

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 REPLY BRIEF

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

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 Respondents

Attorneys for Appellant

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ISSUES

- 1. DOES A KNOWN CLAIM FOR AN ATTORNEY'S LIEN CONSTITUTE A PROPERTY INTEREST SUBJECT TO CONVERSION WHERE AN EXISTING LIEN CLAIM IS RELEASED AT THE CONVERTERS' REQUEST, SUBJECT TO THEIR PROMISE TO HOLD THE FUND?**
- 2. WHETHER A PROMISE BY A LAW FIRM TO BECOME AN ESCROW AGENT CONSTITUTES A BINDING OBLIGATION WHEN IT INDUCES ANOTHER TO TRANSFER ITS CLAIM TO THE ESCROWED FUND?**
- 3. WHEN RESPONDENTS MEASURE THEIR CONDUCT AGAINST THE CODE OF PROFESSIONAL RESPONSIBILITY, MAY APPELLANT RESPOND TO SHOW WHAT THE CODE INDICATES THEY SHOULD DO WHEN A CONFLICTING CLAIM IS PRESENTED AGAINST A FUND THEY'VE PROMISED TO HOLD FOR THE EXPRESS PURPOSE OF SECURING AN ATTORNEY'S LIEN IN A CASE THEY'RE DEFENDING BEFORE A COURT?**
- 4. WHETHER RESPONDENTS ASSUMED A FIDUCIARY DUTY TO APPELLANT BY PROMISING TO HOLD MONEY BUT SIMULTANEOUSLY PLANNING TO WITHHOLD THE MONEY TO PAY THEIR OWN FEES?**

INTRODUCTION

Respondents raise a host of issues seeking to evade responsibility for a simple promise they made, one that lawyers make routinely in order to conduct the practice of law. Respondents' brief never touches the central issue; whether lawyers may be entrusted with money or any other property; and whether those same lawyers may be the arbiters of a claim against money they've promised to hold. Every lawyer has agreed to hold money, even if briefly, to fund transactions, settlements and for other business purposes. Lawyers receive money they agree to distribute to clients and non-clients alike every day in common practice. Respondents say lawyers may not do so—their clients

may order the attorney to pay the money to the client and to withhold information from the person who entrusted the funds to the lawyer.

Respondents also introduce the issue of their ethical obligations. The applicable Rule and Comment make it utterly clear what a lawyer is to do when confronted with this exact claim; i.e., hold the money and pay it into Court if there is any dispute. The one thing they cannot do is decide that one claimant is entitled, the other is not, and secretly pay out the funds.

Respondents also now claim the attorney's lien is invalid against them because no UCC 1 Financing Statement was filed. That is an argument which should have been, but was not raised by them before Judge Crump who confirmed the lien award. A lawyer cannot be permitted to represent a client before a District Court, agree to hold money to secure the claim, then withdraw from the representation and announce that the fund to secure the lien is now gone. Second, the Respondents had actual knowledge of the lien claim making a UCC filing irrelevant.

Respondents also claim that Appellant has another remedy; appellant may sue the former client. They argue in a footnote that the former clients were Rule 19 necessary parties to this suit. The purpose of an attorney's lien, summary in nature, is to avoid that exact result, most particularly when legal malpractice carriers routinely preach to their insureds that lawsuits to collect fees tend to produce spurious malpractice claims.

1. DOES A KNOWN CLAIM FOR AN ATTORNEY'S LIEN CONSTITUTE A PROPERTY INTEREST SUBJECT TO CONVERSION WHERE AN EXISTING LIEN CLAIM IS RELEASED AT THE CONVERTERS' REQUEST, SUBJECT TO THEIR PROMISE TO HOLD THE FUNDS?

Appellant argues conversion occurred here because appellant had a property right in the funds held by Respondents. Contrary to the express terms of the statute, Minn. Stat. § 481.13, the Trial Court said no property right existed until Judge Crump confirmed the lien in his February 22nd, 2006 Order Regarding Attorney's Fees & Costs and Claim For Attorney's Lien (Appellant's Appendix AA-0096) after Respondents had already paid themselves and their clients. Respondents and the Trial Court never address either the plain language of the statute, Minn. Stat. § 481.13, or the long established case law interpreting the statute, already discussed in Appellant's original brief at pages 16-20. The Trial Court ignored this language of Williams vs. Dow Chemical: "Cause of action liens ordinarily arise upon the commencement of the action."

In responding to Appellant's Brief, p. 26, Respondents cite to Boline v. Doty, 345 N.W.2d 285, 288 -289 (Minn.Ct. App. 1984). While Boline doesn't support the contention that Respondents make regarding a Secretary of State filing, Appellant notes that Boline does squarely answer the question whether a lien is a property right:

A lien is a hold or claim on the property as security for a debt or charge. *In re Estate of Eggert*, 245 Minn. 401, 72 N.W.2d 360 (1955). It is a property right. *Sager v. Burgess*, 350 F.Supp. 1310, 1312 (E.D.Pa.), *289 *aff'd* 411 U.S. 941, 93 S.Ct. 1923, 36 L.Ed.2d 406 (1972)

(emphasis added).

Here, plainly, the Oppenheimer law firm and their clients had honored Appellant's lien claim refusing to complete the settlement. The settlement money was paid out and Appellant's lien claim against the stock of Windsaloft Company and the \$115,000 cash

settlement was released solely in reliance upon Respondents' agreement. The literal terms of Minn. Stat. § 481.13 provide:

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.

Cases cited by Appellant in its original brief point out that third parties are liable to honor lien claims though they've already paid the money out to a third party. It is elementary that the lien claim confers a property right from its inception.

In defending against the conversion claim, Respondents also claim that the attorney's lien here was unperfected because no UCC 1 financing statement was filed with the Secretary of State, relying on an unpublished decision. But Respondents ignore key language of that decision quoted here:

Because Harvey, Thorfinnson failed to follow the prescribed method of perfection, Soucy, as a third party subsequent purchaser, took the cause of action free and clear of the law firm's interest. See *Williams*, 415 N.W.2d at 26. In the absence of a showing of actual notice, Soucy is in the position of a bona fide purchaser for value and without notice, and his interest in the cause of action must be given priority. *Sauers*, 234 Minn. at 144, 47 N.W.2d at 772

(emphasis added) (copy attached). In the case cited by Respondents, Soucy prevailed only because the law firm failed to show that Soucy actually knew of their lien claim. Thus, Harvey, Thorfinnson's attorney's lien failed because there was a competing claimant to the same fund; because the firm had not filed a UCC Financing statement;

AND because the law firm failed to show the other claimant, Soucy, had actual knowledge of the attorney's claim to a lien. The facts here are distinguishable.

And it's a brazen example of chutzpah to argue that though they promised to hold money specifically as security for a lien claim while they represented the Howells before Judge Harry Crump in defense of the lien action; and where they gained release of the funds being held at the Oppenheimer law firm in deference to Appellant's claim of lien in exchange for the promise to hold the funds until Judge Crump ruled; that they didn't need to honor that promise because they insist they are a "third party" under the statute entitled to the protection of notice to the public effected by a UCC filing.

It is undisputed here that Respondents knew specifically of the lien claim. They received the funds into their IOLTA account promising Appellant that they, not the Howells, would control the funds in an escrow account in order to secure the lien claim. They specifically represented to Appellant that if Olson would give up his lien claim in Windsaloft securities and the cash settlement of \$115,000 so that the settlement could be finalized, they would hold the fund of \$31,000 to protect the lien. Defendants also ignore this key language from the same unpublished decision:

It is well settled that an attorney's lien on a cause of action may be enforced against the adverse party of the attorney's client when the adverse party pays on the cause of action without providing for the attorney's interest. *Krippner v. Matz*, 205 Minn. 497, 287 N.W. 19 (1939); *Balluff v. Balluff*, 169 Minn. 266, 211 N.W. 462 (1926); *Kubu v. Kabes*, 142 Minn. 433, 172 N.W. 496 (1919); *Desaman v. Butler Brothers*, 114 Minn. 362, 364, 131 N.W. 463, 464 (1911); *Williams v. Dow Chemical Co.*, 415 N.W.2d 20, 26-27 (Minn.Ct. App.1987). The purpose behind this rule is to prevent an adverse party from defeating an attorney's statutory rights in a cause of action. A party who ignores the attorney's legal interest "should bear the consequences of its lack of caution." *Georgian v. Minneapolis & St. Louis Railroad Co.*, 131 Minn. 102, 104, 154 N.W. 962, 963 (1915).

Middleton v. Harvey, Thorfinnson, & Scoggin, P.A., 1990 WL 77076, 2 (Minn. Ct. App. 1990) (Appellant's Appendix p. AA 00207).

An older attorney's lien case held that actual notice of the lien claim imposes liability:

In the case at bar, the evidence clearly shows, and the trial court so found, that defendant had notice of the attorney's claim of lien prior to the time he settled the judgment with plaintiff, and that the settlement was made for the purpose of defrauding the attorney. As before remarked, the evidence fully sustains this finding. It is significant that defendant paid plaintiff only two-thirds of the amount of the judgment, the balance representing the attorney's claim. Were there any doubt of the fact that defendant had notice of the attorney's claim, this fact would relieve the case of any embarrassment, for defendant cannot well claim that he has been misled to his prejudice.

Northrup v. Hayward, 102 Minn. 307, 312, 113 N.W. 701, 703 (Minn.1907).

The difference between Middleton v. Harvey, Thorfinnson and this case is that here it's undisputed that defendants had actual notice of the lien claim; they agreed to hold the money pending the ruling. They also defended the lien case and never claimed that a UCC filing was required. Judge Crump enforced the lien; no appeal was taken from the ruling.

UCC filings at the Secretary of State's office exist to give public notice to innocent third parties of the claim of another in personal property. For example, the Court of Appeals held that even a party who was the first to file a UCC financing statement loses if he has actual notice of an earlier claim which is not properly filed:

Applying the discussion in *Bartos* to the issue presented here, we conclude that a holder of a perfected security interest is charged with knowledge of the contents of a misfiled U.C.C.-1 under section 336.9-401(2), when it has actual knowledge of the critical information required in a properly filed U.C.C.-1. See Minn. Stat. §

336.9-402(1). This critical information includes a general description of the collateral encumbered, and the names and addresses of the debtor and secured party.

D & R Star, Inc. v. World Bowling, Inc., 619 N.W.2d 772, 776 (Minn. Ct. App. 2000).

Obviously, Defendants knew Plaintiff's name and address and what property, i.e., the \$31, 000, was claimed. Real estate recordings apply the same rule - - that one who has actual notice of another's interest does not prevail just because he is first to record:

The purpose of the recording act is to protect third parties from claims against their property where such claims arise out of transactions in which they were not participants and about which they knew nothing. Republic is not such a third party. The conveyances of the mortgage to First Bank and the lease to Marquette were in effect part of the same transaction, the terms of which were dictated in large part by Republic. The recording statute cannot in and of itself create rights in Republic superior to the rights of Marquette when Republic knew of Marquette's prior unrecorded conveyance. Republic's knowledge of the preexisting lease precludes its status as a subsequent purchaser in good faith.

Republic Nat. Life Ins. Co. v. Marquette Bank & Trust Co. of Rochester 312 Minn. 162, 166-167, 251 N.W.2d 120, 123 (Minn. 1977) See also, Henschke v. Christian, 228 Minn. 142, 146-147, 36 N.W.2d 547, 550 (Minn. 1949) (“One is not a bona fide purchaser and entitled to the protection of the recording act, though he paid a valuable consideration and did not have actual notice of a prior unrecorded conveyance from the same grantor, if he had knowledge of facts which ought to have put him on an inquiry that would have led to a knowledge of such conveyance.”).

As between a lawyer and his client, no UCC filing is required; only against third parties (without actual notice in Appellant's view). If, as Respondents argue, they were only agents of their clients bound to act secretly at their clients' direction and to disregard the agreement they'd apparently made with Appellant, then they evidently stand in the

shoes of their clients and cannot now claim to be “third parties” entitled to the protection of a UCC notice.

It’s plain, therefore, that an attorney’s lien exists from the time the original lawsuit is commenced. Recording a UCC financing statement is unnecessary in a situation where the complaining party has actual knowledge of the claim for an attorney’s lien and has agreed to hold the money to protect the claim. Respondents committed conversion of the funds they held to protect Olson’s attorney’s lien claim. The Trial Court’s Order and Judgment should be reversed; the case should be remanded with instructions that summary judgment be ordered in favor of Appellant.

2. WHETHER A PROMISE BY A LAW FIRM TO BECOME AN ESCROW AGENT CONSTITUTES A BINDING OBLIGATION WHEN IT INDUCES ANOTHER TO TRANSFER ITS CLAIM TO THE ESCROWED FUNDS?

Respondents argue there was no enforceable contract with Appellant, but lawyers receive and pay out funds delivered to them by commercial interests; by insurance companies; by real estate purchasers; by business buyers; the list is long. Often there are conflicting claims over the money or property. Some of those claims exist before the attorney receives the property; some arise after the funds come into the lawyer’s hands.

An enforceable contract must exist between the lawyers when they promise to hold money or property, so that they do so in conformity with the agreement that they make, regardless whether it’s them acting or their client. Inevitably, consideration supports the agreements as one side gives up rights in a lawsuit or delivers funds in order to buy out a partner’s interest in a small business corporation and resolve an accounting dispute, for example. Commonly, the lawyer will be paid out of funds being exchanged.

It remains that it is the lawyer who is entrusted with the money. It's parsing in the extreme to argue the agreement here was between the Howells and Olson and that Respondent escrow agents were not a party to that agreement, though they were the ones holding the money. Respondents volunteered for the task to persuade Appellant to allow funds to be paid, and share ownership to be transferred.

Consideration for the contract here is found in the payment of \$115,000 into Respondents' control from which they could *and did* pay themselves. They could have paid themselves from the \$84,000 they received that was not subject to Olson's claim. They elected not to do so and instead set out from the beginning to hold the \$31,000 to secure their own fee claim without disclosing this intention to Olson.

3. WHEN RESPONDENTS MEASURE THEIR CONDUCT AGAINST THE CODE OF PROFESSIONAL RESPONSIBILITY, MAY APPELLANT SHOW THEIR ACTIONS ARE IMPERMISSIBLE?

Respondents raise the issue of their ethical duties to their clients as justifying their actions; and so Appellant must respond that their behavior cannot be justified by any reference contained in the Code of Professional Responsibility.

Rule 1.15 (b) of the Minnesota Rules of Professional Conduct specifically protects the rights of third persons in funds deposited to a lawyer's trust account. The rule provides that a lawyer shall not withdraw any disputed portion of funds until the dispute is resolved:

A lawyer must withdraw earned fees and any other funds belonging to the lawyer or the law firm from the trust account within a reasonable time after the fees have been earned or entitlement to the funds has been established, and the lawyer must provide the client or third person with: (i) written notice of the time, amount, and

purpose of the withdrawal; and (ii) an accounting of the client's or third person's funds in the trust account.

If the right of the lawyer or law firm to receive funds from the account is disputed by the client or third person claiming entitlement to the funds, the disputed portion shall not be withdrawn until the dispute is finally resolved. If the right of the lawyer or law firm to receive funds from the account is disputed within a reasonable time after the funds have been withdrawn, the disputed portion must be restored to the account until the dispute is resolved.

Minn. R. Pro. Conduct 1.15(b).

Here, No notice to Appellant was given at the time of the withdrawal. Comment 4 to Minnesota Rule of Professional Conduct 1.15 is particularly illuminating:

[4] Paragraph (b) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

(emphasis added). Obviously here, contrary to the comment to the Rule, Respondents completely ignored this guidance, unilaterally assumed to arbitrate the dispute on their own, and ignored the advice to have the court resolve the dispute.

LETTER OF PROTECTION

A letter of protection is a term of art used most frequently in the personal injury and worker's compensation fields of law. Remarkably, Respondents claim that the agreement did not constitute a "Letter of Protection". They evidently do so in light of the comment in the Rules of Professional Conduct that a personal injury lawyer may promise to pay funds to creditors of his client; and the lawyer should refuse a client's demand to

turn over money when such third party claims exist. Respondents' Brief defines a letter of protection in footnote 4, Respondents' brief, p. 25:

“A letter of protection is a lawyer's written promise to a third party to protect that party's interests in the settlement of the client's case”

Appellant agrees with that definition. No distinction can be found between the promise made here by Respondents to Appellant and those contained in ordinary letters of protection routinely given in injury cases and worker's compensation cases to doctors, hospitals, etc. Respondents may strain to say it was the Howells' promise, not theirs. But it's the lawyer's promise that any third party relies on.

4. WHETHER RESPONDENTS ASSUMED A FIDUCIARY DUTY TO APPELLANT WHEN THEY PROMISED TO HOLD MONEY BUT SIMULTANEOUSLY PLANNED TO HOLD THE MONEY TO PAY THEIR OWN FEES?

Respondents raised the issue of their ethical behavior. Accordingly, Appellant notes that the comments to the Minnesota Rules of Professional Conduct specifically make a lawyer a fiduciary as to the property of clients and third parties entrusted to him or her:

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts.

Minn. R. Pro. Conduct 1.15, Comment 1. Furthermore:

[5] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to

fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this rule.

Minn. R. Pro. Conduct 1.15, Comment 5.

Respondents assert by way of an Affidavit cited at p. 20 of their Brief that Attorney Newby had no duty to disclose to Olson when the clients demanded Respondents turn over of the money. Respondents claim that Mr. Newby told Mr. Olson that he would not disobey his clients' wishes. First, there is no documentation of this claim in the email exchange on the topic. Instead, Olson specifically asked Newby to confirm he would not follow any contrary instruction by his client. Newby responded by email that he would hold the money. (See email trail at AA-0182, AA-0184).

In the first email on December 5th at 4:39 PM, Olson asked Newby among other things:

“(C) And that on service of a decision, your firm will immediately pay over any amount awarded irrespective of any contrary instruction from your client?”

(AA-0182, AA-0184). Respondents did not forward this email to their clients as they had others. After being prompted on December 6th for a reply, on December 7th at 7:34 am, Newby answered:

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.

Please send a letter to Mike Keyes today releasing him from all liability and claims in connection with your lien petition, and instructing him to release the settlement proceeds to my firm as soon as possible.

(AA-0182, AA-0184). Respondent's Brief cites only Mr. Newby's affidavit that he verbally told Olson he could not disobey any client instruction. In his deposition, however, Mr. Newby admitted he never said any such thing:

Q. And in that e-mail, did you also tell—or in that telephone conference, did you also tell Mr. Olson “If my clients ask for this money that we're going to put in my trust account, then I'm going to give it to them”?

A. No, I did not tell him that because I did not know that my clients intended on reneging on their agreement.”

(p. 28, line 21-25; p. 29, lines 1-3, appendix AA-0350-351).

It has the ring of truth that Mr. Newby was surprised by his clients' demand for the money, but it places context to the claim in his Affidavit that he orally told Mr. Olson that he would have to follow his clients' instructions. Nevertheless, Respondents were protected by the agreement they had made, evidently authorized by their clients, and by the above quoted Rule and Comment. This contention in the Mr. Newby's Affidavit is disputed and may not be the basis for the Trial Court's decision.

Finally, Respondents argue in a footnote that Rule 19 on indispensable parties justifies separately the Trial Court's Order and Judgment. However, attorney lien proceedings are intended to be summary in nature. See for example,

The amended version of section 481.13 eradicated the distinction between establishment and enforcement, stating only that a lien may be established and its amount determined summarily “by the court.” Minn.Stat. § 481.13, subd. 1(c) (2004). From the plain language of the statute, considered in light of its amendment by the legislature, we conclude that the legislature intended the proceeding to establish and enforce an attorney lien to be summary. After the value of the lien has been determined, the district court enters judgment for the amount due.

Thomas A. Foster & Associates, LTD v. Paulson, 699 N.W.2d 1, 6 (Minn. Ct. App. 2005)(emphasis added). In this case, Appellant and its former clients litigated to conclusion before Judge Crump the right to a lien on the settlement. Respondents insist that Appellant must re-litigate this matter and sue the its former clients again. They surely are not indispensable parties to the question of the rights in the monies escrowed for the purpose of securing the lien.

SUMMARY

Respectfully, the Trial Court erred in granting summary judgment to Respondents; and in denying summary judgment to Appellant on its claims of breach of contract, conversion and breach of fiduciary duty. This type of agreement is honored daily by lawyers; without it, practice would have to radically change.

January 28, 2008

Respectfully Submitted,

FOR APPELLANT

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

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