

RISK OF LOSS WHEN ATTORNEY STEALS THE MONEY – *JOHNSON V. SCHULTZ*

By Ed Urban, Title Counsel, Attorneys Title

This case was decided by the N.C. Court of Appeals (No. COA08-1332009). The Johnsons were the sellers. The Schultzes were the buyers. The parties used the NCBA 2005 "Offer to Purchase and Contract." Parker was the closing attorney representing the buyers. He charged the sellers \$125.00 to prepare the deed. \$76,933.56 of the buyers' cash and \$200,320.24 of the buyers' loan proceeds went into Parker's trust account prior to closing. The closing occurred January 3, 2006; the deed to the buyers and the deed of trust were recorded 4:46 P.M. that day, and, that day, Parker gave the sellers a check for \$262,881.38 for net proceeds. That day, Parker's account could cover the check, but on January 4, 2006, Parker misappropriated funds. The sellers tried to cash the check in May, 2006; the check bounced, and was returned "NSF." The sellers sued the buyers, the lender, and the bank seeking rescission.

The lower court held that the sellers bore the loss since the sellers were entitled to the proceeds at the time of Parker's embezzlement, and the buyers were vested with title to the property.

The majority of the Court of Appeals reversed the trial court, and stated the cited reasons:

In sum, we conclude that where, as here: (1) one attorney is used to handle a residential estate closing, (2) the attorney misappropriates the remaining balance of the purchase price owed to the seller, and (3) the risk of loss must be allocated to one or more parties, courts should first consider the existence of fault. However, if fault does not exist and the risk must be allocated between essentially "innocent" parties, courts should then consider which parties had an attorney-client relationship with the wrongdoing attorney and impose the risk of loss on those parties. Where multiple parties to the transaction have an attorney-client relationship with the offending attorney, the risk of loss should be shared among them.

Because the trial court resolved this case under a misapprehension of law, we reverse the grant of summary judgment in the Schultzes' favor. Furthermore, because the Schultzes admit that Mr. Parker was their attorney, we conclude that the Schultzes must bear the loss. Finally, because the trial court did not consider whether Mr. Parker also acted as the Johnsons' attorney, a material issue of fact which the Johnsons and the Schultzes disputed below, we remand and instruct the trial court to consider this issue to determine if the Johnsons must share the loss.

Reversed and remanded.

Judge Wynn dissented.

This important case appears headed for our Supreme Court.