO. A06-0691

---

---

State of Minnesota  
**In Court of Appeals**

---

Robert and Virginia Carlson,

*Respondents,*

v.

SALA Architects, Inc.,

*Appellant.*

---

**APPELLANT SALA ARCHITECTS, INC.'S  
REPLY BRIEF AND APPENDIX**

---

Keith S. Moheban (#216380)  
Liz Kramer (#325089)  
LEONARD, STREET AND DEINARD  
Professional Association  
150 South Fifth Street, Suite 2300  
Minneapolis, MN 55402  
(612) 335-1500

*Attorneys for Respondents*  
*Robert and Virginia Carlson*

William M. Hart (#150526)  
Michael D. Hutchens (#167812)  
Damon L. Highly (#0300044)  
MEAGHER & GEER, P.L.L.P.  
33 South Sixth Street, Suite 4400  
Minneapolis, MN 55402  
(612) 338-0661

*Attorneys for Appellant*  
*SALA Architects, Inc.*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

ARGUMENT ..... 1

I. Respondents failed to establish that SALA violated any law or did anything wrong, and at the very least, a fact question exists as to whether SALA held out David Wagner as a licensed architect..... 1

II. Even if SALA had breached a duty, it did not owe Respondents a fiduciary duty, and thus disgorgement of fees was an improper remedy. .... 8

    A. Minnesota does not recognize a fiduciary relationship between architects and project owners..... 8

    B. Respondents’ alternative theory of disgorgement is equally unavailing..... 13

III. The statute’s “responsible charge” requirement cannot support affirmance..... 15

IV. The district court did not abuse its discretion in refusing to award Respondents their attorney fees because neither statutory, contractual, nor Minnesota common-law authority exists to support such an award..... 20

    A. No contractual authority exists to award Respondents’ attorney fees. .... 21

    B. Respondents’ reliance on foreign case law regarding fiduciary duty does not create authority in Minnesota for an award of attorney fees. .... 24

CONCLUSION ..... 25

## TABLE OF AUTHORITIES

### Cases

<i>Barr/Nelson, Inc. v. Tonto's, Inc.</i> , 336 N.W.2d 46 (Minn. 1983).....	24
<i>Bayne v. Everham</i> , 163 N.W. 1002 (Mich. 1917).....	10
<i>Becker v. Alloy Hardfacing &amp; Eng'g</i> , 401 N.W.2d 655 (Minn. 1987).....	20
<i>Brown v. Pearson</i> , 483 S.E.2d 477 (S.C. App. 1997).....	12
<i>Canton Lutheran Church v. Sovik, Mathre, Etc.</i> , 507 F. Supp. 873 (D.S.D. 1981).....	9
<i>Carlstrom Co. v. German Evangelical Lutheran</i> , 662 N.W.2d 168 (Minn. App. 2003).....	23
<i>Corey v. Eastman</i> , 44 N.E. 217 (Mass. 1896).....	10
<i>DLH, Inc. v. Russ</i> , 566 N.W.2d 60 (Minn. 1997) .....	1, 17
<i>Fabio v. Bellomo</i> , 504 N.W.2d 758 (Minn. 1993) .....	1
<i>Holy Cross Parish v. Huether</i> , 308 N.W.2d 575 (S.D. 1981).....	8, 9
<i>Hotmar v. Lowell H. Listrom &amp; Co.</i> , 808 F.2d 1384 (10th Cir. 1987) .....	11
<i>Howard County v. Pesha</i> , 172 N.W. 55 (Neb. 1919).....	10
<i>In re Salkin</i> , 430 N.W.2d 13 (Minn. App. 1988), <i>review denied</i> (Nov. 23, 1988).....	15
<i>In re Trusteeship of Williams</i> , 631 N.W.2d 398 (Minn. App. 201) .....	20
<i>Leamington Co. v. Nonprofits' Ins. Ass'n</i> , 615 N.W.2d 349 (Minn. 2000).....	1
<i>Lee v. LPP Mortgage Ltd.</i> , 74 P.3d 152 (Wyo. 2003) .....	12
<i>Lennartson v. Anoka-Hennepin Indep. Sch. Dist. 11</i> , 638 N.W.2d 494 (Minn. App. 2002), <i>reversed on other grounds</i> , 662 N.W.2d 125 (Minn. 2003).....	25
<i>Logefeil v. Logefeil</i> , 367 N.W.2d 114 (Minn. App. 1985).....	21
<i>Ly v. Nystrom</i> , 615 N.W.2d 302 (Minn. 2000) .....	20

<i>May v. May</i> , 713 N.W.2d 910 (Minn. App. 2006).....	15
<i>Needham v. Provident Bank</i> , 675 N.E.2d 514 (Ohio Ct. App. 1996) .....	11
<i>Palmer v. Brown</i> , 273 P.2d 306 (Cal. App. 1954) .....	9, 10
<i>Reinke v. Reinke</i> , 464 N.W.2d 513 (Minn. App. 1990) .....	20
<i>Safeco Ins. Co. of Am. v. Dain Bosworth, Inc.</i> , 531 N.W.2d 867 (Minn. App. 1995) .....	12
<i>Shema v. Thorpe Bros.</i> , 240 Minn. 459, 62 N.W.2d 86 (1953) .....	9
<i>State Fund Mut. Ins. Co. v. Mead</i> , 691 N.W.2d 495 (Minn. App. 2005) .....	20
<i>Telex Corp. v. Data Prods. Corp.</i> , 271 Minn. 288, 135 N.W.2d 681 (1965) .....	21
<i>Tereault v. Palmer</i> , 413 N.W.2d 283 (Minn. App. 1987), <i>review denied</i> (Minn. Dec. 18, 1987) .....	25
<i>Turner v. Alpha Phi Sorority House</i> , 276 N.W.2d 63 (Minn. 1979) .....	21
<i>Welsh Const. Corp. v. Wangerin, Inc.</i> , No. CX-88-1951, 1989 WL 49288 (Minn. App. May 16, 1989).....	22
<i>Winkler v. Magnuson</i> , 539 N.W.2d 821 (Minn. App. 1995) .....	16
<b>Statutes</b>	
Minn. Stat. § 326.02, subd. 1 .....	7, 8
Minn. Stat. § 337.01 (2004) .....	22
Minn. Stat. § 337.01, subd. 3 .....	23
<b>Other Authorities</b>	
2 Phillip L. Bruner & Patrick J. O'Connor, Jr., <i>Bruner &amp; O'Connor on Construction Law</i> § 5:92, at 132 (2002).....	9
Justin Sweet & Jonathan J. Sweet, <i>Sweet On Construction Industry Contracts: Major AIA Documents</i> , § 5.03 (4th ed.1999) .....	9, 22

## ARGUMENT

**I. Respondents failed to establish that SALA violated any law or did anything wrong, and at the very least, a fact question exists as to whether SALA held out David Wagner as a licensed architect.**

“The district court’s function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). “[T]he [district] court must not weigh the evidence on a motion for summary judgment.” *Id.* Therefore, to obtain reversal of summary judgment, the nonmoving party need only show that fact issues exist. *Leamington Co. v. Nonprofits’ Ins. Ass’n*, 615 N.W.2d 349, 355 n.4 (Minn. 2000).

Respondents assert that SALA must establish a fact issue with “substantial evidence.” (Respt’s.18). But the supreme court recently rejected this notion, stating that “[a] party need not show *substantial evidence* to withstand summary judgment.” *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006)(emphasis in original). Instead, SALA need only “present[] *sufficient evidence* to permit reasonable persons to draw different conclusions.” *Id.* (emphasis in original). Moreover, on appeal from a summary judgment, “the reviewing court *must* view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993)(emphasis added).

Respondents’ argument disregards the standard of review. Viewing the evidence in the light most favorable to themselves — not to SALA, as the law requires — Respondents premise their entire argument on the contention that it is an “undisputed” fact that SALA held out Wagner as a licensed architect. (Respt’s.1,16,19-20,24). But

they attempt to establish this so-called undisputed fact not with the evidence viewed in a light most favorable to SALA, but with evidence founded upon abuses and misstatements of the record, as a mere sampling of these abuses shows:

- Respondents assert that Wagner “viewed the Carlson project—a big budget, showcase home—as an opportunity to create a portfolio and make a name for himself” (Respt’s.11), as if this were a statement of fact. But this has no record support. Instead, it is merely their jury argument.
- Respondents also cite to Mulfinger’s testimony for the supposed fact that “Mulfinger was busy with other projects, teaching and writing books *and did not have time for the project.*” (*Id.* at 11&16)(emphasis added)(citing A.98-99). But this again misstates the record. Mulfinger never testified that he did not have time for the Carlson project. To the contrary, he testified that he “felt [he] could be quite involved in this project \* \* \* in terms of helping set the scope, helping set the character and design thoughts of the project.” (A.112).
- On this same page, Respondents assert as fact that Mulfinger “turned the project over to Wagner,” and only attended design-team meetings “to maintain the pretense that he was still in charge of the project.” (Respt’s.11)(citing A.112,135). Again, this misstates the record, as the testimony cited does not remotely support these jury-type arguments.
- Next, Respondents assert as fact, without record citation, that SALA “[n]ever [did] seek to obtain the approval set forth under Section 1.1.1” of the parties’ contract. (Respt’s.13). This is another abuse of the record. Section 1.1.1 obligated SALA to “describe the project requirements for the [Carlsons’] approval” (A.49). The record shows that SALA obtained step-by-step approval over the course of the design-team meetings (107,117,159,129-30). Specifically, Mulfinger testified that at each of these meetings the Carlsons gave “incremental approvals of pieces as we [the design team] went along” in the design process, which consisted of a series of “evolutionary decisions.” (A.107).
- Respondents further misstate the record when they assert as fact that “Wagner withheld drawings that show what the house would look like from the outside.” (Respt’s.13)(citing A.149,156). Nothing in these cited pages (or anywhere in the record) supports this claim.

These examples among many from Respondents' statement of "facts" demonstrate how they have liberally abused and misstated the record and ignored the standard of review. As a result, this court should approach with caution anything Respondents claim as support for their argument that SALA held out Wagner as a licensed architect. In fact, the most egregious liberties Respondents take with the record occur in their argument section, as addressed below.

First, no fewer than 11 times, Respondents state that it is "undisputed" (Respt's.16,19-20) that SALA identified Wagner on the design plans as "an architect" or "the architect." (*Id.* at 1,8,12,16,20,21,24) (citing R.A.9;A.178,186-89). But the court need look no further than these plans to see that Respondents' statement is demonstrably false. Nowhere does any document list Wagner as "an architect" or "the architect." (*See* R.A.9;A.178,186-89). Instead, Wagner and the others are listed as nothing more than "Contacts" under their respective categories. (*Id.*) Wagner is listed as such a "Contact" under the heading "Architect" just as Renae Keller is listed as a "Contact" under the heading "Interior Designer" and David L. Peterson is listed as a "Contact" under the heading "Electronics." (*Id.*) The plan contact list is plainly not intended to constitute a magna carta on the licensure status of those listed. In fact, Respondents admit as much when they concede that they do not consider the list as determinative of Renae Keller's licensure status as an interior designer. (Respt's.21,n.4). In short, Respondents themselves do not even purport to have relied on the "Contacts" list as a guarantee, or even an assertion, of licensure.

So it defies all reason for Respondents to interpret these lists of contacts as conclusive evidence that SALA claimed that Wagner was a licensed architect. More importantly, Respondents are well aware of this, as their brief time after time embellishes what the Contacts list actually says, contending falsely that it lists Wagner as “an architect” or “the architect.” If a Contacts list is reasonably to be interpreted as an assertion of licensure, the party so asserting would not need to falsely claim that the document says what it demonstrably does not. In the context of a summary judgment motion, where the evidence must be viewed in a light most favorable to the non-moving party, the law compels the court to hold that the Contacts list, at most, holds Wagner out as a contact at SALA.

Second, Respondents rely on evidence that “Robert Carlson testified he was at all times led to believe that Wagner was a licensed architect. (A. 228 ¶ 2.)” (Respt’s.20). But this assertion derives from a single statement in Carlson’s affidavit that is likewise an embellishment of the record. The Carlson affidavit states:

Defendant led us to believe that Wagner was a licensed architect. *His name was listed as “project architect” on the plans Defendant provided to us.*

(A.228 ¶2)(emphasis added). But the plans to which Robert Carlson refers do not list David Wagner as “project architect.” (R.A.9;A.178). Instead, on the plans’ “General Information” page — the same General Information page that has the “Contacts” list — the following appears: “Project Architect: DM.” (R.A.9;A.183). In other words, the plans actually list Dale Mulfinger as “Project Architect,” not Wagner as the affidavit states. Thus, Respondents’ so-called lynchpin support for the “undisputed” fact

(Respt's.16,19-20) that SALA held out Wagner as a licensed architect is demonstrably false. In fact, Respondents' affidavit is just another reference to the Contacts list, which plainly does not state that Wagner was the "project architect." Taken together, and viewed in the light most favorable to SALA, as the standard of review demands, the clear identification of Mulfinger as the "project architect," while the very same page of the plans lists Wagner as merely a contact, constitutes conclusive evidence that SALA did not hold out Wagner as a licensed architect. At the very least, however, this issue must go to a jury because reasonable persons could reach different conclusions on this evidence.

Third, Respondents contend — without record citation — that SALA labeled Wagner as "an architect" on "other documents," "in meetings," "and elsewhere." (Respt's.1,8,22). But there is only one place where Wagner's name appears in proximity to the word "architect," and that is on the architectural plans, where his is listed merely as a "Contact." (A.178,186-89;R.A.9). There are no "other documents," and no evidence that Wagner was identified as an architect "in meetings" or "elsewhere." These embellishments are nothing more than an effort to create the appearance of evidence that does not exist.

Fourth, and again without record support, Respondents assert that SALA failed to meet its burden to show that fact issues exist "because of *its own numerous admissions* establishing its unlawful holding out of Wagner as an architect." (Respt's.18,19). But nowhere in the record is there any evidence that SALA admitted it held out Wagner as an architect. Again, this assertion creates the false impression that evidence from varied

sources somehow supports Respondents' contention. In fact, the Contacts list is the only evidence, and Respondents' brief has inflated and embellished that list to say what it plainly does not.

Fifth, at several points in their brief (Respt's.2,16,20), Respondents make much ado about the fact that SALA's Answer, prepared by its attorneys, admits the paragraph in Respondents' Complaint in which they allege that "David Wagner is, on information and belief, an architect employed by Defendant [SALA]." (A.39). Not only was the Answer prepared by SALA's attorneys, but Wagner's licensure status, as admitted, is undisputedly true. Wagner obtained his license in 2003. (A.176). The 2004 Complaint asserts Wagner's status in the present tense and makes no reference to a dispute about "holding out" Wagner at an earlier time. It is disingenuous to argue that the Answer constitutes undisputed evidence or an admission that SALA itself, four years earlier, held out Wagner as an architect to the Carlsons.

In addition to their record abuses, and in an ironic twist, Respondents contend that SALA attempts to "spin" the invoices as evidence that it "disclosed" Wagner's unlicensed status. (Respt's.22). This argument ignores the fact that Minn. Stat. § 326.14 does not obligate SALA to "disclose" anything about the employees it uses, so long as SALA uses them consistent with the statute. It is legal to employ a person with two advanced architectural degrees to design a home or to assist in designing a home. The law does not require "disclosure." Respondents' repeated discussion about failure to disclose is a red herring. Failing to disclose is not evidence that SALA affirmatively held Wagner out as an architect.

Moreover, Respondents misunderstand the significance of the invoices. They are not meant only to show “disclosure,” for the reasons discussed. Rather, they are also evidence — which must be viewed in a light most favorable to SALA — that SALA never gave Wagner the title of architect. They are also evidence that Respondents’ “interpretation” of the Contacts list is utterly contrived, but in any event unreasonable. The invoices show that SALA consistently labeled Wagner as a “draftsperson” — a title that Robert Carlson testified he was familiar with, as it was “common practice” among “architects” to utilize and delegate to “draftsmen” and other employees when working on a project. (A.57). Viewed in a light most favorable to SALA, this evidence precludes summary judgment and requires reversal.

Respondents next misstate the law in an attempt to distract from the fact that SALA consistently used the title or description “draftsperson” — not “architect.” Under the statute, it is unlawful for a person to “use or advertise any *title or description* tending to convey the impression that the person is an architect.” Minn. Stat. § 326.02, subd. 1 (emphasis added). But Respondents adopt their own truncated version of this statute by contending that SALA “*took actions* ‘tending to convey the impression that Wagner was an architect.’” (Respt’s.20,24, n.6)(emphasis added). Under the law, it is not “actions,” but use of a title or description, that leads to a violation of the statute. Calling Wagner a “Contact” is not a statutory violation.

In the end, Respondents try to distill their position by quoting the district court, which stated three grounds for its conclusion that it is “undisputed” that SALA held out Wagner as a licensed architect: (1) “by not disclosing the fact that Wagner was not

licensed”; (2) “allowing Wagner to perform architectural services”; and (3) “promoting Wagner as an architect.” (Respt’s.19)(quoting A.35). The first ground is contrary to law. Section 326.14 did not require SALA to “disclose” anything about Wagner’s licensure status. The second ground is similarly contrary to law. Section 326.14 expressly permitted Wagner to perform architectural services under Mulfinger’s supervision. And the third ground is contrary to the record and to the standard of review. No evidence — and certainly not the entire record viewed in a light most favorable to SALA — supports the conclusion that SALA promoted Wagner as licensed. His name appears as a Contact. He in fact was a Contact. Viewing the evidence in the light most favorable to SALA, summary judgment was improper, and this court must reverse.

**II. Even if SALA had breached a duty, it did not owe Respondents a fiduciary duty, and thus disgorgement of fees was an improper remedy.**

SALA’s opening brief (pp.19-34) sufficiently addresses why the district court improperly ordered disgorgement, even if SALA had held Wagner out as a licensed architect in violation of Minn. Stat. § 326.02, subd. 1. Therefore, SALA will address only a few of Respondents’ arguments.

**A. Minnesota does not recognize a fiduciary relationship between architects and project owners.**

Respondents urge this court to follow other states that allegedly “treat architects as fiduciaries of their clients.” (Respt’s.27). But Respondents’ supporting case law is not what it appears. For example, Respondents cite *Holy Cross Parish v. Huether*, 308 N.W.2d 575 (S.D. 1981) for the proposition that South Dakota recognizes a fiduciary relationship between architects and owners. But *Holy Cross* holds that “[a] fiduciary

relationship existed between the architect and appellant *with regard to the architect's supervisory functions.*" *Id.* at 577 (emphasis added)(citing *Canton Lutheran Church v. Sovik, Mathre, Etc.*, 507 F. Supp. 873 (D.S.D. 1981)). *Canton Lutheran Church*, in turn, ruled that the parties' relationship during the design phase is "characterized as that of an independent contractor." 507 F. Supp. at 878. Thus, during the design phase — the only phase at issue here — there is no fiduciary relationship. *See* 5 Phillip L. Bruner & Patrick J. O'Connor, Jr., *Bruner & O'Connor on Construction Law* § 17:3, at 510 (2002) (stating that "the designer's *legal role during the design phase* is that of an 'independent contractor.')(emphasis added). And this is consistent with Minnesota law. *See, e.g., Shema v. Thorpe Bros.*, 240 Minn. 459, 467, 62 N.W.2d 86, 91 (1953) ("[I]t is clear that the parties were dealing at arm's length, and in such a situation a fiduciary relationship cannot be said to exist between the parties."). *Holy Cross* (and *Canton*) actually support SALA's position.

The same is true of Respondents' California case, *Palmer v. Brown*, 273 P.2d 306 (Cal. App. 1954). (Respt's.27). There, the owners sued their architects for fraud because the architects accepted work and received payments from the contractors at the same time they were *supervising those contractors' work* for the owner. 273 P.2d at 316. Under those circumstances, the California court observed that "[a]n architect owes to his client a fiduciary duty of loyalty and good faith \* \* \* [a]s a trusted *agent of the owner*, \* \* \* ." *Id.* (emphasis added) (citations omitted). Here, it is undisputed that only the design phase is at issue. *See* Justin Sweet & Jonathan J. Sweet, *Sweet On Construction Industry Contracts: Major AIA Documents*, § 5.03, at 92 (4th ed.1999) ("As a rule, architects are

not given agency authority in the design phase.”). Under California law, unless the architect takes on a supervisory role, thereby becoming the agent of the owner — neither of which is present here — there is no fiduciary duty. Hence, *Palmer* also supports SALA’s position.

Respondents’ Nebraska case yields the same result. See *Howard County v. Pesho*, 172 N.W. 55 (Neb. 1919) (recognizing architect employed to supervise contractor’s construction of a courthouse is a fiduciary of the county). Finally, neither *Corey v. Eastman*, 44 N.E. 217 (Mass. 1896), nor *Bayne v. Everham*, 163 N.W. 1002 (Mich. 1917) (Respt’s.27) even mention fiduciary duty. In a deceptive use of *Bayne*, Respondents provide only a truncated and misleading quotation: “the responsibility of an architect does not differ from that of a lawyer or physician.” (Respt’s.27). But the actual case holding merely establishes the same requisite-skill-and-knowledge duty for architects that applies to other professionals like doctors and lawyers. 163 N.W. at 1008. The term “fiduciary” appears nowhere in the case. In sum, cases Respondents advance as precedent for creating a fiduciary relationship between architects and project owners do not stand for the proposition advanced.

Respondents next urge the court to find that the American Institute of Architecture’s (AIA) Code of Ethics and Professional Conduct impose a general fiduciary duty on architects in the performance of their duties. (Respt’s.28,30). But these rules, which apply only to AIA members, cannot create a fiduciary duty, because a fiduciary duty “is not created by a unilateral decision to repose trust and confidence; it derives from the conduct or undertaking of the purported fiduciary which is recognized

by the law as justifying such reliance.” *Farmers Ins. Co., Inc. v. McCarthy*, 871 S.W.2d 82, 87 (Mo. Ct. App. 1994); see *Hotmar v. Lowell H. Listrom & Co.*, 808 F.2d 1384, 1387 (10th Cir. 1987) (“[O]ne may not unilaterally impose a fiduciary relationship on another without a conscious assumption of such duties by the one sought to be held liable as a fiduciary.”). In short, a profession’s rules of ethics — none of which SALA breached — do not unilaterally establish a fiduciary relationship among all architects and their clients. Only the law may do so.

Respondents further assert that SALA’s website advertising, which Respondents misquote as saying, among other things, that SALA “serves as ‘an advocate’ for its clients,” somehow creates a fiduciary relationship with consumers like Respondents. (Respt’s.29) (underline emphasis in brief) (quoting R.A.129). But this language deals in advertising abstractions, soliciting business by informing potential customers about the kinds of services that architects can provide. It is not an offer to enter into a fiduciary relationship. Respondents’ argument is similar to one rejected by the Ohio Court of Appeals in *Needham v. Provident Bank*, 675 N.E.2d 514 (Ohio Ct. App. 1996), where the respondent bank published a newspaper advertisement that read: “We know you’ll find a place for Provident Bank as your ‘Partner in Business.’” *Id.* at 521. Based on the ad, the appellants argued that the bank became its “Partner in Business” after it agreed to finance appellants’ businesses, and that the trust inherent in such a relationship created a fiduciary relationship. *Id.* at 522. The court succinctly rejected the absurd notion that the advertisement created a fiduciary relationship: “[O]ne cannot reasonably construe the

advertisement as an open invitation to the public to enter into a partnership with the bank.” *Id.* In short, SALA’s website advertisement is simply that — advertising.

In keeping with this theme, Respondents assert that because they allegedly placed their trust and confidence in SALA, this alone established a fiduciary relationship. (Respt’s.30)(citing Robert Carlson’s affidavit at A.229). But the recognized rule is that a fiduciary relationship cannot be established by the unilateral action of one party. *Brown v. Pearson*, 483 S.E.2d 477, 484 (S.C. App. 1997); see *Lee v. LPP Mortgage Ltd.*, 74 P.3d 152, 162 (Wyo. 2003) (“[F]iduciary duty is not created by a unilateral decision to repose trust and confidence; it derives from the conduct or undertaking of the purported fiduciary.”). As the Wyoming Supreme Court noted, “because fiduciary relationships carry significant legal consequences, they cannot be the product of wishful thinking.” *Lee*, 74 P.3d at 162.

Finally, Respondents argue that because their expert’s testimony that a fiduciary relationship existed went “unopposed,” this means that such a relationship in fact existed. (Respt’s.31). But expert witnesses do not make the law. See *Safeco Ins. Co. of Am. v. Dain Bosworth, Inc.*, 531 N.W.2d 867, 873 (Minn. App. 1995) (“An affidavit from an expert cannot create a duty where none exists.”), *review denied* (Minn. July 20, 1995). Respondents further assert that if SALA “intended to create a fact dispute as to the nature of its obligations to its client, it was incumbent on [SALA] to submit such testimony.” (Respt’s.31). Not only is this inaccurate, but it asserts that the question of fiduciary relationship is a fact issue, a point that contradicts the law.

In sum, the law rejects the notion that a fiduciary relationship exists between an architect and a client for the design of a home. Nor may Respondents unilaterally foist a fiduciary duty on SALA by their own alleged confidences and wishful thinking. In the absence of such a relationship, disgorgement of fees could never be the proper measure of damages, even if the Respondents are able to convince a jury that they reasonably relied on the “Contacts” list as evidence of licensure status. The law requires a plaintiff to prove actual damages causally related to any breach of duty. Thus, reversal is required.

**B. Respondents’ alternative theory of disgorgement is equally unavailing.**

Respondents argue that disgorgement is the proper remedy even if a fiduciary relationship does not exist. (Respt’s.33).<sup>1</sup> Their theory is that because Wagner was unlicensed, the parties’ contract was void and illegal, thereby mandating total disgorgement of SALA’s fees. Respondents’ argument is without merit. The general rule is that “where 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. Minnesota Mut. Life Ins. Co.*, 257 Minn. 184, 189, 100 N.W.2d 819, 823 (1960). But here, licensed architect Mulfinger signed the parties’ agreement — not Wagner. (A.51). And Mulfinger was the project architect. There is no contract whose validity depends on Wagner’s licensure.

---

<sup>1</sup> SALA stands on its earlier briefing with regard to disgorgement under *Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982).

But even if the contract were void, this would not justify total disgorgement. Under Respondents' view of the law, project owners could receive the full benefits of architectural design work, but then get all their money back if it turned out that the architect was unlicensed. To receive such a windfall would constitute unjust enrichment. *See Gallagher v. Leary*, 674 A.2d 787, 788 (Vt. 1996) (“[R]equiring a party who provides services to return the fees received would provide an unfair windfall to the complaining party.”); *Hawkins v. Holland*, 388 S.E.2d 221, 223 (N.C. Ct. App. 1990) (equity and principles of restitution do not require that unlicensed parties be completely uncompensated).

Furthermore, because one can design a single-family home with or without a license under Minn. Stat. § 326.03, subd. 2(a), disgorgement can never be a proper remedy in this context. With the goal of protecting the public, the legislature devised licensing requirements. Disgorgement in some circumstances might serve this public-policy goal by punishing licensing violations, which implicate the public-policy goal of public protection. Thus, the underlying premise of the disgorgement remedy is inextricably tied to the existence of licensing requirements. So where there are no licensing requirements, as with the statute's residence exception, there can be no public-policy basis for a disgorgement remedy. By virtue of the absence of a licensing requirement for designing single-family homes, the legislature has indicated no need for public protection, hence disgorgement has no public purpose to promote here.

And the two Minnesota cases that Respondents rely on, *Layne Minnesota Co. v. Town of Stuntz*, 257 N.W.2d 295 (Minn. 1977) and *Village of Wells v. Layne-Minnesota*

Co., 60 N.W.2d 621 (Minn. 1953) (Respt's.33-34), are consistent with that principle. For example, *Layne* merely recognizes the general rule allowing unlicensed contractors to recover fees from a municipality to the extent the work conferred a benefit — even where a contract is void and unenforceable. 257 N.W.2d at 300. By the same token, where the municipality has received no benefit, the contractor is not entitled to recover fees. *Id.* Furthermore, where state municipalities cannot recoup all amounts paid, it makes no sense that Respondents would be entitled to complete disgorgement here. *See* 6A A. Corbin, *Corbin on Contracts* § 1512, at 713 (1962) (stating “justice and sound policy do not always require the enforcement of licensing statutes by large forfeitures going not to the state but to repudiating defendants”). Respondents are not entitled to disgorgement.

### **III. The statute’s “responsible charge” requirement cannot support affirmance.**

Without citation to legal authority, Respondents assert that “[t]his Court need not address the [“responsible charge”] issue articulated in Appellant’s brief, as Appellant did not list that issue in its Statement of the Case submitted to this Court \* \* \* .” (Respt’s.35). This argument is contrary to settled law. *See May v. May*, 713 N.W.2d 910, 913 (Minn. App. 2006) (“The statement of the issues contained in an appellant’s statement of the case does not limit the reviewability of issues on appeal.”); *In re Salkin*, 430 N.W.2d 13, 15 (Minn. App. 1988) (“[W]e decline to hold that a statement of the case must include all issues to be addressed in the briefs.”), *review denied* (Nov. 23, 1988).

Moreover, citing to the district court’s order on SALA’s motion for reconsideration (A.23-A.36), Respondents contend that “[t]he 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.” (Respt’s.36). But while that may be said of that order, the district court’s original August 30, 2005 order granting summary judgment clearly states that “[b]ecause [SALA]’s holding out Wagner as an architect *and Mulfinger’s failure to take responsible charge of the project* \* \* \* Summary Judgment is Granted for the [Carlsons] \* \* \* .” (A.22)(emphasis added). Because Respondents raised this issue in the district court, and the district court’s order mentions it, albeit only in passing, SALA would be remiss in failing to address it, wary of the principle set forth in *Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995) (stating that the court of appeals may properly consider an issue raised below and that an appellate court can affirm summary judgment on alternative grounds), *review denied* (Minn. Feb. 13, 1996).

So although SALA agrees with Respondents that this court need not consider “responsible charge,” SALA nevertheless is compelled to address the merits of Respondents’ arguments. First, Respondents speculate that because Mulfinger did not sketch the project drawings himself, this somehow leads to the legal conclusion that he failed to take responsible charge of the project. (Respt’s.37). But that fact says nothing about whether Mulfinger “super[vised] subordinates during the course of the work,” or whether his “professional skill and judgment are embodied in the plans, designs, and advice” on the project. Minn. R. 1805.1600, subp. 1. Instead, this shows merely that Mulfinger directed Wagner and other SALA employees, including licensed architect Marcelo Valdes and CAD operator Marc Sloom, to prepare the project drawings. (A.129,135,212). The fact that Mulfinger directed Wagner and others to sketch project

drawings is evidence of nothing, other than the fact that he delegated this task to two junior employees under his supervision — something Respondents knew about in advance. (A.54,57,111,130). Indeed, because of the substantial scale and short timeframe of the project, Respondents not only expected Mulfinger to delegate tasks to junior SALA employees, including draftspersons like Wagner, they demanded it. (*Id.*).

Moreover, Wagner testified that “Dale [Mulfinger] doesn’t typically produce construction drawings’, but that he and the other SALA employees submitted the drawings to Mulfinger “[f]or him to look at, review.” (A.135). Wagner further testified that “he and [Mulfinger] would work together in collaboration on a design for [the Carlsons],” and then Wagner would “do the majority of the drawing work.” (A.129). Wagner’s sworn affidavit also states that Mulfinger supervised him at all times on the Carlson project. (A.176). Just as a judge may issue an opinion penned by a law clerk, or a partner may sign off on a brief drafted by the firm’s clerk, this in no way compels a conclusion that the judge or partner failed to oversee and direct the law clerk, or that that the judge or partner abdicated responsible charge over the final product. Furthermore, at the very least, reasonable minds could draw different conclusions on this fact, thereby precluding summary judgment. *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006); *see DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (“[S]ummary judgment is inappropriate when reasonable persons might draw different conclusions from the evidence presented.”). In short, Respondents cannot support summary judgment with their speculation that Mulfinger abdicated responsible charge by not sketching the drawings himself.

Next, Respondents rely on the SALA invoices, arguing that the number of hours that Mulfinger billed compels the legal conclusion that he failed to take responsible charge. (Respt's.37). According to SALA, these invoices show that "as of February 2001, Wagner billed 195 hours on the project while Mulfinger billed only 3 hours." (*Id.*). But this statement creates a false impression. The invoices from August 2000 through February 2001 undisputedly show that Mulfinger had billed 106 hours during that time. (A.204-217). So in fact, "as of February 2001," Mulfinger had billed 106 hours — not 3 hours, as Respondents would have this court believe. And the remaining invoices (A.190-203) illustrate that Mulfinger continued to work on the project until the Carlsons abandoned it in fall 2001. Viewing this evidence in the light most favorable to the nonmoving party, at a minimum this raises a disputed question of fact, which renders summary judgment improper.

Respondents also point out the bare fact that Wagner billed more hours on the project than Mulfinger (Respt's.38), as though this somehow compels the conclusion that Mulfinger failed to take responsible charge over the project. Again, just as a law clerk or intern will often contribute the majority of time in preparing a legal memorandum, this by no means implies that the judge or partner failed to take responsible charge of the project, or that the final product embodies anything less than the judge's or partner's professional skill and judgment. And Respondents do not dispute that Mulfinger participated in numerous meetings with the Carlsons and the rest of the design team. Mulfinger testified that he would be "quite involved in this project" in terms of "set[ting] the scope," and "set[ting] the character and design thoughts of the project." (A.112). At the very least,

reasonable minds could reach different conclusions as to whether the fact that Wagner billed more hours than Mulfinger means that he failed to take “responsible charge” as required by Minn. Stat. § 326.14.

Respondents further argue that because SALA kept no “timekeeping records to document any of the tasks performed” by Mulfinger, SALA has nothing to establish that he took responsible charge of the project. (Respt’s.37-38). For one thing, it is Respondents’ burden — not SALA’s — to not only prove that SALA violated Minn. Stat. § 326.14, but also to show the absence of a material fact as to whether SALA violated the statute. More important, the statute does not impose any requirement that SALA maintain detailed timekeeping records in order to establish responsible charge, and Respondents cite no authority for that proposition. Nor does the statute impose a requirement that SALA maintain “internal policies concerning supervision of unlicensed staff performing architectural services.” (Respt’s.38). So while Respondents are emphatic over the fact that SALA has no such internal policies, this is of no consequence; the law does not obligate SALA to have any.

In sum, contrary to Respondents’ belief, material issues of fact exist to preclude summary judgment. To the extent that the district court granted summary judgment on the basis that Mulfinger failed to responsible charge over the project, this was improper and merits reversal.

**IV. The district court did not abuse its discretion in refusing to award Respondents their attorney fees because neither statutory, contractual, nor Minnesota common-law authority exists to support such an award.**

Respondents challenge the district court's refusal to award them attorney fees, arguing that "their contract with [SALA] and common law" mandate such an award. This court reviews a district court's decision whether to award attorney fees for abuse of discretion. *State Fund Mut. Ins. Co. v. Mead*, 691 N.W.2d 495, 502 (Minn. App. 2005). Absent an abuse of discretion, this court will not reverse the district court's decision to deny attorney fees. *See Becker v. Alloy Hardfacing & Eng'g*, 401 N.W.2d 655, 661 (Minn. 1987) ("On review, this court will not reverse a trial court's award or denial of attorney fees absent an abuse of discretion."). "An abuse of discretion will be found only if there is a \* \* \* conclusion that is against logic and the facts on record. The award must not be disturbed if it has a reasonable and acceptable basis in fact and principle." *Reinke v. Reinke*, 464 N.W.2d 513, 514 (Minn. App. 1990).

"Minnesota follows the 'American rule' concerning the award of attorney fees" against an opposing party, and "as the Minnesota Supreme Court \* \* \* noted, it is a 'fundamental principle of law deeply ingrained in our common law jurisprudence that each party bears his own attorney fees in the absence of a statutory or contractual exception.'" *In re Trusteeship of Williams*, 631 N.W.2d 398, 409 (Minn. App. 201) (quoting *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000)). As discussed below, neither statutory nor contractual authority exists to authorize an award of attorney fees to Respondents.

**A. No contractual authority exists to award Respondents' attorney fees.**

Respondents concede that there is no statutory basis for an award of fees. They argue, however, that the following provision from the parties' contract mandates that they recover their attorney fees:

7.5 To the fullest extent allowed by law, the Architect [SALA] hereby agrees to *indemnify and hold the Owner* [the Carlsons] *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 at 7.5)(emphasis added). "The construction and effect of a contract are questions of law for the court." *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979). When construing an unambiguous contract, "it is neither necessary nor proper \* \* \* to go beyond the wording of the instrument itself." *Telex Corp. v. Data Prods. Corp.*, 271 Minn. 288, 195, 135 N.W.2d 681, 686-87 (1965). Here, Respondents' reliance on this provision is misplaced because it constitutes a standard indemnity clause, which obligates SALA to indemnify the Carlsons only for claims brought by third parties.

An indemnity clause is a "contractual provision in which one party agrees to answer for \* \* \* liability or harm that the other party might incur." *Black's Law Dictionary*, 784 (8th ed. 2004). The indemnity clause here merely obligates SALA to protect the Carlsons from actions brought against them by *third parties*. See *Logefeil v. Logefeil*, 367 N.W.2d 114, 116 (Minn. App. 1985) ("In general, indemnification agreements contemplate payment for attorney fees incurred in litigation with *third parties* concerning the matter indemnified against \* \* \* .")(emphasis added)(citation omitted).

Two prominent treatise authors agree, stating that with respect to an indemnification clause in AIA documents, “[w]e are assuming a claim is made by a third party, which is usually the principal reason for indemnification.” Justin Sweet & Jonathan J. Sweet, *Sweet On Construction Industry Contracts: Major AIA Documents*, § 19.01, at 619 (4th ed.1999). In short, the indemnity clause does not require SALA to reimburse Respondents for attorney fees incurred in their direct action against SALA. *See, e.g., Welsh Const. Corp. v. Wangerin, Inc.*, No. CX-88-1951, 1989 WL 49288, at \*1 (Minn. App. May 16, 1989) (Reply App.1) (rejecting plaintiff’s claim that the parties’ contract entitled plaintiff to attorney fees, where the contract contained a standard indemnity provision whereby defendant agreed to save plaintiff harmless for losses, including attorney fees, occasioned by defendant’s failure to fulfill the contract, because indemnity provision was intended to protect plaintiff from claims by *third parties*). In short, the indemnity clause does not support Respondents’ claim for fees.

Moreover, even if the nature of the indemnity clause did not preclude its application here, it still could never apply because the scope of SALA’s indemnity obligation is limited to personal injury or property damage — neither of which is present here. Under Minnesota law, the parties’ contract is a “building and construction contract.” *See* Minn. Stat. § 337.01 (2004) (defining “building and construction contract” as “a contract for the design, construction, alteration, improvement, repair or maintenance of real property”). Section 337.01 limits an indemnification agreement to liability for bodily injury or property damage:

“Indemnification agreement” means an agreement by the promisor to indemnify or hold harmless the promisee against liability or claims of liability for damages arising out of *bodily injury to persons or out of physical damage to tangible or real property*.

Minn. Stat. § 337.01, subd. 3 (emphasis added). Consistent with this, the indemnification clause here restricts SALA’s indemnity obligation to “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). Because Respondents’ claim does not arise out of bodily injury or property damage, the indemnification clause could never serve as a basis for recovering attorney fees — even if it applied to Respondents’ direct action against SALA.

Respondents cite *Carlstrom Co. v. German Evangelical Lutheran*, 662 N.W.2d 168 (Minn. App. 2003) as support for their contention that the above provision entitles them to attorney fees. (Respt’s.45-46). According to Respondents, in *Carlstrom* this court “examin[ed] a contract clause similar to that at issue here,” and recognized “that attorney fees are authorized by contract for negligence claims.” (Respt’s.46). But Respondents read *Carlstrom* too broadly. The *Carlstrom* court upheld the denial of fees because the clause at issue failed to mention contract disputes, which were the substance of the appellant’s claims. 662 N.W.2d at 174. So *Carlstrom* stands for nothing more than the unremarkable proposition that a district court does not abuse its discretion in refusing to award attorney fees when the contract does not apply to the type of claim at issue, the very holding of the court below. Here, although the clause at issue uses the word “negligent,” it refers to a type of claim — third-party indemnity for personal injury

or property damage — that is not part of this case. *Carlstrom* does not hold that the bare use of the term “negligent” requires the court to ignore all other contractual terms that limit the reach of the fee provision. The district court did not abuse its discretion in refusing to award attorney fees under a contractual indemnity provision that applies to third-party claims for personal injury or property damage.

**B. Respondents’ reliance on foreign case law regarding fiduciary duty does not create authority in Minnesota for an award of attorney fees.**

Respondents argue that even in the absence of an applicable contractual provision, the court should follow cases from other jurisdictions that permit a court to award attorney fees where a party breaches a fiduciary duty. But Respondents’ reliance on foreign case law is misplaced for two reasons. First, the parties’ contract unequivocally provides that “[t]his Agreement shall be governed by the law of the location of the project.” (A.50). In short, Minnesota law applies. And Minnesota law is clear and well-established: a party may not recover attorney fees absent contractual or statutory authority. *See Barr/Nelson, Inc. v. Tonto’s, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983).

Second, SALA did not breach any fiduciary duty to Respondents because Minnesota does not recognize a fiduciary-type relationship between architects and their employers, as set forth above and at length in SALA’s opening brief. Indeed, Respondents openly admit that Minnesota law does not permit an award of attorney fees based on breach of fiduciary duty. (Respt’s.46). So the fact that other jurisdictions award attorney fees in the context of a breach of fiduciary duty has no bearing on this case. Consequently, the cases that Respondents rely on are legally inapposite.

Undeterred, Respondents invite this court to follow other jurisdictions that award attorney fees based on breach of fiduciary duty. (*Id.* at 46-47). But as an error-correcting court, it is not this court's prerogative to adopt reasoning or public policy from other jurisdictions that runs counter to established Minnesota Supreme Court precedent, or to otherwise extend Minnesota law. See *Lennartson v. Anoka-Hennepin Indep. Sch. Dist. 11*, 638 N.W.2d 494, 497 (Minn. App. 2002) ("As an error-correcting court, we are bound to follow the supreme court's precedent."), *reversed on other grounds*, 662 N.W.2d 125 (Minn. 2003); *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (stating that the task of extending the law falls to the supreme court or the legislature, but does not fall to this court), *review denied* (Minn. Dec. 18, 1987). Because long-standing Minnesota law and public policy dictates that a party can only recover attorney fees pursuant to statutory or contractual authority, if Minnesota is to adopt an exception to the American rule for alleged breaches of fiduciary duty, a clear expression of that change must come from the supreme court or the legislature.

In sum, because Respondents have neither a contractual nor a statutory basis to recover attorney fees, the district court properly exercised its broad discretion in refusing to award such.

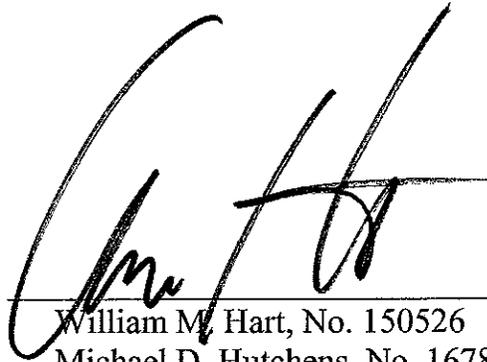
### CONCLUSION

For the reasons stated in this brief and in its opening brief, Appellant SALA Architects, Inc. respectfully requests that this court reverse the district court's order for summary judgment, but affirm its order refusing to award Respondents their attorney fees.

Respectfully submitted,

Dated: September 21, 2006

By

A large, stylized handwritten signature in black ink, appearing to read 'W. M. Hart', is written over a horizontal line.

William M. Hart, No. 150526  
Michael D. Hutchens, No. 167812  
Damon L. Highly, No. 0300044  
**Meagher & Geer, P.L.L.P.**  
33 South Sixth Street, Suite 4400  
Minneapolis, MN 55402  
Telephone: (612) 338-0661

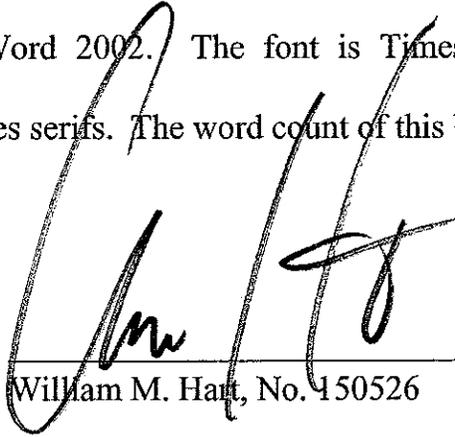
**Attorneys for Appellant  
SALA Architects, Inc.**

1369928

**FORM AND LENGTH CERTIFICATION**

This brief was drafted using Word 2002. The font is Times New Roman, proportional 13-point font, which includes serifs. The word count of this brief is 6,988.

Dated: September 21, 2006



---

William M. Hart, No. 450526

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).