

NO. A07-2165

---

---

State of Minnesota  
**In Court of Appeals**

---

Thomas B. Olson & Associates, P.A.,

*Appellant,*

vs.

Leffert, Jay & Polglaze, P.A. and  
Terrance C. Newby,

*Respondents.*

---

**APPELLANT'S BRIEF AND APPENDIX, VOLUME I**

---

Thomas B. Olson (#82314)  
Matthew H. Jones (#286412)  
OLSON & LUCAS, P.A.  
One Corporate Center I  
7401 Metro Boulevard, Suite #575  
Edina, MN 55439  
(952) 224-3644

and

Richard J. Sheehan (#99983)  
HARVEY & SHEEHAN, P.A.  
7401 Metro Boulevard, Suite 555  
Minneapolis, MN 55439-3033  
(952) 831-8500

*Attorneys for Appellant*

Paul C. Peterson (#151543)  
William L. Davidson (#201777)  
LIND, JENSEN, SULLIVAN &  
PETERSON, P.A.  
150 South Fifth Street  
Suite 1700  
Minneapolis, MN 55402  
(612) 333-3637

*Attorneys for Respondents*

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).

## TABLE OF CONTENTS

	Page
<b>Table of Authorities</b>	<b>3</b>
<b>Legal Issues</b>	
<b>1. WHERE RESPONDENTS ASKED APPELLANT TO RELEASE A LIEN CLAIM SO THAT SETTLEMENT PROCEEDS COULD BE TRANSFERRED, AND WHERE RESPONDENTS PROMISED TO HOLD THE MONEY IN ESCROW UNTIL A JUDGE RULED ON A LIEN APPLICATION, DID RESPONDENTS COMMIT CONVERSION OF THE FUNDS WHEN THEY SECRETLY PAID THEMSELVES AND THEIR CLIENT?</b>	<b>5</b>
<b>2. WHETHER A PROMISE BY A LAW FIRM TO HOLD MONEY IN ITS TRUST ACCOUNT UNTIL A TRIAL JUDGE RULES CONSTITUTES AN ENFORCEABLE AGREEMENT?</b>	<b>5</b>
<b>3. WHEN RESPONDENTS RECEIVED SETTLEMENT FUNDS SUBJECT TO AN ATTORNEY'S LIEN CLAIM IN THEIR IOLTA TRUST ACCOUNT PROMISING TO HOLD THE FUNDS IN ESCROW UNTIL A JUDGE'S RULING, DID A FIDUCIARY DUTY ARISE TO APPELLANT TO HOLD THE MONEY?</b>	<b>5</b>
<b>Statement of Case and Facts</b>	<b>6</b>
<b>Argument</b>	
<b>1. RESPONDENTS RECEIVED MONEY IN WHICH APPELLANT HAD AN INTEREST AS THE SOURCE FOR PAYMENT OF ITS ATTORNEY'S FEES AND WHEN RESPONDENTS TOOK AND PAID OUT THOSE FUNDS, THEY COMMITTED CONVERSION AND BECAME LIABLE TO APPELLANT</b>	<b>14</b>
<b>2. RESPONDENTS WERE CLEARLY PARTIES TO THE ESCROW AGREEMENT; THERE WAS CONSIDERATION FOR THE AGREEMENT IN APPELLANT'S PERMISSION TO RELEASE THE SHARES AND FUNDS, AND ALSO IN RESPONDENTS' RECEIPT OF FUNDS FROM WHICH THEY COULD AND DID PAY THEMSELVES.</b>	<b>21</b>
<b>3. UNDER THE CIRCUMSTANCES WHERE RESPONDENTS RECEIVED MONEY PROMISING TO HOLD IT, AND WHERE APPELLANT COULD NOT KNOW OF RESPONDENTS FURTHER ACTIONS WITH THOSE FUNDS, A FIDUCIARY DUTY TO APPELLANT AROSE PROHIBITING RELEASE OF THE FUNDS WITHOUT INFORMING APPELLANT OR SEEKING COURT APPROVAL.</b>	<b>27</b>

**TABLE OF AUTHORITIES**

<b>Statutes</b>	Minn. Stat. 481.13	4,14,16-20
<b>Cases</b>		
<u>Brooksbank v. Anderson</u>		5,23
586 N.W.2d 789, 794 (Minn.App.,1998);		
<u>Brown v. Legal Foundation of Washington</u>	538 U.S. 216, 229,	29
123 S.Ct. 1406, 1415 (U.S.,2003).		
<u>Chalmers v. Kanawyer</u>		5,23
544 N.W.2d 795, 798 (Minn.App.,1996)		
<u>Christensen v. Milbank Ins. Co.</u>	658 N.W.2d 580, 585 -586	15
(Minn.,2003).		
<u>Commercial Associates, Inc. v. Work Connection, Inc.</u>		5,29
712 N.W.2d 772, 779 (Minn.App.,2006);		
<u>DLH, Inc., v. Russ</u>		5,15
566 N.W.2d 60, 71 (Minn.1997).		
<u>Dairy Farm Leasing Co. v. Haas Livestock Selling Agency,</u>		15
458 N.W.2d 417, 419 (Minn.App.1990).		
<u>Desaman v. Butler Brothers,</u>		5,16
114 Minn. 362, 364, 131 N.W. 463, 464 (1911);		
<u>Estrada v. Hanson</u>		5,23-24
215 Minn. 353, 355, 10 N.W.2d 223, 225 (Minn.1943);		
<u>Fabio v. Bellomo</u>	504 N.W.2d 758, 761 (Minn.,1993)	13
<u>Fawcett v. Heimbach</u>	591 N.W.2d 516, 519 -520	14
(Minn. App. 1999)		
<u>Heitzig v. Hanson Industries, Inc.</u>	1988 WL 88536, 1	21,26
(Minn.App.,1988), (Appellant's Appendix, 00373)		
<u>Humphreys v. Minnesota Clay Co.</u>	94 Minn. 469, 471-472,	15
103 N.W. 338, 339 (Minn.1905)		

<u>In re Revocable Trust of Margolis</u> 731 N.W.2d 539, 545 (Minn.App.,2007);	5,30
<u>Kielley v. Kielley</u> 674 N.W.2d 770, 777 (Minn.App.,2004)	24
<u>Klein v. First Edina Nat. Bank</u> 293 Minn. 418, 421, 196 N.W.2d 619, 622 (MINN 1972)	6, 30-32
<u>La Fleur v. Schiff</u> 239 Minn. 206, 210, 58 N.W.2d 320, 323 (MINN 1953)	17
<u>Mantz v. Sullwold</u> 203 Minn. 412, 413, 281 N.W. 764, 764 (Minn.1938)	19
<u>Molenaar v. United Cattle Co.</u> , 553 N.W.2d 424, 430-31 (Minn.App.1996), <i>review denied</i> (Minn. Oct. 15, 1996)	15
<u>Olson v. Moorhead Country Club</u> , 568 N.W.2d 871, 872 (Minn.App.1997), <i>review denied</i> (Minn. Oct. 31, 1997)	15
<u>Pine River State Bank v. Mettill</u> 333 N.W.2d 622, 629 (Minn.,1983)	24
<u>Richfield Bank &amp; Trust Co. v. Sjogren</u> 309 Minn. 362, 365, 244 N.W.2d 648, 650 (MINN 1976).	31
<u>Sylvester Bros. Development Co. v. Great Cent. Ins. Co.</u> 503 N.W.2d 793, 795 (Minn.App.,1993)	13
<u>Thomas A. Foster &amp; Associates, LTD v. Paulson</u> 699 N.W.2d 1, 5 -6 (Minn.App.,2005);	5,12,17-19,21,26
<u>U.S. v. Oberhauser</u> 142 F.Supp.2d 1118, 1122 (D.Minn.,2001)	29
<u>Welsh v. Barnes-Duluth Shipbuilding Co.</u> 221 Minn. 37, 44-45, 21 N.W.2d 43, 47 (MINN 1945)	25
<u>Williams v. Dow Chemical Co.</u> 415 N.W.2d 20, 25 -26 (Minn.App.,1987)	5,16,20
<u>Zip Sort, Inc. v. Commissioner of Revenue</u> 567 N.W.2d 34, 37 (Minn.,1997)	13

## LEGAL ISSUES

**1. WHERE RESPONDENTS ASKED APPELLANT TO RELEASE A LIEN CLAIM SO THAT CASH PROCEEDS COULD BE RELEASED, AND WHERE RESPONDENTS PROMISED TO HOLD THE MONEY IN ESCROW UNTIL A JUDGE RULED ON A LIEN APPLICATION, DID RESPONDENTS COMMIT CONVERSION OF THE FUNDS WHEN THEY SECRETLY PAID THEMSELVES AND THEIR CLIENT?**

The Trial Court ruled that no property interest existed in the Appellant's attorney's lien claim and therefore no conversion occurred when Respondents removed all the funds.

Citations: Minn. Stat. 481.13; Thomas A. Foster & Associates, LTD v. Paulson 699 N.W.2d 1, 5 -6 (Minn.App.,2005); Desaman v. Butler Brothers 114 Minn. 362, 364, 131 N.W. 463, 464 (1911); Williams v. Dow Chemical Co. 415 N.W.2d 20, 25 - 26 (Minn.App.,1987); DLH, Inc., v. Russ, 566 N.W.2d 60, 71 (Minn.1997).

**2. WHETHER A PROMISE BY A LAW FIRM TO HOLD MONEY IN ITS TRUST ACCOUNT UNTIL A TRIAL JUDGE RULES CONSTITUTES AN ENFORCEABLE AGREEMENT?**

The Trial Court ruled there was no consideration for the contract between Appellant and Respondents.

**Citations:** Estrada v. Hanson 215 Minn. 353, 355, 10 N.W.2d 223, 225 (Minn.1943); Brooksbank v. Anderson 586 N.W.2d 789, 794 (Minn.App.,1998); Chalmers v. Kanawyer 544 N.W.2d 795, 798 (Minn.App.,1996)

**3. WHEN RESPONDENTS RECEIVED SETTLEMENT FUNDS SUBJECT TO AN ATTORNEY'S LIEN CLAIM IN THEIR IOLTA TRUST ACCOUNT PROMISING TO HOLD THE FUNDS IN ESCROW UNTIL A JUDGE'S RULING, DID A FIDUCIARY DUTY ARISE TO APPELLANT TO HOLD THE MONEY?**

The Trial Court held that Respondents did not undertake any fiduciary duty to Appellant despite their express promise to hold the money in their IOLTA account until a Trial Judge's ruling.

**Citations:** Commercial Associates, Inc. v. Work Connection, Inc. 712 N.W.2d 772, 779 (Minn.App.,2006); In re Revocable Trust of Margolis 731 N.W.2d 539,

545 (Minn.App.,2007); Klein v. First Edina Nat. Bank 293 Minn. 418, 421, 196 N.W.2d 619, 622 (MINN 1972)

### **STATEMENT OF CASE AND FACTS**

Respondents Leffert Jay and Terrence Newby asked Tom Olson of Appellant law firm to release Appellant's lien claim against Windsaloft stock and settlement funds of \$115,000; and to confine the lien to \$31,000 to be held in Respondents' IOLTA account until the trial court's ruling on Olson's pending lien application. Days after promising to hold the money in trust to pay Appellant if it won the pending attorney's lien action before Judge Crump, Respondents secretly paid themselves and their clients. When Appellant won the lien action, Respondents denied responsibility to Appellant Thomas B. Olson & Associates, P.A. ("Olson").

Appellant Olson filed an Affidavit and Application by Tom Olson in District Court before Hon. Harry S. Crump in July, 2005 to determine its right to enforce an attorney's lien for payment of legal fees and costs from a settlement Olson achieved for clients Elizabeth and Mary Howell. Howells' shares in Windsaloft Company (6.5%) were to be redeemed and they were to be paid \$115,000. They were also released from all liability, a matter of significant concern. The settlement was to be paid in the underlying action where the Howells had sued Windsaloft and George Howell before Hon. Harry Crump. Appellant withdrew from representation of the Howells due to non payment (and other issues) after the settlement was reached; the Respondents replaced

Appellant as the Howells' attorneys. In October, Judge Crump enforced the settlement mediated by Appellant, in response to a motion brought by Respondents.

In December, 2005, Respondents requested in writing that Appellant release its attorney's lien claim in corporate shares and cash settlement proceeds so that the Howells' shares could be redeemed and they could be cashed out of the company, Windsaloft. Respondents promised Appellant that Respondents would hold \$31,000 in their IOLTA account to secure Appellant's lien claim until Judge Crump ruled on Appellant's lien application.

On December 5, 2005 at 4:23 p.m., Respondent Attorney Newby e-mailed Olson as follows:

Tom,

We will agree to place in an escrow account an amount sufficient to cover the amount of your lien petition request, and any interest that could legally be awarded.

Please send a letter to Mike Keyes releasing him from all claims, and advising him that you stipulate to allow him to release the settlement funds to me. (emphasis added)

Please call if you have any questions.

Appellant's Appendix (hereinafter AA), p. 0109

On December 7, 2005, Respondent Newby again wrote to Olson:

Tom, Please be advised that my clients have agreed to place \$31,000 into my firm's escrow account after we receive the settlement proceeds from Mike Keyes. That amount will remain in my firm's escrow account pending the outcome of your lien petition" (emphasis added), AA 0108.

On December 7, 2005, Attorney Olson wrote an email to the Oppenheimer law firm with copy to the Respondents, as follows:

Pursuant to my agreement with Terry Newby and his firm, I do advise that I and my firm release our claim of an attorney's lien for fees and costs versus Windsaloft Inc....on the assumption that (Windsaloft) defendants shall cause to be paid to the IOLTA trust account of Leffert Jay & Polglaze all settlement proceeds (understood to be \$115,000).

It is my understanding that the lump sum of \$115,000 will be paid into the Leffert, Jay and Polglaze trust account. Our lien shall continue by agreement with Mr. Newby and his clients in a certain sum of said proceeds to be deposited by him into his law firm IOLTA trust account pending resolution of our claims by Judge Crump. (emphasis added)  
AA 0101.

However, Oppenheimer was not satisfied with the documentation requesting more formal documentation of the lien release as to Windsaloft. Respondents asked that Appellant prepare a formal Limited Release of Attorney's Lien as requested by Oppenheimer. Newby wrote Olson by email:

Tom, I assume you will prepare the "formal" signed release that Mike is requesting, and send it to him. I would appreciate it if you would send me a copy.

Thank you.  
AA 0103.

On December 9, Tom Olson forwarded the draft Limited Release of Attorney's Lien to Respondent Newby and to attorney Michael Keyes of the Oppenheimer firm for their review and approval. Keyes replied on December 13<sup>th</sup>:

Tom

It looks like the language in the limited release regarding the settlement proceeds is meant to just give you the right to seek dollars from the Leffert trust fund. If so lets add something in the release to make clear that all (Windsaloft) defendants are getting a complete and final release...

AA 0343. That email was cc'd to Respondent Newby. Appellant agreed to revise the Limited Release which revision was acceptable to all parties. The Limited Release of Attorney's Lien was delivered to the Respondents, as well to the Oppenheimer law firm who represented the defendants in the underlying action. The Limited Release of Attorney's Lien stated:

The undersigned hereby releases and discharges from the claim of lien by Thomas B. Olson & Associates, P.A. the following: a) the defendants Windsaloft Company; Akona, LLC; c) George E. Howell; d) George E. Howell Revocable Trust; e) the shares held by Elizabeth Howell and Mary Howell in Windsaloft Company; and f) the interest of Elizabeth Howell and Mary Howell in the lawsuit and settlement proceeds. This release is complete and final as to the defendants, namely, Windsaloft Company, Akona LLC, George E. Howell and the George E. Howell Revocable Trust.

This Release of Lien is limited in that said Lien claim shall continue in those settlement cash proceeds to be paid over by Defendants to Leffert, Jay & Polglaze, P.A.'s IOLTA trust account in the sum of \$115,000.00. Said continuing claim of an attorney's lien is limited to the total sum of \$31,000. The actual amount of any lien will be determined by the District Court. (emphasis added).

AA 0095

On the same day (December 13) that Appellant delivered the Limited Release of Attorney's Lien to Respondents and to the Oppenheimer law firm, Respondents discussed internally how much they were owed in an email from Jennifer Wright to Respondent Newby:

Are they planning on paying us out of the settlement? Including November's invoice, they owe us almost \$15k.

AA 0345. The money was not delivered to Respondents until December 21st, see document entitled Posted Trust, AA 0145.

On December 23<sup>rd</sup>, in an email obtained in discovery, Terry Newby wrote Thomas Leffert: “The check that cleared was from the (Windsaloft) Defendants in the amount of \$115,000. We are keeping \$31,000 in our escrow account to cover fees, and a pending lien. The client owes us approximately \$12,000...” (emphasis added); AA 0346

On December 26<sup>th</sup>, the Howells evidently asked Respondents in an email to turn over all of the \$115,000 to them. Respondents refused to obey their clients’ instruction demonstrating that they knew they were not bound to follow client direction in this regard, because of outstanding claims to the funds. At that date, Respondents had not sent any of the money to the Howells. On December 30<sup>th</sup>, Respondents sent out a check for \$84,000 to the Howells withholding the \$31,000. On January 3, 2006, Newby wrote to the Howells noting he’d received the Howells’ request that he turn over the \$31,000. He refused to do so but nowhere mentioned they’d been holding the \$31,000 to secure the Olson lien petition. Newby wrote: “Because we have a dispute about the fees owed to my firm, we are retaining the disputed amount in our trust account until we resolve the dispute. He continued saying he wanted to “address Tom’s lien petition”, but didn’t discuss that they were no longer honoring their promise to hold the funds to secure the Olson lien, AA 0281-282. The correspondence demonstrates that Respondents were aware that they could insist on withholding money and disobeying their clients’ instruction in order to secure their fees. However, they did so against the \$31,000, not the balance of \$84,000 available.

Respondents did not notify Appellant that they were releasing part of the money they had promised to hold. Instead, on January 20<sup>th</sup>, Respondents secretly emptied their

IOLTA trust account paying themselves and the Howells the balance of the monies from the \$31,000; Posted Trust, AA 0145.

In February, 2006, Appellant learned that the money was gone in a phone call from Howells' Washington state lawyer. On February 21st, 2006, Judge Harry Crump ruled that Appellant was entitled to an attorney's lien for \$29,701.51 plus interest from June 30, 2005 upon all of the Howells' rights in the lawsuit including the stock and cash. Respondents refused payment denying that they owed any obligation to Appellant. See Order Regarding Attorney's Fees & Costs and Claim for Attorney's Lien, AA 0024.

### **MAY LAWYERS HANDLE SETTLEMENT AND CONTRACT FUNDS?**

This case raises the issue whether a law firm may be liable when they take funds which they have expressly promised to hold in escrow and decide for themselves who is entitled to the funds. These are questions which the case raises:

Is a lawyer who agrees to act as an escrow agent to hold funds claimed under an attorney's lien liable to the lien claimant when he secretly pays the money over to himself and his clients?

Suppose a lawyer promised to pay a doctor bill from an auto accident settlement for medical services rendered to his client? If his client demands the funds, may the lawyer distribute the personal injury settlement ignoring a letter of protection he has given? Or suppose a lawyer receives a land purchaser's earnest money promising that the lawyer will hold the money "in escrow"? If the client claims the money, may the lawyer surreptitiously turn it over with impunity and tell the buyer to sue the lawyer's client?

And what if a lawyer receives payment to buy the assets of a closely held company he represents? If the client tells the lawyer to turn over the trusted money, must he distribute the funds to the client when he's promised to hold them pending a successful closing? Must he account to the buyer if conditions are not met and he has secretly paid the money to himself and to his client?

May a lawyer ever act as an escrow agent or are all promises to hold money or property pending some condition or event unenforceable against the lawyer if the lawyer was ordered by the client to turn over the money/property?

May the lawyer determine with impunity whether a claimant has a legitimate claim or does that decision await a court ruling?

#### **THE THOMAS FOSTER & ASSOCIATES HOLDING**

A relatively recent decision of this Court addressing the attorney's lien statute is particularly instructive because both the District Court and the Court of Appeals approved this exact procedure for the securing of an attorney's lien claim. In Thomas A. Foster & Associates, LTD v. Paulson 699 N.W.2d 1, 5 -6 (Minn.App.,2005), Tom Foster and Phillip Gainsley, the lawyer for the complaining clients, agreed that Gainsley would hold the funds which Foster claimed from Gainsley's clients, pending the Court's ruling. Gainsley was authorized to release the rest of the funds to his clients. When the Trial Court confirmed the attorney's lien, it then ordered that attorney Gainsley turn the escrowed funds over to Foster (AA 0352); and the Court of Appeals affirmed this Order.

Here the Trial Court agreed with Respondents that they owed no duty to Appellant to hold the money and could pay it out to themselves and to their clients in secret.

## STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo.

This court reviews a grant of summary judgment de novo and will affirm only if the record shows that there is no genuine issue of material fact and the court below has not erred in its application of law. *Offerdahl v. University of Minn. Hosps. and Clinics*, 426 N.W.2d 425, 427 (Minn.1988).

Zip Sort, Inc. v. Commissioner of Revenue 567 N.W.2d 34, 37 (Minn.,1997)

The Court is required to view the evidence in the light most favorable to Appellant:

On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted. *Abdallah, Inc. v. Martin*, 242 Minn. 416, 424, 65 N.W.2d 641, 646 (1954).

Fabio v. Bellomo 504 N.W.2d 758, 761 (Minn.,1993)

Deference to a trial court decision on summary judgment is not required:

We do not defer to the trial court's application of the law. *See Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn.1984) (appellate court need not give deference to a trial court's determination of a legal issue).

Sylvester Bros. Development Co. v. Great Cent. Ins. Co. 503 N.W.2d 793, 795 (Minn.App.,1993)

## ARGUMENT

**1. WHERE RESPONDENTS ASKED APPELLANT TO RELEASE A LIEN CLAIM SO THAT CASH PROCEEDS COULD BE RELEASED, AND WHERE RESPONDENTS PROMISED TO HOLD MONEY IN ESCROW UNTIL A JUDGE'S RULING ON A LIEN APPLICATION, DID RESPONDENTS COMMIT CONVERSION OF THE FUNDS WHEN THEY SECRETLY PAID THEMSELVES AND THEIR CLIENTS?**

## ARGUMENT

### **RESPONDENTS RECEIVED MONEY IN WHICH APPELLANT HAD AN INTEREST AS THE SOURCE FOR PAYMENT OF ITS ATTORNEY'S FEES AND WHEN RESPONDENTS TOOK AND PAID OUT THOSE FUNDS, THEY COMMITTED CONVERSION AND BECAME LIABLE TO APPELLANT.**

The Trial Court decided that Respondents did not convert the trusted funds holding that Appellant had no property interest in the funds when Respondents paid them out, Order for Judgment & Memorandum, Conclusion of Law #3, p. 4; AA 0004.

Appellant respectfully contends that it owned a property interest in the form of an attorney's lien claim against the cash, stock and other rights. According to the plain language of the statute discussed below, Minn. Stat. 481.13, such a claim is a property interest which gave Appellant rights arising at the commencement of the original, underlying Windsaloft lawsuit. The Trial Court's interpretation, if correct, would mean that a settling party may pay out funds in disregard of the attorney's claim because a Trial Court had not yet confirmed the lien in a final ruling. This is not what the statute says nor what the case law holds.

### **ELEMENTS OF CONVERSION**

Conversion is an act of willful interference with the personal property of another that is without justification or that is inconsistent with the rights of the person entitled to the use, possession, or ownership of the property. Fawcett v. Heimbach 591 N.W.2d 516, 519 - 520 (Minn. App. 1999)

The Restatement defines conversion as "an intentional exercise of dominion or control over the chattel." 586 Restatement (Second) of Torts § 223 cmt. b (1965). As such, "[m]ere nonfeasance or negligence, without such an intent, is not sufficient for conversion." *Id.* Describing the character of the intent required, the Restatement explains: The intention necessary to subject to liability one who deprives another of the possession

of his chattel is merely the intention to deal with the chattel so that such dispossession results. It is not necessary that the actor intend to commit what he knows to be a trespass or a conversion.

Christensen v. Milbank Ins. Co. 658 N.W.2d 580, 585 -586 (Minn.,2003).

The subject of conversion may be intangible property as well including stock in the case below:

Any act of dominion wrongfully exercised over another's personal property in denial of his right constitutes a conversion of it. Cumbey v. Ueland, 72 Minn. 453, 75 N. W. 727. The refusal of the defendant to transfer the stock on its books and its assertion of the right to cancel the stock was a conversion of it.

Humphreys v. Minnesota Clay Co. 94 Minn. 469, 471-472, 103 N.W. 338, 339 (Minn.1905)

Conversion occurs where one willfully interferes with the personal property of another "without lawful justification," depriving the lawful possessor of "use and possession." DLH, Inc., v. Russ, 566 N.W.2d 60, 71 (Minn.1997). "Wrongfully refusing to deliver property on demand by the owner constitutes conversion." Molenaar v. United Cattle Co., 553 N.W.2d 424, 430-31 (Minn.App.1996), *review denied* (Minn. Oct. 15, 1996) (citation omitted). The elements of common law conversion are: (1) plaintiff holds a property interest; and (2) defendant deprives plaintiff of that interest. Olson v. Moorhead Country Club, 568 N.W.2d 871, 872 (Minn.App.1997), *review denied* (Minn. Oct. 31, 1997). Good faith is not a defense to a claim of conversion. Dairy Farm Leasing Co. v. Haas Livestock Selling Agency, 458 N.W.2d 417, 419 (Minn.App.1990).

**Appellant Olson had a property interest**

Minnesota Statute 481.13 generally governs establishment of an attorney's lien for fees and costs upon a client's property. A lawyer may have a lien on a client's property.

The Trial Court disregarded the plain language of the statute which makes clear the lien exists from the commencement of the underlying lawsuit. It prevents a defendant and plaintiff from settling and depriving an attorney of his or her compensation.

In litigation, the lien exists from the commencement of the underlying lawsuit and is confirmed by application and Court Order. Desaman v. Butler Brothers 114 Minn. 362, 364, 131 N.W. 463, 464 (1911). As stated by the Court of Appeals:

Cause-of-action liens ordinarily arise upon the commencement of the action; however, Williams' lien would have commenced when the notice of association was filed, because he did not represent the Parranto defendants at the commencement of the action. Once formed, a lien on a cause of action exists until it is satisfied and is not extinguished by the entry of judgment on the cause of action. *Desaman v. Butler Brothers*, 114 Minn. 362, 364, 131 N.W. 463, 464 (1911). (emphasis added).

Williams v. Dow Chemical Co. 415 N.W.2d 20, 25 -26 (Minn.App.,1987). Minn.Stat. §

481.13 governs attorney liens and provides:

a) An attorney has a lien for compensation whether the agreement for compensation is expressed or implied (1) upon the cause of action from the time of the service of the summons in the action, or the commencement of the proceeding, and (2) upon the interest of the attorney's client in any money or property involved in or affected by any action or proceeding in which the attorney may have been employed, from the commencement of the action or proceeding, and, as against third parties, from the time of filing the notice of the lien claim, as provided in this section.

b) An attorney has a lien for compensation upon a judgment, whether there is a special express or implied agreement as to compensation, or whether a lien is claimed for the reasonable value of the services. The lien extends to the amount of the judgment from the time of giving notice of the claim to the judgment debtor.

The lien under this paragraph is subordinate to the rights existing between the parties to the action or proceeding.

(c) A lien provided by paragraphs (a) and (b) may be established, and the amount of the lien may be determined, summarily by the court under this paragraph on the application of the lien claimant or of any person or party interested in the property subject to the lien (emphasis added)

M.S.A. § 481.13

The Trial Court disregarded the plain language of the statute when it ruled that the lien did not exist until Judge Crump confirmed it by his February 21<sup>st</sup> Order.

Respondents were also not entitled to set off any claims of their own against the pre-existing attorney's lien which they had agreed to honor:

It must follow that there could be no offset which would defeat the attorney's lien unless a prior lien existed by virtue of the order issued in the supplementary proceeding conducted by Scarsdale.

La Fleur v. Schiff 239 Minn. 206, 210, 58 N.W.2d 320, 323 (MINN 1953)

The Thomas A. Foster, *supra* decision is on point. The Court of Appeals reaffirmed the principle that a lawyer may claim and enforce a lien in a summary, informal proceeding. There, lawyer Tom Foster entrusted the settlement sum into the hands of Phillip Gainsley who was representing Foster's complaining client, just as happened here. Foster's agreement allowed the clients to receive the undisputed portion of the settlement, just as here. Text from the District Court Order (AA 352) which required Gainsley to pay over the entrusted funds to Foster when the lien was confirmed:

Petitioner endorsed the check so that Respondents could have access to the proceeds of the lawsuit provided that the claimed attorneys' fees and costs would be held in trust by Respondent's present counsel. Petitioner now brings this

motion, requesting attorneys' fees and costs in the amount of \$30,204.56.

LEGAL ANALYSIS:

This Court finds that it has no legal basis to deny Petitioner's motion for attorneys' fees and costs. The parties entered into a valid retainer agreement, whereby the Respondents agreed to pay Petitioner 25% of any amount recovered in their claims against Lundgren Brothers Construction. Therefore, their current counsel has no authority to retain these fees and costs in a trust, and these funds must be distributed to Petitioner.

Thomas A. Foster & Associates, LTD v. Paulson 2004 WL 3563779, 1 (Minn. Dist. Ct., 2004) (emphasis added)

AA 0352.

The Court of Appeals noted that this procedure was followed:

In June 2004, the construction company issued a check for the settlement amount payable to the Paulsons and Foster. Foster endorsed the check but requested that the Paulsons' new counsel hold in trust the disputed attorney fees and costs. Foster then brought a motion under Minn. Stat. § 481.13, subd. 1(c) (2004), to determine the amount of the attorney lien and enter judgment on the lien.

Thomas A. Foster & Associates, LTD v. Paulson 699 N.W.2d 1, \*4 (Minn. App., 2005)

(Also, the Application for fees by Foster actually followed his turn over of the money to Gainsley.)

In this case, the Trial Court in ruling on Appellant's claim disregarded and did not even mention the clear language of Minn. Stat. 481.13 which says the lien attaches from the commencement of the underlying suit. The Trial Court wrote: "Until a district court establishes and determines a lien in a summary proceeding, an enforceable lien does not exist". This is obviously wrong and does not comport with the actual holding in Thomas A. Foster & Associates or with the statute, 481.13.

The Foster Court wrote:

Thus, if a client recovers money as a result of an attorney's services, the attorney has a lien on the recovery as security for fees owed by the client. *St. Cloud Nat'l Bank & Trust Co. v. Brutger*, 488 N.W.2d 852, 855 (Minn.App.1992), *review denied* (Minn. Nov. 17, 1992).

Obviously, the lien does not work as security unless a third party may be required to hold it pending the Court's ruling. The Court continued:

As an equitable lien, the attorney lien protects against a successful party receiving a judgment secured by an attorney's services without paying for those services. *Johnson v. Blue Cross & Blue Shield of Minn.*, 329 N.W.2d 49, 53 (Minn.1983); *Schroeder, Siegfried, Ryan & Vidas v. Modern Elec. Prods., Inc.*, 295 N.W.2d 514, 516 (Minn.1980).

Foster at 5-6.

Foster goes on noting that the lien under 481.13 is "upon the cause of action".

Another decision makes it clear that the attorney has a lien for his services on the sum due his client; and that the attorney may recover the money from a third party who has received those funds knowing of the attorney's claim:

Defendant, by the decision below, was found to have had contemporaneous and complete knowledge of the transaction from beginning to end. With such knowledge, he received from his father \$1,000, in discharge of an indebtedness of his father to him. So his position is that of a creditor, taking a part of the fund on which plaintiff had a lien, with full knowledge of plaintiff's rights thereunder. Plaintiff's statutory charging lien, see Mason's Minn.St.1927, § 5695, was on the client's cause of action.

Mantz v. Sullwold 203 Minn. 412, 413, 281 N.W. 764, 764 (Minn.1938)

The prosecution to judgment against client of attorney's claim for compensation for legal services merged debt in the judgment but did not extinguish security of attorney's lien so as to preclude attorney from maintaining action against client's creditor who took part of fund on which attorney had a lien with full knowledge of attorney's rights.

Mantz v. Sullwold, *supra*, (Minn.1938)

A holder of a fund where an attorney's lien is claimed is subject to double liability if it pays the money out in disregard of the lawyer's claims.

Cases interpreting a 1905 statute that is, in all relevant aspects, identical to the current statute state repeatedly that the payment of a claim without the plaintiff's lawyer's consent makes the paying defendant subject to the enforcement of the attorney's lien.

Williams v. Dow Chemical Co. 415 N.W.2d 20, 26 (Minn.App.,1987)

Olson had a valid Attorney's Lien claim upon the \$31,000.00 that Leffert Jay promised to keep in its trust account until the Trial Court's ruling. The Limited Release of Attorney's Lien specifically states that funds being transmitted to the Leffert, Jay trust account are subject to Olson's Attorney Lien. And Respondents requested that Appellant draft the Limited Release; then reviewed and approved its form.

Second, Olson's Attorney's Lien attached to the funds upon commencement of the Howells's suit against Windsaloft pursuant to Minn. Stat. § 481.13. Accordingly, it is evident that Appellant had a property interest in the fund subject to conversion; and that they did in fact convert the money by paying to themselves and to the Howells.

## ISSUE

### 2. WHETHER A PROMISE BY A LAW FIRM TO HOLD MONEY IN ITS TRUST ACCOUNT UNTIL A TRIAL JUDGE RULES CONSTITUTES AN ENFORCEABLE AGREEMENT?

## ARGUMENT

### RESPONDENTS WERE CLEARLY PARTIES TO THE ESCROW AGREEMENT; THERE WAS CONSIDERATION FOR THE AGREEMENT IN APPELLANT'S PERMISSION TO RELEASE THE SHARES AND FUNDS, AND ALSO IN RESPONDENTS' RECEIPT OF FUNDS FROM WHICH THEY COULD AND DID PAY THEMSELVES.

Attorneys do as a matter of course hold money in escrow in their IOLTA accounts for many purposes in many transactions. Cases cited in this brief, to wit, Thomas A. Foster & Associates, LTD v. Paulson , 699 N.W.2d 1, 5-6 (Minn.App.,2005); and Heitzig v. Hanson Industries being two cases in point, AA 373.

The Trial Court ruled there was no material fact dispute and that there was no consideration for an agreement between Respondents and Appellant (Order for Judgment & Memorandum, page 6). Therefore, there could not be an enforceable agreement on the part of Respondents to honor their promise to hold the liened funds. On the other hand, the Trial Court held that there was an agreement between Appellant and Respondents' clients that Respondents hold the escrowed money, (see Finding 8, Order for Judgment & Memorandum, p. 2). Appellant at all times understood the agreement for the escrow was with Respondents who would hold the funds in their IOLTA account, not with Respondents' clients, whom Appellant justifiably did not trust. The value of an attorney's lien is the ease of collectability from third party payor. To the extent the Trial

Court found otherwise, Finding # 8 stands on a disputed fact. At all times, Appellant understood the agreement to be with Respondents who were the escrow holder and promise maker to Appellant.

It is undisputed that Appellant did not understand that Respondents' promise was subject to control by their clients. It is also undisputed that Respondents never told Appellant they would be controlled by their clients' direction.

Obviously, using Respondents to hold trust funds if they were subject to client control would have made no sense whatsoever. The money would as well have been given to the clients directly and the lien claim dropped.

With due respect for the Trial Court, Appellant contends the Trial Court applied an incorrect understanding of the requirement of consideration to support a promise. The Trial Court mistakenly required Appellant show a direct benefit to Respondents. (Appellant did by showing that Respondents obtained \$115,000, and ultimately used a portion to pay themselves; thus, they did directly benefit; but direct personal benefit is not necessary to existence of consideration). The Supreme Court has not required that a promise maker receive a benefit, but has required that the recipient of the promise (promisee) suffer some detriment. The Supreme Court has explained the doctrine of consideration to support a contract in this fashion:

A valuable consideration may consist of some benefit accruing to one party or some detriment suffered by the other, and the tendency is to emphasize the detriment to the promisee. 1 Williston, Contracts, Rev.Ed., § 102. As we said in Johnson v. Kruse, 205 Minn. 237, 241, 285 N.W. 715, 717: 'Consideration means, not so much that one party is benefited, as that the other suffers detriment. (emphasis added)

Estrada v. Hanson 215 Minn. 353, 355, 10 N.W.2d 223, 225 (Minn.1943)

Estrada has been cited with approval in Brooksbank v. Anderson 586 N.W.2d 789, 794 (Minn.App.,1998)

Minnesota follows the long-standing contract principle that a court will not examine the adequacy of consideration as long as something of value has passed between the parties." *C & D Investments v. Beaudoin*, 364 N.W.2d 850, 853 (Minn.App.1985) (citing *Estrada v. Hanson*, 215 Minn. 353, 356, 10 N.W.2d 223, 225-26 (1943)), *review denied* (Minn. June 14, 1985).

Here, Respondents argued and the Trial Court decided that they received nothing of value when 1) Appellant drafted and Respondents approved the Limited Release of Lien; and then 2) executed and delivered said Limited Release of Lien to the Oppenheimer law firm releasing Appellant's lien on both the Windsaloff shares and \$115,000 cash, even though Respondents acknowledge that they asserted their own lien upon the same settlement funds once they gained control of the money. Respondents refused their clients' demand for a turnover of the funds and ultimately paid their attorney's fees and costs from this fund.

In the case below, a party to a Miller-Shugart settlement agreement argued that he received nothing of value from the agreement and that a contract could not be enforced against him. The Court disagreed: See Chalmers v. Kanawyer, 544 N.W. 2d 795, 799 (Minn. App. 1996) where the Court of Appeals noted that an enforceable agreement arose although one party may have received nothing of value, because the other party sustained some detriment:

Thus, while Chalmers may not have received anything of value, Kanawyer gave consideration in the form of the legal detriments he suffered by admitting negligence and causation.

The Court's analysis was as follows:

A second long-standing principle in Minnesota is that "a court will not examine the adequacy of consideration as long as something of value has passed between the parties." ... Chalmers argues that there was no consideration because he received nothing of value. As discussed above, however, it has not yet been determined whether the agreement may ultimately provide a basis for garnishment against State Farm. Because we cannot say with any legal certainty that the agreement is worthless, we must reject Chalmers' first argument. Furthermore, even if the agreement were worthless, there may still be other consideration. The Minnesota Supreme Court has stated: Consideration requires the voluntary assumption of an obligation by one party on the condition of an act or forbearance by the other. *Cady v. Coleman*, 315 N.W.2d 593, 596 (Minn.1982) (citing *Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 104 N.W.2d 661 (1960)). (emphasis added).

In this case, it was Respondents who undertook the obligation to escrow money until Judge Crump's ruling (not the Howells); and Appellant who forebore to continue assertion of its lien claim against the shares and funds in the hands of Oppenheimer.

It is also clear that the Court is not to engage in a review of consideration to determine its adequacy. Citing Estrada v. Hanson, the Supreme Court stated:

The demand for mutuality of obligation, although appealing in its symmetry, is simply a species of the forbidden inquiry into the adequacy of consideration, an inquiry in which this court has, by and large, refused to engage.

Pine River State Bank v. Mettill 333 N.W.2d 622, \*629 (Minn.,1983)

See also Kielley v. Kielley 674 N.W.2d 770, 777 (Minn.App.,2004): The amount of consideration is not relevant as long as some benefit or detriment is established, citing Estrada v. Hanson, *supra*.

**CONSIDERATION FOR EXECUTED CONTRACT  
NOT SUBJECT TO ATTACK**

Additionally, one cannot attack consideration given on terms expressly approved by the Respondents, after Appellant already provided its performance. Once Appellant performed its promise to release its lien against the Windsaloft settlement and to continue it in the cash proceeds to be held by Respondents, it was irrelevant whether Respondents received consideration in return for their promise:

While it is true that a consideration is necessary to the validity of an executory contract, the rule has no application to executed contracts, for the reason that performance, either partial or in full, supplies a sufficient consideration to support all its provisions. Citations omitted. The rule with respect to mutuality is the same. Citations omitted. In cases of executed contracts, mutuality, lacking while the contract was executory, or, as it is said, at its inception, is supplied by the promisee's subsequent performance. As a consequence of the promisee's performance, the contract is made binding on the promisor.

Welsh v. Barnes-Duluth Shipbuilding Co. 221 Minn. 37, 44-45, 21 N.W.2d 43, 47 (MINN 1945)

**Respondents' consideration was control of the funds which they used to pay their own fees.**

While Appellant Olson relied to its detriment upon the promise made by Respondents to protect the lien claim, Leffert Jay also received consideration in the form of a direct benefit: One Hundred fifteen thousand dollars was paid into their trust account. Leffert Jay immediately asserted its own attorney's lien on the same \$31,000 and ultimately paid itself a substantial portion of the monies it held.

**The agreement for the escrow included Respondents as a party.**

The Trial Court further disregarded the Affidavit of Thomas B. Olson and attached documentary evidence which shows that Appellant's agreement was with Respondents to escrow the money. See Finding 8, Order for Judgment, & Memorandum. The Trial Court instead found that Respondents, the escrow agents, were not a party to the escrow agreement. Instead, according to the Trial Court, the agreement for the escrow was between Appellant and the Howells. Yet no one contends that Appellant or Respondents even considered that the Howells would have any authority over the funds; rather, only the Respondents would have authority as escrow agent. Instead of escrowing with Respondents, Appellant could have refused to release its lien and have required the money be paid into Court or be retained by the Oppenheimer law firm. Because of Respondents' express promise to hold the funds, Appellant agreed to the transfer subject to the terms of the Limited Release of Attorney's Lien.

Lawyers are not prohibited from serving as an escrow agent or stakeholder; and in the common knowledge of this Court, do so daily. See, e.g., Heitzig v. Hanson Industries, Inc. 1988 WL 88536, 1 (Minn.App.,1988), (Appellant's Appendix, 00373) where Lindquist and Vennum acted as escrow agent for a variety of claims made:

Hanson received \$75,000 in the settlement, currently held in escrow by his attorneys, Lindquist & Vennum. The attorneys have been appointed stakeholders of the proceeds for all claiming an interest in them. Hanson's attorneys have a valid and perfected attorney's lien on Hanson's settlement proceeds in the amount of \$25,000, and have an assignment of the balance to secure obligations of Hanson for future services.

See also, Thomas Foster & Associates, supra. For some reason, the Trial Court presumed here that an attorney could not act in the capacity of an escrow agent having an obligation

to one other than its client. The Trial Court stated that could cause a conflict for the lawyer, yet lawyers may ask for and obtain waivers of conflicts of interest, routinely. Examples even include instances of representation of parties who have conflicting interests but share some common goal. This agreement was for Respondents, not the Howells, to hold the money pending Judge Crump's ruling. There was no discussion of a right in the Howells to unilaterally alter Respondents' status as escrow holder.

Again, this basis for the ruling is not supported by any Finding of Fact; and would create a material fact dispute if it were asserted by Respondents.

#### **ISSUE**

**3. WHEN RESPONDENTS RECEIVED SETTLEMENT FUNDS SUBJECT TO AN ATTORNEY'S LIEN CLAIM IN THEIR IOLTA TRUST ACCOUNT PROMISING TO HOLD THE FUNDS IN ESCROW UNTIL A JUDGE'S RULING, DID A FIDUCIARY DUTY ARISE TO APPELLANT TO HOLD THE MONEY?**

#### **ARGUMENT**

**UNDER THE CIRCUMSTANCES WHERE RESPONDENTS RECEIVED MONEY PROMISING TO HOLD IT, AND WHERE APPELLANT COULD NOT KNOW OF RESPONDENTS FURTHER ACTIONS WITH THOSE FUNDS, A FIDUCIARY DUTY TO APPELLANT AROSE PROHIBITING RELEASE OF THE FUNDS WITHOUT INFORMING APPELLANT OR SEEKING COURT APPROVAL.**

The Trial Court ruled that no fiduciary duty was owed by Respondents to Appellant despite the negotiation of the Notice of Limited Release of Lien imposing the lien on the funds in Respondents' trust account, despite Respondents' written promises and despite their superior knowledge of the Howells' demand for the funds and their negotiations over their distribution from their IOLTA trust account.

The case law in Minnesota makes it clear that where one party has superior knowledge of information which the other side can in no other way obtain, he must say enough so that his words are not misleading. A fiduciary duty may arise in these situations. Appellant did not know and could not independently investigate what Respondents were owed, or how that sum would be paid, or that Howells requested a turn over of the escrowed funds, or that Respondents withheld the funds until agreement was reached for payment of their fees and costs.

To the extent that the Trial Court's Order for Judgment, & Memorandum, paragraph 9 of Findings of Fact, AA 0003, seems to say that Appellant knew of the proposed transfer by Respondents to their client as it happened, this is inaccurate. Respondents never have contended that Appellant knew that Respondents were about to pay the Howells or themselves. This statement in the Trial Court's Findings has no evidentiary support. In fact, it is undisputed that the money was secretly paid by Respondents to the Howells and themselves. Appellant only learned of the transfer when it was a *fait accompli*.

Two days after the funds were transferred into Respondents' hands, they privately discussed their intention to hold the funds to secure their own fees although they knew it was possible that Judge Crump would award the entire sum to Appellant.

Obviously, Respondents never asked and Appellant never agreed that Respondents could hold the \$31,000 to cover their own fees. Respondents could have, but chose not to secure their claim against the balance of \$84,000 they received.

The Supreme Court of the United States has used the term escrow in conjunction with lawyers' IOLTA accounts likening the one to the other:

Most of the pretrial discovery related to the question whether the 1995 Amendment to the IOLTA Rules had indirectly lessened the earnings of LPOs because LPOs no longer receive certain credits that the banks had provided them when banks retained the interest earned on escrowed funds. Each of the petitioners, however, did identify a specific transaction in which interest on his escrow deposit was paid to the Foundation.

Brown v. Legal Foundation of Washington 538 U.S. 216, \*229, 123 S.Ct. 1406, \*\*1415 (U.S.,2003).

A lawyer may use his IOLTA account in such a way that it becomes an escrow account:

The Oberhauser & Neveaux IOLTA trust account at Norwest Bank in Wayzata, Minnesota, was primarily used by K-7, Inc. for the receipt of investor funds, rendering Oberhauser & Neveaux as an escrow agent.

U.S. v. Oberhauser 142 F.Supp.2d 1118, \*1122 (D.Minn.,2001)

One who becomes a trustee owes to the beneficiary a fiduciary obligation. See for example, Commercial Associates, Inc. v. Work Connection, Inc. 712 N.W.2d 772, 779 (Minn.App.,2006):

Traditionally, those owing fiduciary duties include general partners with limited partners, attorneys with clients, and trustees with beneficiaries. The fiduciary obligation is premised on trust.

One who is acting as a trustee owes a fiduciary duty to the person for whose benefit the fund is held; he may not act for his own benefit:

Under Minnesota law, trustees owe several fiduciary duties to trust beneficiaries. Most importantly, trustees owe a duty of loyalty to trust beneficiaries. The trustee's

"primary duty [is] not to allow his interest as an individual even the opportunity of conflict with his interest as trustee." *Smith v. Tolversen*, 190 Minn. 410, 413, 252 N.W. 423, 425 (1934). A trustee can breach the duty of loyalty by acting for personal gain. See *In re Estate of Lee*, 214 Minn. 448, 9 N.W.2d 245 (1943).

In re Revocable Trust of Margolis 731 N.W.2d 539, 545 (Minn.App.,2007)

Appellant concedes that normally lawyers do not owe fiduciary duties to one another and that they typically occupy an adversary role entirely appropriate to representation of clients. However, if a lawyer proposes to act as an "escrow agent", he takes on a new duty limited to the responsibilities of the escrow agent. Respondents were not forbidden to act as lawyers for their clients otherwise; but they also were not permitted to break the promise they made to Appellant to hold the money when they had recognized the validity of Appellant's lien on the settlement proceeds by virtue of their request that Olson prepare the Limited Release of Attorney's Lien, by their approval of the Limited Release; and their receipt of the funds pursuant to the Limited Release.

One who has knowledge of special facts or circumstances may have a duty to disclose them. Klein v. First Edina Nat. Bank 293 Minn. 418, 421, 196 N.W.2d 619, 622 (MINN 1972) discusses the ordinary relation between a bank and a customer and recites that it is normally not a confidential or fiduciary relation, but that there may be circumstances where such a relation arises:

As a general rule, one party to a transaction has no duty to disclose material facts to the other. However, special circumstances may dictate otherwise. For example:

(a) One who speaks must say enough to prevent his words from misleading the other party. *Newell v. Randall*, 32 Minn. 171, 19 N.W. 972 (1884).

(b) One who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party. Marsh v. Webber, 13 Minn. 109, Gil. 99 (1868).

(c) One who stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts. See, e.g., Wells-Dickey Trust Co. v. Lien, 164 Minn. 307, 204 N.W. 950 (1925).

The Supreme Court in Klein went on to state that the circumstance changes when a bank has reason to know that a customer is placing confidence in the bank:

We believe the correct rule to be that when a bank transacts business with a depositor or other customer, it has no special duty to counsel the customer and inform him of every material fact relating to the transaction-including the bank's motive, if material, for participating in the transaction-unless special circumstances exist, such as where the bank knows or has reason to know that the customer is placing his trust and confidence in the bank and is relying on the bank so to counsel and inform him.

Klein v. First Edina Nat. Bank 293 Minn. 418, \*422, 196 N.W.2d 619, \*\*623 (MINN 1972)

Respondents induced Appellant to repose confidence in them; they expressly asked Appellant to entrust \$31,000 into their hands; simultaneously, they privately discussed using the \$31,000 to pay themselves. Special circumstances are plainly present which require a finding of the existence of a fiduciary duty by Respondents to Appellant.

Another case requiring disclosure of facts in certain circumstances is Richfield Bank & Trust Co. v. Sjogren 309 Minn. 362, 365, 244 N.W.2d 648, 650 (MINN 1976).

That case follows and approves the holding in Klein v. First Edina Nat. Bank:

Before nondisclosure may constitute fraud, however, there must be a suppression of facts which one party is under a legal or equitable obligation to communicate to the other, and which the other party is entitled to have communicated to him.

L & H Airco, Inc. v. Rapistan Corp. 446 N.W.2d 372, 380 (Minn.,1989) holds that in some circumstances a lawyer may owe a duty to third parties:

We do not intend by this decision to insulate an attorney from liability to his or her adversary for fraud. An attorney who makes affirmative misrepresentations to an adversary, or conspires with his or her client, or takes other active steps to conceal the client's fraud from the adversary may be liable for fraud. *See Hoppe*, 224 Minn. at 241, 28 N.W.2d at 791; *see also McDonald v. Stewart*, 289 Minn. 35, 40, 182 N.W.2d 437, 440 (1970). However, merely failing to disclose a client's fraud to the adversary will not make the attorney liable, absent a duty on the attorney to make such a disclosure. (emphasis added).

See also Goldberger v. Kaplan, Strangis and Kaplan, P.A. 534 N.W.2d 734, 738 (Minn.App.,1995) holding that lawyers may on occasion even owe a duty to a third party beneficiary who is not a client; Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan, 494 N.W.2d 261, 266 (Minn.1992) (citing Marker v. Greenberg, 313 N.W.2d at 5).

Due to the inability of Appellant to monitor the funds once they were turned over to Respondents, it was incumbent on them to protect the money in dispute; and no law in Minnesota prevented them from either holding the funds or paying them into court so that they did not breach their promise.

The Rapistan case goes on to spell out those instances when a lawyer and others must speak to prevent someone from being misled:

The general rule is that "one party to a transaction has no duty to disclose material facts to the other." *Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972). A duty to disclose facts may exist under certain

circumstances, such as when a confidential or fiduciary relationship exists between the parties or when disclosure would be necessary to clarify information already disclosed, which would otherwise be misleading. *Id.*; see also Restatement (Second) Torts § 551 (1976). We have also stated that "[o]ne who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party." (emphasis added).

If this sort of conduct is authorized by the Court, then it seems that no property or money may be entrusted to a lawyer per an agreement, settlement or court decision. The lawyer would always be bound to dishonor his or her promise and abide by a client demand even though he'd agreed to hold the funds for another purpose and could not have liability if he breached the promise.

If the Trial Court's ruling is correct, how can anyone entrust money or property to a lawyer pending completion of any transaction; settlement or court ruling? The holding of the Trial Court effectively means that lawyers may simply not be trusted to honor an unconditional promise because clients can always override their promise. It is a routine occurrence that lawyers receive payment of funds into trust accounts and delivery of property and instruments where there are or have been disputed claims; and the lawyers agree to hold the money, instruments and property and to disburse it in accordance with agreements, settlements and court decisions.

If affirmed, the Trial Court ruling means that funds, instruments, and property delivered to a lawyer for subsequent disbursement or delivery per an agreement or Order are instead fair game and can be grabbed by the lawyer's client and by the lawyer despite an express promise to the contrary.

This decision plainly interferes with lawyers' handling of settlements and commercial transactions. It also brings discredit on the profession because it would mean that lawyers are not accountable for promises expressly made to protect third party interests in property.

### **CONCLUSION**

At Respondents' request, Appellant released its attorney's lien claim against stock, cash and other rights in return for the promise that Respondent would respect the claim for attorney's lien against the \$31,000 to be held by them pending Judicial review. Respondents specifically requested and approved the form of the Limited Release of Attorney's Lien. Respondents could have protected themselves against double liability by paying the funds into court via an action for Interpleader.

### **RESPONDENTS ACTUALLY RELIED ON AN ATTORNEY'S LIEN TO WITHHOLD THE MONEY FROM THEIR CLIENTS**

Respondents argued they were bound to turn over the funds on their clients' demand. Rather, the Respondents actually rejected the clients' demand, and held the funds themselves for their own benefit until they negotiated a satisfactory payment to themselves.

Appellant gave consideration for Respondents' promise; and not for any promise by the Howells who were not the persons to whom the money was entrusted.

Respondents undertook a fiduciary duty to Appellant by promising to keep and retain money in trust until Judge Crump's ruling, then not revealing either the Howells' demand for the money or their negotiations for a payment to themselves.

Appellant requests that this Court reverse the decision of the Trial Court and order that it enter judgment in favor of Appellant and against Respondents jointly and severally directing the payment of the sum awarded by Judge Crump plus interest in conformity with his Order.

December 14, 2007

Respectfully Submitted,

**OLSON & LUCAS, P.A.**

By: 

Thomas B. Olson, # 82314  
Matthew H. Jones, #286412  
7401 Metro Blvd., # 575  
Minneapolis, MN 55439  
(952) 224-3644  
(952) 224-5879 FAX