

67046-8

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NO. 67046-8

WASHINGTON STATE COURT OF APPEALS
DIVISION I

JEFFREY MOORE,

Appellant,

v.

VICTOR SIEGEL and JANE DOE SIEGEL,

Respondents.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Honorable Mariane C. Spearman)

JEFF MOORE'S REPLY BRIEF

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I. INTRODUCTION.

Respondent Victor Siegel's Response Brief avoids the point of Jeff Moore's Opening Brief because it spends little time on the central issue – that this Court decided in *Moore I* the core issues are disputed issues of fact which require trial on the merits. *That* is the operative law of the case: that the matter must be tried. The trial court had no authority to change it under RAP 12.2, which Siegel failed to address or dispute.

Because this issue is dispositive and requires reversal, it is the focus of Moore's Reply Brief. The other Response arguments as to evidence issues on remand (exclusion of Holli Baxter evidence) and the proper application of the wage statutes are fully addressed in Moore's Opening Brief and the Court is respectfully directed there.

The fact that Siegel tried to short-circuit *Moore I* and got the new trial judge to misconstrue the decision (largely by continually asserting the facts and their inferences in his favor despite being the moving party) does not make it right. This Court neither wrote a new standard for summary judgment nor held that "state of mind" is susceptible to being determined on summary judgment. Instead, this Court held that, under the claims and allegations, trial is required. The new trial court's ruling, which effectively reversed *Moore I*, must itself be reversed and the case remanded for trial as required in *Moore I*.

II. REPLY ARGUMENT.

- A. **This Court Stated Clearly In *Moore I* That Summary Judgment Was Being Reversed And The Case Remanded Because Of A Dispute Of Material Fact. No “Special Instructions” Were Needed. Rather, The New Trial Court Violated RAP 12.2 By Granting Siegel’s Motion. Reversal Of Summary Judgment For Siegel Is Required Because Trial Is Necessary To Resolve Disputed Material Facts.**

Without citing any controlling authority, Siegel argues that there were no “specific instructions” from the Appellate Court on remand, implying that such were required. But such specific instructions were not required, particularly because the following statement from this Court made it abundantly clear that there was to be a trial on the merits:

Because there is a genuine issue of material fact as to whether a bona fide dispute existed, we reverse the trial court’s summary judgment order [in favor of Moore] and its award of attorney fees and costs.

Moore v. Blue Frog Mobile, Inc., 153 Wn. App. 1, 10, 221 P.3d 913 (2009), *rev. den.*, 168 Wn.2d 1020 (2010) (“*Moore I*”).

Despite Siegel’s strenuous arguments seeking summary judgment in his favor in *Moore I*, this Court did **not** grant summary judgment for Siegel, as it could have and certainly would have if it had been warranted. Because the trial court failed to follow the clear directive of this Court in *Moore I*, the dismissal must be reversed and the case remanded – again – for trial.

It is telling that Siegel fails to even attempt to refute Moore's citation to RAP 12.2 and the associated cases, which forbid a trial court from deciding motions that would challenge issues already decided by the appellate court absent explicit authorization, which did not exist here. *See* Opening Brief, pp. 12-13. This is a conclusive reason why the summary judgment for Siegel must be reversed. Moreover, this reason is not disputed or contested by Siegel.

While in some cases the trial court makes a mistake because the remand instructions are not sufficiently detailed or clear,¹ this is not such a case. The rule that a dispute of material fact precludes summary judgment and requires trial is not only so well established no citation is required, it also is explicitly stated in the rule: "The judgment sought shall be rendered forthwith if . . . **there is no genuine issue as to any material fact** and that the moving party is entitled to a judgment as a matter of law." CR 56(c). In this context of the review of a summary judgment ruling, the appellate ruling that "there is a genuine issue of material fact as to whether a bona fide dispute existed" can *only* mean that trial is required on the issue. The new trial court's order in 2011 precluding trial on the material issue of fact must therefore be reversed.

¹ *See, e.g., In re Marriage of Rockwell*, 147 Wn. App. 449, 453, 238 P.3d 1184 (2010) (Judge Appelwick wrote the panel "regrets that the earlier opinion created confusion"). The decision in *Moore I* was not the cause of the trial court's confusion in this case.

B. Siegel’s Fact-Based “State of Mind” Argument That Moore “Conspired” With The Eisenberg Family To Harm Blue Frog In The ITL Litigation Is Incorrect, Irrational, And Unreasonable Given Moore’s Ownership Of 500,000 Shares Of Blue Frog Stock And Additional Options Because The Only Possible Interest Moore Had Was For Blue Frog To Succeed. Such “Alignment” Would Have Been Financial Suicide For Moore. To The Extent Siegel Claims Moore Was “Aligned” with ITL And Against Blue Frog And That Assertion Can Be Deemed Potentially “Reasonable”, There Is A Factual Dispute Which Reinforces Why Trial Is Required.

Siegel’s arguments also depend on a fundamentally flawed premise (in addition to his erroneous insistence in construing all facts in his own, rather than Moore’s favor): that Moore “conspired” with others in the Eisenberg family to harm Blue Frog in providing the ITL Declaration. Nothing could be further from the truth. After all, Moore still owned 500,000 shares and had additional stock options accelerated. He had every interest in preserving his own personal assets and seeing Blue Frog succeed so that those assets would increase in value. It thus would only severely hurt Moore financially to “take sides” with ITL and the Eisenbergs in the litigation, something that not only would be irrational as financial suicide,² but simply is not consistent with the facts, particularly when the facts and the inferences are taken in Moore’s favor, as is required on summary judgment where he is the non-moving party.

² In fact, Blue Frog’s second failure to pay the required severance combined with the later failure of Blue Frog to drive Moore himself into personal bankruptcy. *See* CP 871, ¶ 5 (Moore Dec. dated March 23, 2011).

Siegel's effort to demonstrate a nefarious motive on Moore's part via a conspiracy with others adverse to Blue Frog demonstrates one of the basic trial themes for Moore – Sigel and Blue Frog were in acrimonious litigation with the Eisenbergs (who were founders of Blue Frog) at that time, incorrectly saw Moore as part of the Eisenberg "team", incorrectly attributed "suspect motives" to his truthful Declaration about the ITL Contract, and thus improperly sought to find a way to punish Moore for his friendship with the Eisenbergs.³

This was not a reasonable decision by Siegel absolving him of liability under the Washington wage statutes – the true legal standard in Washington – let alone fairly debatable. Rather, Siegel's three-pronged claims: 1) that he believed Moore was aligned with the Eisenbergs and ITL against Blue Frog; and 2) that this "belief was genuine; and 3) that this belief was both reasonable and provided a basis to withhold the settlement wages – give yet another demonstration of disputed material facts which can only be resolved by trial.

³ A related theme is Siegel's continuing resentment at being forced bby Moore in April 2007 to resume his severance pay and having to pay Moore's \$10,000 legal fees to boot. Siegel wanted to undo the severance.

C. Siegel’s Repeated Characterization Of The Facts On Summary Judgment To Be Construed In His Favor Is Contrary To The Basic Principles of Summary Judgment And Amounts To Mischaracterizing What Are The Applicable Facts For Purposes of Summary Judgment.

It is hornbook law that on summary judgment the facts *and inferences* are taken in favor of the non-moving party. CR 56(c); *Moore*

I. Yet Siegel’s approach is to continually insist and repeat *Siegel’s* interpretation of the facts in *Siegel’s* favor, including all inferences, and then insist, again and again, that judgment must be granted to him. But in the context of summary judgment where he is the moving party, this approach amounts to a misstatement or mischaracterization of what are the operative facts for purposes of summary judgment.

The Response Brief repeats these misstatements in what seems like a classic Madison Avenue effort: anything repeated often and insistently enough will ultimately sink in and become the “truth” (or here, the proper basis for a decision), whether that occurs on the subconscious or conscious level; and whether it is, in fact, correct or not. But that approach, while it may be time-honored and frequently practiced in advertising (and politics, for that matter), and even at trial when trying to sell the case to the jury, it is *not* a proper basis for appellate judicial decision-making on whether the case should go to the jury in the first place. A few examples will show Siegel’s effort and why the appellate court should not be taken in.

Siegel's repeated "theme" (his claimed "Big Truth" of the case), is that Moore signed a declaration to actively support ITL in order to help it defeat Blue Frog in their litigation and, by that means, "disparage" Blue Frog in a manner that violated his Severance Agreement. For example, at page 32 of the Response, Siegel contends that Moore "chose" the substance of the declaration and that by doing so Moore was actively "supporting" the position of the opposing party to Blue Frog in the ITL litigation. Siegel, of course, conveniently neglects to include facts from Moore's perspective: that Moore signed the declaration to avoid a half-day deposition the parties intended to take of him in which they would get all that information; that it contained the truth; *and* that Moore contacted Blue Frog's legal counsel to ask if it had any objections or concerns with him doing that – but got no objection, nor any other response.⁴

But in fact, and from Moore's perspective of the facts (as is required on summary judgment), what Moore did was no more than give a accurate fact declaration in lieu of a deposition that he did not want to have to go through or pay counsel to defend himself. He did not "give" anything of "value" to ITL it would not have gotten soon from his deposition. It is undisputed that Blue Frog's counsel stated no later than July 11 that Blue Frog expected to take Moore's deposition soon and that

⁴ This, of course, is one of the places where Ms. Baxter's declaration is material, as it documents Moore's efforts to work with Blue Frog on this matter. *See* CP 147, ¶ 10.

it was expected to be a half day. CP 742, App. C. Moore's deposition and its associated time and financial costs to him were on the table. By giving a declaration, Moore simply provided – for both parties -- the same information that he would have given to both parties in deposition and to which both parties were entitled to get from him as a fact witness. Facts are facts. A party subject to a fact deposition is not entitled to hide them, nor will he or she be able to hide them.

There is no claim that Moore fabricated or created facts that were intended to hurt Blue Frog. And similar to how truth is an absolute defense to a claim of libel, because the facts Moore gave in his declaration were the truth and nothing more, there can be no straight-faced contention that they “disparaged” Blue Frog. Yes, Siegel did not like the fact Moore signed the declaration, just as Moore also believes that Siegel did not like the fact he had to agree to pay the severance when the agreement was made under threat of litigation in April, 2007. Moore is entitled to the inference on summary judgment that Siegel did not like being held accountable in April and being required to pay Moore not only his severance, but \$10,000 in attorney's fees, and that Siegel was looking for any excuse, no matter how thin, to stop that payment. Under these circumstances, there is no telling how Siegel described the circumstances

to any attorneys he may have consulted and whether they were accurate, full, and complete.

Moore's declaration, viewed from his perspective (as required on summary judgment), did not "negatively comment on, disparage, or call into question the business operations, policies, or conduct" of Blue Frog, as the Severance Agreement specified, and as Siegel argues at page 32 of the Response. Reciting the facts relating to the making of a contract between the two parties does not meet the test of the quoted language when the facts are nothing more than the truth, and a truth that prior CEO's to Siegel were aware of. *See* Opening Brief, pp. 9-10 and CP 231-34, Moore's 2008 declaration. To the extent that Siegel wants to argue that these facts should be deemed to have disparaged Blue Frog and harmed it based on *Siegel's* interpretation of the facts and their inferences, they are disputed facts and Siegel's interpretation is something he is entitled to argue to the jury at trial and get it to make the finding.

Thus, the gist of this issue is, at least for Moore, that it is a dispute of material fact because, from Moore's perspective, swearing to undisputed facts that are the truth, and which the parties have already stated they intend to get by a half-day deposition, is not "disparaging" or "harmful" to either party. It is providing the required facts more

efficiently and cheaply by sparing everyone (including Moore *and* Blue Frog) a deposition and the attendant legal costs.

D. Siegel Himself Recognized In *Moore I* That A Key Issue Is The Reasonableness Of Siegel's Belief That Moore Violated The Severance Agreement Because He Was "Aligned" With ITL And That The Reasonableness Of His Claimed Belief Is A Question Of Fact Not Susceptible To Summary Judgment. This Is Particularly True Here Where Siegel Claims His Belief There Was A Bona Fide Dispute Also Is "Reasonable" Because He Consulted With Counsel, But Never Provides Any Evidence Of What Counsel Said. Because Siegel Had Control Of And Failed To Provide That Evidence It Can Only Be Inferred That Such Evidence Would Be Unfavorable To Siegel, Making Siegel's Belief Unreasonable As A Matter Of Law.

The appendix to Moore's opening brief has excerpts from Siegel's Court of Appeals briefing in *Moore I* in which Siegel asserted the "signal issue" was the reasonableness of his belief; and that reasonableness of a person's state of mind is a fact question. *See* App. pp. A-2 to A-4.

No specifics have been given as to just what was the advice of counsel (if any) that Siegel supposedly received in the cryptic references which are contained *only* in the excerpts of Siegel's successor's CR 30(b)(6) deposition, and which are not based on his personal knowledge. *See* CP 142-144 and 587-588 (Siegel's two declarations from 2008) and CP79 (pp. 51 and 52 of the Giordani deposition). It is troubling that Siegel is resting his defense on these claimed consultations when neither of his declarations from 2008 reference any such consults, and he did not submit a declaration when he moved for summary judgment in 2011.

Siegel is baldly asking the Court to bless his exemption from statutory liability on the basis of an undocumented assertion by another person that Siegel had consulted with counsel before stopping Moore's pay, with the *unstated, undocumented assumption* that the attorneys in fact gave Siegel advice that withholding of Moore's wages would be proper.

Thus, Moore and the Court do not know if the attorney, or attorneys, actually advised Siegel **not** to withhold wages but should keep paying them because there was **not** a proper basis for that action, and that he was taking a risk in doing that; or if the attorneys deferred making any advice, saying it was not clear; or if the attorneys said they thought there might be a basis, but refrained from giving an opinion on it until they got more information. No one knows on this record.

Siegel's failure to provide any evidence of what counsel actually were told and advised, information that was (or should have been) subject to his control⁵ and certainly subject to his direct comment on some level, means the only permissible inference is that the lawyers' evidence would

⁵ Siegel has the affirmative obligation to provide such evidence to support his claim that these consultations both occurred and give him a defense. While Siegel argues that he personally does not now "control" the attorney client privilege which is owned by Blue Frog, the information he is making use of was from Blue Frog's designated speaking agent while defending Blue Frog and would have had the authority to waive the privilege if necessary to provide a defense. To the extent the privilege was not waived at the time and more detailed information proffered in order to make the defense making the assertions inadequate, Siegel must take the evidence as he found it and be subject to the presumption that had the evidence been produced by Blue Frog, it would have been unfavorable.

be unfavorable to him. *Pier 67 Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977),⁶ and cases cited therein. These principles apply equally on summary judgment. *Lynoff v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 689, 871 P.2d 146 (1994). They also apply here because Siegel had personal knowledge of these matters and could have related what he discussed with counsel and provided his personal documentation. He also could have sought and likely obtained any waivers that may have been necessary from Blue Frog. Not only did he not obtain such waivers in 2008 when both he and Blue Frog were engaged in the litigation, he also did not provide any affirmative testimony of his own. Thus, the only permissible inference under these circumstances is that any legal advice Siegel received was detrimental to his position and, thus, his defense fails.

Moreover, even if he were to claim his attorneys advised that stopping the severance was the right thing to do legally, that is not a silver bullet to the threat of personal liability. Even if Siegel claimed he was advised that, under the circumstances, he could withhold the wages, a client can skew the analysis of the attorney with the presentation of “facts”

⁶ The Court explained at 89 Wn.2d at 385-86:

We have previously held on several occasions that where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him. In so holding, we have noted, “ ‘(t)his rule is uniformly applied by the courts and is an integral part of our jurisprudence.’ ”

and circumstances submitted for analysis. The jury could find that the attorneys were not given all the proper or necessary facts by Siegel and that he did this intentionally to try and cut off the severance he still resented having to give when his hand was forced in April, 2007, and the attorneys therefore gave incorrect advice the wages could be withheld.

Where that incorrect advice is procured based on Siegel's giving incorrect or incomplete information, there cannot be a proper basis for absolving the executive. If there were, then there will always be an excuse for an executive, they will always seek "advice of counsel" and find impunity no matter what the advice is. In short, if the executive manipulates counsel to get the desired advice, that cannot excuse or immunize an executive from a wrongful withhold of wages. Rather, it reinforces why personal liability should be imposed.

This all means the case still comes down to a jury's determination of Siegel's state of mind at the time he made the decision, after it hears all the evidence. Unless this Court were to find the withheld evidence on consulting with counsel requires a presumption against Siegel that Moore is entitled to on summary judgment and which denies Siegel the potential defense, trial is required.⁷

⁷ If Moore is entitled to the presumption the attorneys' advice was adverse to Siegel's position – *i.e.*, that he did not have a proper basis to withhold the wages – then summary judgment is required -- **for Moore**. CR 56(c); *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992).

III. CONCLUSION.

In 2009, this Court reversed summary judgment in favor of Moore, rejected Siegel's request that summary judgment be entered in his favor, and remanded for trial. The new trial court's grant of summary judgment to Siegel was wrong as a matter of law, was contrary to this Court's decision in *Moore I*, and so in conflict with RAP 12.2 That ruling must be reversed and the matter remanded for trial. The only alternative is to reverse and grant summary judgment in favor of Moore on the basis that Siegel's failure to provide any evidence from the lawyers he claimed to have gotten counsel from is presumed to be unfavorable to him, denying him his defense, and making withholding of Moore's severance pay unreasonable, intentional, and actionable against Siegel personally.

Respectfully submitted this 15th day of December, 2011.

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APPENDIX C

From: Phillips, Stevan D. [SDPHILLIPS@stoel.com]
Sent: Wednesday, July 11, 2007 6:17 PM
To: Rasmussen, William
Cc: lonnier@bluefrogmedia.com
Subject: Document production

7/11/07

Dear Bill:

As I informed you on July 6, 2007 Blue Audio does not seek any additional documents other than those initially requested on June 26, 2007 and those required to be exchanged under JAMS Rule 17. In response to the specific documents requested by Blue Audio on June 26, 2007 ITL stated that it would provide objections and responses within a reasonable period. (ITL's Disclosure at 2.) As of this date we have received neither. As far as we can tell there were no documents produced in response to items 3,5,7,8, 10, 11, and 12 of my letter of June 26, 2007. There were some documents produced in response to items 4,, 6, and 9; we cannot tell if there are or should be additional documents for these items. Please produce all requested documents by July 16, 2007. As soon as all documents have been produced we would like to depose Yvette Melendez, Jeffrey Moore, Ian Eisenberg and Ron Erickson. We believe these will be no more than 1/2 day each. Please let us know your availability.

Very truly yours,

Stevan D. Phillips

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