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Court of Appeals
Division III
State of Washington
4/5/2019 12:13 PM

No. 363163

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

EAKIN ENTERPRISES, Inc., a Washington Corporation; JOHN W.
EAKIN, a single person,

Appellants,

vs.

STRATTON BALLEW, PLLC, a Washington Professional Limited
Liability Company; SVENDSEN LEGAL, LLC, a Washington Limited
Liability Company; CHRIS E. SVENDSEN and "JANE DOE"
SVENDSEN, husband and wife, and the marital community composed
thereof; STRATTON LAW & MEDIATION, P.S., a Washington
Professional Services Corporation; REX B. STRATTON and "JANE
DOE" STRATTON, husband and wife and the marital community
composed thereof; PATRICK H. BALLEW, a single person,

Respondents.

REPLY BRIEF OF APPELLANTS

Vernon W. Harkins, WSBA #6689
Michael J. Fisher WSBA #32778
RUSH HANNULA
HARKINS & KYLER, LLP
4701 South 19th Street, Suite 300
Tacoma, WA 98405
253-383-5388
Attorneys for Appellants

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I. INTRODUCTION

Despite the Respondent' efforts to portray this matter as extremely complex and convoluted, in reality the issues before this Court are relatively simple and straight forward.

In August of 2006 Eakin had an invention (cattle footbath system) that he wanted to patent. Eakin contacted a patent lawyer (Svendsen) in August of 2006 about obtaining a patent for his invention. The patent lawyer (Svendsen) advised Eakin in August of 2006 that he had no conflicts and that he could assist Eakin in obtaining the patent that Eakin wanted for his invention. At that point both the client (Eakin) and the patent lawyer (Svendsen) agree that Eakin reasonably believed that an attorney-client relationship had been established. The only issue left unresolved in August of 2006 was the timing of when the paperwork for the patent would be completed and filed.

The timing of the formation of the attorney-client relationship between Eakin and Svendsen is the critical central inquiry in this case. If the attorney-client relationship began in August of 2006, then the **second prototype** of the cattle footbath was patentable at that point. If the attorney-client relationship did not begin until October of 2007, then the **second prototype** of the cattle footbath was not patentable at that time.

In granting the defendants' motion for summary judgment, the trial court concluded that an attorney-client relationship did not begin between Eakin and Svendsen prior to October of 2007. In order to reach this decision the trial court improperly weighed evidence, resolved factual disputes and excluded evidence in order to find there were no genuine issues of material fact in dispute.

Appellants' position is that there are clearly genuine issues of material fact in dispute regarding the timing of the formation of an attorney-client relationship which should have precluded summary judgment and the trial court's order granting summary judgment should be reversed.

II. ARGUMENT IN REPLY

A. RESPONDENTS' MOTION FOR REMAND SHOULD BE DENIED.

"CR 54(b) makes an immediate appeal available in situations in which it could be unjust to delay entering a judgment on a distinctly separate claim until the entire case has been finally adjudicated." *Nelbro Packing v. Baypack Fisheries*, 101 Wn. App. 517, 522, 6 P.3d 22 (2000). "The rule was copied from the federal rule and the two rules are essentially the same." *Id.* "Thus, federal cases construing the rule are

persuasive, though not binding. *Id.* The following requirements apply to motions for a CR 54(b) certification:

Thus, four things are required for entry of a final judgment under CR 54(b). There must be: (1) more than one claim for relief or more than one party against whom relief is sought; (2) an express determination that there is no just reason for delay; (3) written findings supporting the determination that there is no just reason for delay; and (4) an express direction for entry of the judgment.

Nelbro Packing, 101 Wn. App. at 523.

1. **The Trial Court Properly Applied the Four Factor Test in Granting Plaintiffs' Motion for a CR 54(b) Certification.**

Respondents' motion for remand is almost entirely based upon the argument that Plaintiffs have not asserted more than one separate claim for relief. In support of this argument the Respondents cite to the following from the *Nelbro Packing* case:

When adjudicated and pending claims are closely related and stem from essentially the same factual allegations, judicial economy generally is best served by delaying the appeal until all the issues can be considered by the appellate court in a unified package.

Nelbro Packing, 101 Wn. App. at 526.

The *Nelbro Packing* court analyzed various methods or tests to determine if a claimant has asserted more than one claim:

According to Wright, Miller, and Kane, "there is no generally accepted test that is used to determine whether more than one claim for relief is before the court." The United States Supreme Court has indicated that a claim need not be entirely distinct from

all other claims in the action and arise from a different occurrence or transaction to be considered a separate claim for Rule 54(b) purposes. But one commentator argues that courts of appeals continue to rely on a "transaction" or "pragmatic" theory, thus conserving appellate court effort by avoiding review of the same evidence in more than one appeal.

Several courts have adopted a test enunciated by the Second Circuit to determine whether more than one claim for relief is before the court: "The ultimate determination of multiplicity of claims must rest in every case on whether the underlying factual bases for recovery state a number of different claims which could have been separately enforced." Thus, when the facts give rise to more than one legal right or cause of action, or there is more than one possible form of recovery and they are not mutually exclusive, the claimant has presented multiple claims for relief.

Nelbro Packing, 101 Wn. App. at 523-24 (citations omitted).

In the present case the underlying factual bases asserted by Eakin state a number of separate claims, which could have been separately enforced, and also give rise to more than one legal right or cause of action, and thus are not mutually exclusive. Specifically, plaintiffs asserted causes of action for negligence related to the patentability of the **second prototype** footbath; negligence related to the filing and prosecution of the patent infringement lawsuit and negligence related to the patentability of the **third prototype** footbath. While these claims share the same factual bases to a certain extent, they remain separate claims each of which could have been independently brought.

The trial court on summary judgment dismissed most of plaintiff's claims for damages relating to errors alleged to have been made in failing to timely file an application for the plaintiff's **second prototype** of his footbath invention, and further errors in filing and prosecuting a patent infringement lawsuit when defendants should have known plaintiff did not have a patentable invention. The court denied defendants' summary judgment on the arguments of negligence in failing to file a patent for the **third prototype** of plaintiff's invention and left that claim for damages for trial.

The remaining claims which were not dismissed on summary judgment relate solely to arguments or negligence of the obligation to patent the **third prototype** of plaintiff's invention. However, the damages related to this claim are much more limited than those relating to the claims regarding the **second prototype** and fail to deal at all with damages associated with the prosecution of a doomed patent infringement lawsuit.

Though not referenced in Respondents' brief, the citation above to case law from Page 526 of the *Nelbro Packing* case actually comes from the case of *Solomon v. Aetna Life Ins. Co.*, 782 F.2d 58 (6th Cir. 1986). In *Solomon*, the Court stated as follows:

We acknowledge that the district court's decision to certify a claim for immediate appeal under Rule 54(b) merits substantial deference. *Curtiss-Wright Corp. v. General Electric*,

446 U.S. 1, 12, 64 L. Ed. 2d 1, 100 S. Ct. 1460 (1979). That deference, however, rests on the assumption that the district court undertook to weigh and examine the competing factors involved in the certificate decision. *Id.*, 446 U.S. at 10. Certainly a proper exercise of discretion under Rule 54(b) requires the district court to do more than just recite the 54(b) formula of "no just reason for delay." The Court in *Protective Committee v. Anderson*, 390 U.S. 414, 434, 20 L. Ed. 2d 1, 88 S. Ct. 1157 (1968), provided:

It is essential . . . that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the fact or analysis of the law

The guiding principles of *Panichella, supra*, and *Protective Committee, supra*, have been uniformly followed. As the Second Circuit noted in *Schwartz v. Compagnie General Transatlantique*, 405 F.2d 270, 275 (2d Cir. 1968):

The trial court [should] marshal the competing considerations and state the ones considered to be most important . . . [when making a Rule 54(b) certification] *Accord, Gumer v. Shearson, Hammell & Co., Inc.*, 516 F.2d 283 (2d Cir. 1974). It would be helpful to us in reviewing the exercise of discretion in granting a Rule 54(b) certificate if the [district] court . . . would make a brief reasoned statement in support of its determination that, 'there is no just reason for delay' and its express direction for 'the entry of a final judgment as to one or more but fewer than all of the claims or parties' *See also Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360, 364 (3d Cir. 1975), (citing *Wright & Miller, Federal Practice and Procedure: Civil* § 2659 (1973)).

Solomon, 782 F.2d at 60 (emphasis added).

The guidance provided by the *Solomon* case is that in reviewing a trial court's certification of a final order under CR 54(b), there must be a

record of the basis and reasoning used by the trial judge in exercising his or her discretion. The appellate court's "review becomes a determination of whether the district court provided reasons for exercising its discretion. If no reasons were given then [the appellate court] cannot tell if there has been an abuse of discretion." *Id.* at 61.

In *Solomon*, the court found "in this case, no independent analysis of the competing factors, relevant to CR 54(b) certification was made." *Solomon*, 782 F.2d at 61. In *Nelbro Packing*, the court found "the written findings do not reflect whether the trial judge considered how certifying the judgments as final might complicate the case. The trial court's CR 54(b) order also does not indicate whether the court considered if the need for review might be mooted by future developments in the trial court. . . without consideration of all the relevant factors, the reasons the court gave for granting CR 54(b) certification do not support the decision and were untenable." *Nelbro Packing*, 101 Wn. App. at 531-533.

In both the *Solomon* case and the *Nelbro Packing* case cited by Respondents, the trial court failed to create a proper record of the bases for the CR 54(b) certification for the appellate court to review, resulting in the need to remand those cases back to the trial court.

At the hearing on Appellants motion to certify under CR 54(b), the trial court made the following findings regarding the four elements required for a CR 54(b) certification:

First of all, the relationship between the adjudicated and unadjudicated claims. They are closely related to the extent that there are background facts necessary for the adjudication of the third prototype issue, but they are separate facts with regard to the adjudication of the second prototype. So they're related but a lot of it is background information that would be helpful to the trier of fact to understand what occurred in adjudicating the third prototype issue. So that's kind of a mixed bag, but there are, there is a relationship but they're separable, as far as this Court's concerned.

RP 120-121.

The second factor is the question, is whether questions which would be reviewed on appeal are still before the Trial Court for determination in the unadjudicated portion of the case, and this is really, I'm satisfied with the argument that I've heard. I understand that there wasn't more than basically a cursory statement with regard to that, as far as the plaintiffs' briefing. However, I tend to agree that the point is rather obvious, that the question on appeal would be pretty much when the attorney/client relationship was established and whether or not there was a material issue of fact as to that, and when I exercised my judgment on that particular issue, I didn't find the inferences that I was being asked to be reasonable inferences and the issue itself or the issues themselves are fairly simple issues; the subject matter is rather complex, and I think that's where we bog down sometimes, but I think that I agree with the plaintiff that the questions on appeal are fairly simple and they are separate.

RP 121.

With regard to the third issue, whether it is likely that the need for review may be mooted by future developments in the Trial Court, I tend to disagree with the defense. I don't think that even if the

factfinder were to find in favor of the plaintiffs that the relief would be the same as if all of the claims were brought before the Court, and I understand that that supposes some facts or speculates a little bit, but I think that there, it may be, it could be moot but, on the other hand, there are a lot of other issues, particularly the issue of, as the plaintiff makes in context, the essence of their complaint or the essence of their claim is essentially gone, which is the significant damage portion and it is significantly different than the issues on the third prototype.

RP 122.

With regard to the fourth factor, whether an immediate appeal will delay the adjudicated matters without gaining any offsetting advantage in terms of the simplification and facilitation of trial and the practical effects of allowing an immediate appeal, obviously the practical effect of allowing an immediate appeal would be to essentially stay the proceedings at this level and to cause delay. The question is not so much the delay or the effect of the stay as much as it is the offsetting advantage, in terms of simplification and facilitation of a trial, and my finding on that is that yes, it would cause delay and yes, it would cause a stay, but overall if it were to be determined at the appellate level that this Court was wrong with regard to the summary judgment, it is in the benefit of not only the parties but also the Court that there would be a simplification and facilitation at the trial level of all issues before the Court, and that would be a benefit and offsetting advantage as far as this Court's concerned with regard to the ultimate resolution of this case, and for those reasons I am going to ask that we talk about the written findings that are necessary.

RP 122-123.

I do make a finding that there is no just reason for delay and will enter a written finding supporting that determination and make an express direction for entry of judgment under CR 54(b), which I think is an extraordinary relief under the circumstances, but it is my, within my right to make that discretionary, those discretionary findings in that ruling, and so to that extent, the motion is granted.

In the present case the trial court did create a proper record of the bases for the CR 54(b) certification, both on the record at the time of the hearing as well as in the Findings of Fact and Conclusions of Law filed in conjunction with the CR 54(b) certification. The Respondents' motion for remand should be denied.

2. Respondents' Assault on the Findings and Conclusions Fails to Comply with the Rules on Appeal.

Respondents motion to remand is nothing more than a back door attempt to challenge the findings and conclusions entered by the trial court. Any argument that the Respondents may have regarding the Findings of Fact and Conclusions of Law entered by the Trial Court have been waived by their failure to file a cross-appeal contesting the findings and conclusions.

Even if the Respondents' had appropriately filed a cross-appeal they have failed to comply with the requirements of RAP 10.3(g), which requires specific assignments of error for each finding or conclusion contested. A party must assign error to a finding of fact for it to be considered on review. *See, Eggert v. Vincent*, 44 Wn. App. 851, 854, 723 P.2d 527 (1986). Consequently, the trial court's findings are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Moreover, RAP 10.3(g) provides in relevant part:

A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

State v. Goodman, 150 Wn.2d 774, 781-782, 83 P.3d 410 (2004).

The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of review **only if** (1) the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case. RAP 2.4(a) (emphasis added). RAP 2.5 rejects raising an issue for the first time on appeal.

Respondents' argument is simply a back door attempt to appeal what they now perceive as an error by the Trial Court, contrary to the Rules of Appellate Procedure and Respondents' motion to remand should be denied.

B. FORMATION OF AN ATTORNEY-CLIENT RELATIONSHIP.

Case law is clear that the existence of an attorney-client relationship "turns largely on the client's subjective belief that it exists." *In re Disciplinary Proceeding Against Egger*, 152 Wash. 2d 393, 410-11, 98 P.3d 477 (2004). The caveat is that the client's belief must be "reasonable." *Id.*

At his deposition Svendsen himself admitted that Eakin likely had a reasonable subjective belief that an attorney-client relationship existed as of the fall of 2006:

Page 46 Line 12 through Line 19:

Q Let me ask it a different way. When do you believe the attorney-client relationship began for the effort to get a patent for the cattle foot-bath system?

A **I -- I would -- I would say that that would have been in the mind of John Eakin and -- and is a big part of that. And I'm -- I'm sure he considered this in the fall here of 2006. That that -- that relationship was -- a formal relationship had started.**

CP 274.

Respondents' argue in their brief that Appellants contend that because of this testimony, Svendsen has admitted that an attorney-client relationship was formed in August of 2006. This is not accurate. The relevance and significance of this testimony by Svendsen goes to the ultimate question that must be resolved in this lawsuit, i.e, are there genuine issues of material fact in dispute regarding whether Eakin had a reasonable belief that an attorney-client relationship existed with Svendsen in August of 2006. In conducting that inquiry for purposes of summary judgment all facts and inferences from the facts must be construed in favor of the Plaintiffs as the non-moving party. Therefore, the fact that defendant Svendsen himself testified that Eakin likely believed that an attorney-client relationship existed beginning in August of 2006 is not

only relevant, it is significant because it creates an issue of fact on that issue which should have precluded summary judgment.

1. There are Genuine Issues of Material Fact in Dispute Regarding the Timing of the Attorney-Client Relationship Between Eakin and Svendsen.

Respondents go to great lengths to argue that the initial contact between Eakin and Svendsen was nothing more than a screening interview, and thus no formal attorney-client relationship was formed. Again, the question before this Court is whether there were genuine issues of material fact in dispute on this issue which should have precluded summary judgment. Respondents' position on this issue is undermined by the very evidence cited in Respondents' Brief. Beginning at Page 14 of Respondents' Brief they include excerpts of the deposition testimony of Svendsen¹ in which Svendsen acknowledges the attorney-client relationship started in August of 2006.

Q So do you believe you started the process of working on getting a patent in August of 2006?

A No, I think it was -- it just opened the door so that we could -- we could discuss in -- in -- for the purpose of -- of obtaining a patent certainly.

Respondents would have the Court focus on the first word of Svendsen's answer to the question about whether the process of obtaining

¹ The excerpted deposition testimony can be found at CP 273-274 (deposition of Svendsen, Page 45, Line 1 through Page 46, Line 19).

a patent started in August of 2006, in which Svendsen says “no.”

However, a close reading of the entire answer to the question reveals that the process of obtaining a patent did, in fact, start in August of 2006.

Svendsen’s answer, read in totality, says that the telephone call in August of 2006 opened the door for the purpose of obtaining a patent certainly.

Q Do you know how long after August 2nd of 2006 you would have actually met with Mr. Eakin to go through the details?

A You know, I'm sure I met with him socially many times after that -- or several times at least after that. What the -- the process to start the patent can be considered as when you first are given a general disclosure or general description of the idea from the client. When you actually get down to making diagrams, typing up the detail description, et cetera, that -- that didn't take place as I recall until -- until the fall of 2007.

In answer to this question Svendsen again confirms that the process of obtaining a patent, the specific reason for which Eakin contacted a patent lawyer (Svendsen), began in August of 2006. Svendsen testified that **“the process to start the patent can be considered as when you are first given a general disclosure or general description of the idea from the client.”** During the initial contact with Eakin in August of 2006, Svendsen was given a general disclosure and description of the cattle footbath system that Eakin wanted to patent. Thus the process, and hence the attorney-client relationship, began in August of 2006. After the conflict check was done, Svendsen agreed he would represent Eakin in

getting a patent. He told Eakin to let him know when he was ready to file as Eakin was still tinkering with his invention.

Svensden goes on to testify that actually “making diagrams, typing up the detail description, etc.” didn’t take place until fall of 2007. This work is not done at the beginning of the relationship, it is done later in the process of obtaining a patent. In his mind Svensden is clearly noting a distinction between the start of the attorney-client relationship (i.e. when he is provided the initial description of the invention) and the point at which the formal patent documents are prepared for filing.

Q So when do you believe you were officially retained to obtain a patent on behalf of -- or a patent for this cattle foot-bath system?

A Well, retainer, I -- I seldom charge retainers. My -- my relationships with my clients generally begin with the -- with the understanding that they've contacted me and I'm going to be helping them in a -- in a -- in a certain project. What -- the -- as I recall it would have been in the fall of 2007 that there would have been a formal -- more formal, Okay, we're going to file this and it's going to cost this amount. And we're going to -- and we're going to go forward with it.

In answer to this question Svensden once again confirms that the attorney-client relationship began in August of 2006. He clearly testified that **“my relationship with my clients generally begin with the understanding that they’ve contacted me and I’m going to be helping them in a certain project.”** During the initial contact in August of 2006, Svensden was contacted by Eakin about obtaining a patent and Svensden

advised Eakin he had no conflicts and would represent Eakin in obtaining a patent.

In the second portion of his answer Svendsen testified “as I recall it would have been in the fall of 2007 that there would have been a formal, more formal, okay we are going to file this. . . we’re going forward with it.” Here Svendsen once again confirms there is a distinction between the formation of the attorney-client relationship (i.e. an agreement to represent) to obtain a patent at the beginning of the process, and the subsequent preparation of the formal patent documents for filing later on in the process.

Significantly, it is critical that this Court keep in mind that the issue to be decided on this appeal is not when the attorney-client relationship was formed, but whether or not there are genuine issues of fact on this issue that are in dispute and must be decided by the jury, which would preclude summary judgment. In deciding that issue, all facts and reasonable inferences therefrom must be construed in favor of the Plaintiffs, as the non-moving party on summary judgment. When the excerpts of Svendsen’s deposition testimony quoted above are construed in favor of the Plaintiffs, there are clearly genuine issues of material fact which should have precluded summary judgment.

2. **The Opinions and Conclusions of Expert Mark Lorbiecki were Sufficient to Create a Genuine Issue of Material Fact Regarding the Timing of the Attorney-Client Relationship.**

Respondents argue that Appellants' claim that the trial court failed to consider the opinions and issues of fact created by expert Mark Lorbiecki is patently false. Respondents' Brief, Pg. 40. Respondents then go on to acknowledge that Appellants' claims were not patently false by arguing that "the trial court **rejected** Mr. Lorbiecki's contentions about when the attorney-client relationship was formed because he had no firsthand knowledge and was offering only speculation." Respondents' Brief, Pg. 41 (emphasis added). Respondents cannot have it both ways.

As an initial matter, an expert witness rarely, if ever, has firsthand knowledge of the issues in a case. If the standard for expert witness testimony required firsthand knowledge, no expert witness would ever be permitted to offer opinion and conclusion testimony. This is not the law in Washington.

Secondly, as set forth in Appellants' Brief, Pg. 34-35, Washington law does not permit the trial court to resolve issues of expert witness credibility on summary judgment.

Issues of credibility, including the credibility of experts, may not be resolved at summary judgment. *Herron v. King Broadcasting Co.*, 112

Wn.2d 762, 768-69, 776 P.2d 98 (1989). "Because weighing of evidence, balancing of competing expert credibility, and resolution of conflicting material facts are not appropriate on summary judgment, a trial is necessary to resolve these matters." *Larson v. Nelson*, 118 Wn. App. 797, 810 (footnote 17), 77 P.3d 671 (2003). **The evidence of the non-moving party must be believed at summary judgment.** *Id.* (emphasis added) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505 (1986)).

The opinions and conclusions offered by Mr. Lorbiecki, a patent lawyer with over 30-years experience in patent law, were not based upon speculation. ER 703 allows an expert witness to base an opinion or an inference upon facts or data "perceived or made known to the expert at or before the hearing." Further, the facts or data need not be admissible in evidence so long as they are of a type "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." The proponent must show that persons in the expert's profession, in general, reasonably rely upon such material in the practice of their own profession. *State v. Nation*, 110 Wn. App. 651, 41 P.3d 1204 (2002). It has long been the rule in Washington that expert witnesses can even rely on hearsay in forming their opinions. In *Le Van v. Dep't. of Labor & Indust*, 18 Wn. App. 13, 16, 566 P.2d 573 (1977), the court held that an

“expert may state his opinion upon the basis of his personal knowledge plus the testimony he has heard.” (Citation omitted.) In *Thornton v. Annest*, 19 Wn. App. 174, 181, 574 P.2d 199 (1978), the court held as follows regarding expert testimony:

Testimony concerning these statements was objected to on grounds they were hearsay statements. We find no merit in the challenge to this evidenced. The statements were allowed not to prove their truth, but to form a part of the basis for this opinion. As such they were not hearsay, but proper as a foundation for his opinion.

(Citation omitted).

Reasonable reliance need not be established by independent evidence. The proponent may establish the necessary foundation by the expert’s own testimony. *Peteet v. Dow Chemical Co.*, 868 F.2d 1428 (5th Cir. 1989) (in assessing the sufficiency of the basis of an expert’s opinion under ER 703, “the trial court should defer to the expert’s opinion of what data they find reasonably reliable”). This determination is not left to the jury to determine. *O’Conner v. Commonwealth Edison Co.*, 807 F.Supp. 1376 (C.D. Ill. 1992).

ER 704 consists of only one sentence, stating: “Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” Thus a witness may testify that the defendant in a civil case was or was

not responsible for the plaintiff's injuries. This point is illustrated by numerous Washington appellate cases.

For purposes of summary judgment the trial court was not permitted to make credibility determinations and factual findings. That is the role of the jury at trial. By "rejecting" the issues of fact regarding the formation of the attorney-client relationship created by Mr. Lorbiecki's declaration for purposes of summary judgment the trial court erred.

3. Svendsen owed Duties and Obligations to Eakin even if Eakin was only a Prospective Client in August of 2006.

Respondents attempt to extend the argument that Svendsen owed no duties to Eakin following the initial contact in August of 2006 to the breaking point by claiming that, in the absence of a formal attorney-client relationship, no legal malpractice (or other actionable wrong) could occur following an initial consultation between an attorney and a prospective client. This is not accurate.

As set forth above and in Appellants' original Brief, the Respondents' attempt to characterize the initial contact between Eakin and Svendsen in August of 2006 as nothing more than a conflict check is contrary to the evidence before the Court. Respondents' argue that Eakin did not provide any "confidential information" to Svendsen and did not seek "any advice or assistance" from Svendsen. Respondents' Brief, Pg.

46. Further, Respondents' argument regarding a mere "conflict check" fails in the context of summary judgment, where all inferences are to be taken in favor of the Plaintiffs as the non-moving party.

Svendsen's own testimony, discussed in Section B above, clearly establishes that Eakin contacted him in August of 2006 to seek advice and assistance (i.e. find a patent lawyer to represent him) in obtaining a patent for this cattle footbath invention. In conjunction with this initial contact in August of 2006, Svendsen created a **Client** Information Form identifying Eakin as a client in the law firm's system, stating there were no conflicts and that Svendsen would represent Eakin in obtaining a patent. CP 192, 395, 561.

Moreover, the very reason that Eakin contacted Svendsen was to discuss confidential information (i.e., the cattle footbath system) that Eakin wanted to patent. If Respondents' argument above were accepted, and no duties or obligations whatsoever arose at the time Svendsen initially spoke with Eakin in August of 2006, then Svendsen would have been free to disclose the details of Eakin's cattle footbath system, and his desire to patent it, to others. However, we know that this would not be permitted under Washington law because there are duties and obligations that arise even following an initial consultation by an attorney with a prospective client.

For example, RPC 1.18 prohibits lawyers who have discussions with prospective clients from using or revealing information learned in the consultation:

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client or except as provided in paragraph (e).

In addition:

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter...

As Comment 3 to RPC 1.18 explains, Svendsen was prohibited from "using or revealing the information" he learned from Eakin "regardless of how brief their initial conference" might be. In other words, legal malpractice and other actionable wrongs can be committed by an attorney even following a very brief consultation with even a prospective client.

Cases from other jurisdictions certainly support Appellants' position in this regard. *See, Factory Mutual Ins. Co. v. Apcompower, Inc.*, 662 F.Supp.2d 896 (W.D.Mich. 2009) (Where a potential client consults with an attorney, the consultation establishes a relationship "akin to that of an attorney and existing client," in which the attorney is "bound by

the attorney-client privilege and the duty of confidentiality..."); *O Builders & Associates, Inc.*, 206 N.J. 109, 19 A.3d 966 (New Jersey, 2011) ("Plain language" of RCP 1.18 compels disqualification of a lawyer who has been consulted by a former prospective client where the matter is related and the information is harmful to the former prospective client); *Zalewski v. Shelroc Homes, LLC*, 856 F.Supp.2d 426 (N.D.New York, 2012) (disqualifying attorney based upon motion brought by former prospective client, and adverse party in litigation); *Sturdivant v. Sturdivant*, 367 Ark. 514, 241 S.W.3d 740 (Ark., 2006) ("...the duty [the lawyer] owed...a prospective client under Rule 1.18(b) would be coextensive with the duty an attorney owes to a former client under Rule 1.9(c)...regardless of how brief the initial conference may have been and regardless of the fact that no client-attorney relationship ensued").

Since Eakin shared information with Svendsen regarding his cattle footbath system and his desire to patent it, Svendsen could not thereafter represent clients whose interests were adverse to Eakin regarding that invention. Svendsen had an ethical obligation not to represent parties adverse to Eakin after he had obtained confidences from Eakin regarding the cattle footbath invention which could conceivably be used against Eakin.

One can only imagine the mischief that is possible by attorneys interviewing "prospective clients" and then recruiting or representing parties making claims against them. This is especially true in the field of patent law where patent lawyers routinely learn of a new inventions from prospective clients.

As attorneys we are guided by the following maxims:

Each lawyer must find within his or her own conscience the touchstone against which to test the extent to which his or her actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of the legal profession and the society which the lawyer serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principals, the law will continue to be a noble profession. This is its greatness and its strength, which permit no compromise.

Washington *Rules of Professional Conduct* (amended 2006),"Fundamental Principals of Professional Conduct."

The rules that govern the conduct of lawyers are designed to protect both the public and the integrity of the profession of practicing law. *See, e.g., Hizey v. Carpenter*, 119 Wn.2d 251, 263, 830 P.2d 646 (1992). John Eakin is as deserving of the protection of these rules as any client and he respectfully requests that this Court reverse the Trial Court and grant this appeal.

III. CONCLUSION

For purposes of this Appeal, the question before the Court is, after taking all the evidence and inferences therefrom in favor of the Plaintiffs, whether or not there were genuine issues of material fact in dispute which should have precluded summary judgment. Appellants submit that when all of the evidence and inferences therefrom are taken are construed in favor of the Plaintiffs/Appellants, there are genuine issues of material fact regarding whether or not an attorney-client relationship was formed between Eakin and Svendsen in August of 2006 which should have precluded summary judgment.

Appellants respectfully request that this Court reverse the summary judgment granted by the trial court and remand this case for trial.

Respectfully submitted this 5th day of April, 2019.

RUSH, HANNULA, HARKINS & KYLER, LLP
Attorneys for Petitioner



Vernon W. Harkins, WSBA #6689



Michael J. Fisher, WSBA #32778

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2019, I electronically filed the Reply Brief of Appellants with the Clerk of the Court using the Washington State Courts' Portal, which in turn automatically generated a notice of electronic filing to the parties in the case who are registered users of the system:

James Berg
Larson Berg & Perkins PLLC
105 North 3rd Street
Yakima, WA 98901
jsberg@lbplaw.com

Ms. Helga Kahr
6007 Palatine Ave No
Seattle, WA, 98103-5350
orcawild@aol.com

Rex B. Stratton
Lynch & Foley, P.C.
7 Washington Street
Middlebury, VT 05753
rstratton@lynchandfoley.com



Cathy Valnes, Paralegal
Rush, Hannula, Harkins & Kyler, LLP

RUSH HANNULA HARKINS AND KYLER, LLP

April 05, 2019 - 12:13 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36316-3
Appellate Court Case Title: Eakin Enterprises, Inc., et al v. Stratton Ballew, PLLC, et al
Superior Court Case Number: 15-2-02682-7

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Address:
4701 S 19TH ST STE 300
TACOMA, WA, 98405-1199
Phone: 253-383-5388

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