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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.

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

This is an appeal from an order granting summary judgment dismissing various claims of plaintiffs Eakin Enterprises, Inc., and John Eakin (hereafter “Eakin”). Eakin asserted claims of attorney malpractice against Chris Svendsen and various law firms and lawyers with which he was associated (hereafter “Svendsen”). Eakin claimed that Svendsen, a patent lawyer, violated the standard of care when he failed to advise Eakin that, in order to protect a system Eakin had invented to sterilize the feet of dairy cattle, Eakin needed to file a patent application within a year of publicly displaying the system.

On appeal, Eakin contends that in granting summary judgment, the trial court improperly weighed evidence and resolved factual disputes, and improperly excluded evidence to conclude that Eakin and Svendsen did not have an attorney client relationship until after his invention became unpatentable. Eakin asks this court to reverse the trial court’s order granting summary judgment, and remand the case to the trial court.

II. ASSIGNMENTS OF ERROR

The trial court erred by:

1. Considering the issue of whether attorney-client relationship did not exist prior to October of 2007 which was not properly before the trial court since Svendsen did not raise that issue until his reply brief.

2. Making a factual finding on summary judgment that an attorney-client relationship between Eakin and Svendsen was not created until October of 2007.
3. Striking and disregarding the Declaration of John W. Eakin and Plaintiff's Supplemental Memorandum submitted in opposition to summary judgment.
4. Failing to find a genuine issue of material fact was created by the Declaration of Eakin's expert Mark Lorbiecki.
5. Denying Eakin's motion for reconsideration of the trial court's rulings on summary judgment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The following issues pertain to Eakin's assignments of error:

1. Whether the trial court erred and/or abused its discretion in the context of summary judgment by failing to acknowledge that Eakin's expert witness, patent attorney Mark Lorbiecki, opined in his declaration that an attorney-client relationship existed between Eakin and Svendsen in August of 2006, thereby creating a genuine issue of material fact on that issue.
2. Whether the trial court erred and/or abused its discretion in making a factual finding on summary judgment regarding when an attorney-client relationship was formed between Eakin and Svendsen when genuine disputed issues of material fact existed regarding that issue.
3. In deciding when an attorney-client relationship existed between Eakin and Svendsen, must the trial court consider all of the facts in the record, including whether the purported client subjectively and reasonably believed himself to be a client, including the failure of the trial court to consider the Declaration of John Eakin and Plaintiff's Supplemental Memorandum in Opposition to Summary Judgment.

4. Whether the trial court erred and/or abused its discretion in the context of summary judgment by failing to acknowledge that Eakin's expert witness, patent attorney Mark Lorbiecki, opined in his declaration that the second prototype of Eakin's cattle foot-bath system was patentable prior to November of 2007, thereby creating a genuine issue of material fact on that issue.
5. Whether the trial court improperly weighed evidence, judged the credibility of witnesses and made factual findings regarding disputed issues of material fact.

IV. STATEMENT OF THE CASE

Starting in 2004, Eakin invented the first of three different prototypes of a footbath system designed to clean and sterilize the feet of dairy cattle prior to milking. CP 186. The footbath system works by applying a concentration of formaldehyde into a basin through which the cows would walk, thus washing their feet with the formaldehyde solution. CP 187. The original conception of the footbath was not successful because it allowed an undiluted concentration of formaldehyde to flow from the large bulk tank ("tote") into the basin and because the footbath system allowed dairy farm workers to be splashed with undiluted formaldehyde. CP 186-187. Eakin displayed this **first prototype** of the footbath at the 2005 Dairymen's Show in November of 2005. CP 187.

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Eakin and Svendsen first met each other socially in approximately 2005. CP 549. Both Eakin and Svendsen were mutual friends with an attorney named Wes Gano. CP 549. In late summer of 2006, Eakin spoke with attorney Wes Gano about obtaining a patent on the cattle footbath system. CP 241. Mr. Gano referred Eakin to patent attorney Svendsen. CP 549.

On August 2, 2006, Eakin met with Svendsen for a screening interview. CP 553-554. On the screening interview document prepared by patent attorney Svendsen, it states Eakin was seeking information on obtaining a patent and Svendsen identified Eakin's need for patent protection for "Hoof Sanitization System and Formulation for a Cattle Milking/Feeding Station." CP 192, 395. Svendsen used the screening interview document to conduct a check for conflicts in his representation of Eakin. CP 192, 395, 553. On the screening interview document Svendsen hand wrote in "EA12.P01" next to Eakin's name. CP 395. On the Client Information form created on August 10, 2006, Svendsen noted the following file information:

Client Name:	John Eakin
Client No.:	EA12
Matter No.:	P01
File Type:	Patent
Matter Description:	Method for dispensing Bateria Cyde

CP 561.

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.

Eakin subsequently developed a **second prototype** of the footbath system which had a metering apparatus that could measure a precise amount of formaldehyde for dilution in the basin of the footbath. CP 187. The check valve in the **second prototype** worked by venting formaldehyde fumes into the atmosphere. CP 187. Formaldehyde is quite volatile and noxious and the fumes can be harmful even in small quantities. CP 187.

Eakin installed a version of the **second prototype** footbath for use at the Sunridge Dairy in Nampa, Idaho in the summer of 2006. CP 85-86. Eakin also displayed the **second prototype** of the footbath at the 2006

Dairymen's Show which ran November 11-13, 2006 approximately two months after his initial meeting with Svendsen. CP 187, 196. At the 2006 Dairymen's Show a retired OSHA inspector suggested capturing the formaldehyde fumes in some manner. CP 187.

Based upon the suggestion from the retired OSHA inspector, Eakin subsequently developed a **third prototype** of the footbath system which included a return valve and closed circuit that captured the formaldehyde fumes and routed them back into the tote rather than allowing the fumes to escape to the atmosphere. CP 187-188. Eakin described the changes to the **third prototype** footbath as a nonexposure system as a breakthrough which "changed everything." CP 188.

On December 7, 2006, Eakin faxed Svendsen a three page letter. CP 188, 249. It is Eakin's position that this three page letter was to inform Svendsen that Eakin had developed a **third prototype** which included a return system for capturing the formaldehyde fumes. CP 188. However, Eakin does not specifically remember the precise content of the three page letter. CP 249.

Svendsen left his employment with Patrick Ballew's law firm in April of 2009 and opened his own practice as Svendsen Legal, LLC. CP 81. Upon Svendsen leaving Mr. Ballew immediately changed the locks on the doors and prohibited Svendsen from accessing any records or

computers. CP 551. Unfortunately the three page letter of December 7, 2006, along with other documents and pieces of evidence were not produced herein because they were destroyed by defendant attorney Patrick Ballew, including smashing computer hard drives with a hammer. CP 551, 553.

After experimenting with multiple sized hoses and pipes, in May of 2007 Eakin perfected the **third prototype** of the footbath system. CP 188. By October 23, 2007, Eakin supplied Svendsen with drawings for the perfected **third prototype** to be used in the patent filing. CP 188-189.

The patent laws provide the inventor a one-year grace period in which to file a patent application after an invention is displayed to the public or installed for use. CP 192. Since the **second prototype** footbath was installed and used at the Sunridge Dairy in the summer of 2006, the one-year grace period gave Eakin until the summer of 2007 to file a patent application to protect the **second prototype** footbath. CP 192. Had a patent application been filed shortly after the initial meeting between Eakin and Svendsen in August of 2006, the one-year grace period would extend backward one-year to August of 2005 and would have also protected **first prototype** of the footbath which had been displayed at the 2005 Dairymen's Show in November of 2005. CP 192.

Svendsen did not file for a provisional application for a patent until

November 21, 2007. CP 84, 189. The provisional application filed by Svendsen described the **second prototype** footbath, but failed to describe the **third prototype** footbath with the return valve and closed circuit to capture the formaldehyde fumes. CP 189.

V. PROCEDURAL HISTORY

In or about 2011, Eakin discovered that a competitor, Specialty Sales, LLC, was engaged in the manufacture and sale of a cattle footbath system in violation of his patent. CP 401. Svendsen advised Eakin to pursue a lawsuit against Specialty Sales for patent infringement. CP 402. On September 23, 2011, a patent infringement lawsuit was filed on behalf of Eakin against Specialty Sales. CP 402. During the patent infringement lawsuit Svendsen advised Eakin that he did not have a valid patent because the patent application for the **second prototype** footbath was filed after the one-year grace period had expired and because Svendsen never filed a patent application for the **third prototype** footbath. CP 404. Eakin agreed to dismiss the patent infringement lawsuit after Svendsen advised him he did not have a valid patent to pursue. CP 497-498.

On September 15, 2015, Eakin filed the underlying lawsuit against Svendsen claiming damages from, among other things, legal malpractice related to Svendsen's failure to advise Eakin of the time limits to file for a patent after a public display or use, Svendsen's failure to obtain a valid

patent for the **second prototype** and Svendsen's failure to apply for a patent for the **third prototype**. CP 12-17.

In February of 2018, Svendsen filed a motion for summary judgment seeking dismissal of the lawsuit filed by Eakin. CP 66-78. Eakin also filed a cross-motion for summary judgment seeking a ruling from the Court that an attorney-client relationship existed between Eakin and Svendsen as of the screening interview on August 2, 2006 and also seeking a ruling that the defendants had violated the standard of care applicable to patent lawyers in their efforts to obtain a patent for Eakin's cattle footbath system. CP 138-160.

Svendsen's motion sought summary judgment of dismissal on the following three grounds:

1. Exclusive jurisdiction for legal malpractice claims involving a patent is in federal court;
2. Plaintiffs publicly displayed the second prototype footbath in the summer of 2006 which rendered the second prototype unpatentable in October of 2007;
3. The Cause of Action for violation of the Consumer Protection Act does not apply to claims of legal malpractice.

CP 66-78.

Eakin voluntarily agreed to withdraw the cause of action for violation of the Consumer Protection Act and Svendsen withdrew the claim of exclusive federal jurisdiction at the hearing on summary judgment. RP 18/19-23. At the time of the summary judgment hearing

before the trial court, the only remaining basis for summary judgment asserted by the defense was the claim that the **second prototype** was not patentable because it was displayed by Eakin in the summer of 2006. RP 18/25 – 19/3.

On April 25, 2018, the trial court heard argument on the cross-motions for summary judgment. RP 18-65. The trial court made a lengthy oral ruling on the cross-motions for summary judgment. RP 53-57, 61-64. Following the hearing on Svendsen’s motion for summary judgment, the Court indicated in an oral ruling that it intended to make a factual finding that a formal attorney-client relationship was not formed during the initial interview between Eakin and Svendsen on August 2, 2006, and that a formal attorney-client relationship did not exist between Eakin and Svendsen until October of 2007. RP 53/21 – 54/22.

The trial Court directed the parties to prepare a written order on summary judgment to be presented to the trial court at a later date. RP 64/22-24¹. On May 10, 2018, prior to the trial Court entering a written order on summary judgment, Eakin filed a Supplemental Memorandum and Declaration of John W. Eakin in opposition to summary judgment to supplement the record. CP 601-603. In response Svendsen filed a Motion

¹ The reference to RP 64/22-24 directs the Court to Page 64, lines 22 through 24 of the Verbatim Report of Proceedings.

to Strike the Supplemental Memorandum and Declaration of John Eakin.
CP 589-600.

On May 11, 2018, the trial court heard oral argument on the Svendsen's Motion to Strike the Declaration of John W. Eakin and as well as argument regarding the language of the written order on summary judgment. RP 66-96. The trial court granted the Motion to Strike the Declaration of John Eakin. RP 85/23, CP 609-611. The trial court entered an Order on Cross-Motions for Summary Judgment which eliminated the majority of Eakin's damages claims. CP 604-608.

On May 18, 2018, Eakin filed a Motion for Reconsideration regarding the trial court's rulings on the cross-motions for summary judgment. CP 612-631. The Motion for Reconsideration was summarily denied by the trial court without oral argument. CP 632.

On June 21, 2018, Eakin filed a Motion to Certify the trial court's order granting summary judgment as a CR 54(b) Order to permit the Eakin to seek relief in the Court of Appeals. CP 633-646. On August 17, 2018, the trial court entered Findings of Facts and Conclusions of Law granting Eakin's Motion to Certify the trial court's order granting summary judgment as a CR 54(b) Order. CP 674-677.

On September 10, 2018, Eakin timely filed a Notice of Appeal to Washington State's Court of Appeals, Division III, seeking review of the trial court's orders as discussed above. CP 678-680.

VI. ARGUMENT

A. Standard of Review.

The standard of review by this court of an order granting summary judgment is *de novo* based upon the record considered by the Trial Court. *Green v. Cmty Club*, 137 Wn. App., 665, 151 P. 3d 1038 (2007), *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn. 2d, 291, 996 P. 2d 582 (2000). The record considered in making the summary judgment decision is properly listed in the summary judgment order and based on the documents listed in that order. RAP 9.12.

Summary judgment is appropriate only if the pleadings, affidavits, depositions and admissions on file demonstrate the absence of any genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party, in this case Svendsen, bears the burden of demonstrating there is no genuine dispute as to any material fact. A material fact is one upon which the outcome of the litigation depends, in whole or in part. *Barrie v. Host of Am., Ins.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980).

B. The Issue of Whether an Attorney-Client Relationship did not Exist until October of 2007 Was Not Properly Before the Trial Court Because Svendsen Only Raised the Issue in His Reply.

In the motion for summary judgment, Svendsen did not raise any issues regarding the existence of an attorney-client relationship between Eakin and Svendsen and specifically Svendsen failed to make any argument that no attorney-client relationship existed until 2007. Frankly, the issue of the attorney-client relationship was completely absent from Svendsen's motion for summary judgment.

In response to Svendsen's motion for summary judgment Eakin submitted competent evidence, including a Declaration from expert Mark Lorbiecki giving his opinion, on a more probable than not basis, that an attorney-client relationship was formed in August of 2006 which imposed a duty on Svendsen at that time to inquire as to the status of the invention, whether the invention had been publicly displayed or put into use and to advise Eakin of the time limit to file for a patent after any public display or use of the invention. Once Eakin established a prima facie case, at that point the burden shifted to Svendsen, as the moving party, to identify those portions of the record, together with the affidavits, if any, which they believe **demonstrate the absence of a genuine issue of material fact.** *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 170, 810 P.2d

4, 9 (1991) (emphasis added); *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wash.2d 127, 132, 769 P.2d 298 (1989).

It was not until he filed his Reply materials that Svendsen for the first time addressed the issue of the timing of the formation of an attorney-client relationship with Eakin. In his Reply brief Svendsen argued that Eakin was a prospective client in 2006 and did not become an actual client until October of 2007. Significantly Svendsen, who had been held out as both a defendant and an expert witness in patent law, failed in his Reply Declaration to give an opinion, on a more probable than not basis, that no attorney-client relationship was formed in 2006.

In essence, the Reply materials filed by Svendsen did nothing more than identify and confirm that there was a genuine issue of material fact in dispute, i.e., when the attorney-client relationship was formed between Eakin and Svendsen, thereby making summary judgment inappropriate.

As the Court in *White, supra*, noted:

Defendants only marginally complied with this requirement. Their claim that White had no competent expert testimony regarding the applicable standard of care was not substantiated by reference to any pleadings, documents, or deposition testimony. **Not until they submitted their "rebuttal documents"** did Defendants point out those parts of the depositions upon which they relied to support their lack of evidence claim. We emphasize, however, that only rarely will a moving party comply with the strict requirements of *Celotex, Young*, and

***Baldwin* without having made specific citations to the record in its opening materials.**

White, 61 Wn. App. at 170 (Emphasis added); citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989); *Baldwin, supra*.

As is apparent from a review of the record before the trial court, there was simply no effort on the part of Svendsen to meet the burden under *Young* and *White* as it relates to the issue of when the attorney-client relationship between Eakin and Svendsen was formed. In the moving papers, Svendsen made no argument, offered no evidence and made no evidentiary citation to support the notion that there was an absence of any genuine issue of material fact about when the attorney-client relationship was formed.

C. Because of the Manner in Which the Issue of Whether an Attorney-Client Relationship did not Exist Until October of 2007 Arose, the Trial Court Should have Considered the Materials Eakin Submitted After Oral Argument.

At the summary judgment hearing both Svendsen and the Court noted that Eakin had not filed a Declaration of John Eakin regarding the formation of the attorney-client relationship, in opposition to summary judgment. First, there was no reason to file such a declaration from Eakin because Svendsen did not seek summary judgment on the issue of when

the attorney-client relationship was formed in the initial summary judgment pleadings.

Second, unless and until Svendsen, as the moving party on summary judgment, met the burden to **demonstrate the absence of a genuine issue of material fact** on the issue of when the attorney-client relationship was formed, summary judgment could not be granted, regardless of whether Eakin submitted a Declaration of John Eakin. “If the moving party does not meet their initial burden, summary judgment may not be entered, **regardless of whether the opposing party submitted responding materials.**” *White, supra* (emphasis added); *Jacobsen v. State*, 89 Wash.2d 104, 108, 569 P.2d 1152 (1977); *see also, Baldwin*, 112 Wn.2d at 132.

In making its oral ruling, the trial court did not appropriately consider the opinions and issues of fact created by Eakin’s expert Mark Lorbiecki. Therefore, prior to entry of the written order on summary judgment, Eakin provided the trial court with a short, three-page Declaration of John Eakin regarding the timing of the attorney-client relationship, in which Eakin stated in relevant part, as follows:

In early August 2006 I was referred by a local attorney, Wes Gano, to patent attorney, Chris Svendsen. I was told that Mr. Svendsen had a specialty in patent law and could help me obtain a patent for an invention that I had been working on for some time.

I called Mr. Svendsen in early August that year and described developing a cattle foot bath system to distribute formaldehyde to cattle feet for use in the dairy industry. I asked if he could help me patent my invention. He told me he would first need to do a conflict check within his firm to be sure there would be no conflict in representing me. He thereafter advised me that there was no conflict and that he could represent me in obtaining a patent for my invention. He opened a file for the purpose of representing me and asked if I was ready to move forward with a patent at that time. I indicated I was still perfecting my invention and that I would be in touch with him further when I felt I was ready to patent the device.

* * *

Throughout this time period beginning when he told me in August 2006 that his law firm did not have a conflict in representing me and that he would open a file and be ready to proceed with work on the patent when I felt the invention was ready, I considered him to be my lawyer for purposes of securing a patent for my invention. At no time thereafter did he tell me he would not work on a patent for me but only told me to let him know when I felt my invention was ready to be patented.

CP 602-603.

Eakin relied upon *Cole v. Pierce County*, 8 Wn. App. 258, 505 P.2d 476 (1973), as support for filing the Declaration of John Eakin in opposition to summary judgment. On an identical issue the Court of Appeals ruled in that case as follows:

Before we reach the principle issue in this appeal, we must note that the court correctly considered the affidavit of counsel. Under normal circumstances **it is not desirable to file affidavits after argument is heard** on the motion, **but**

it is a party's right to do so. Until a formal order granting or denying the motion for summary judgment is entered, a party may file affidavits to assist the court in determining the existence of an issue of material fact.

Cole v. Pierce County, 8 Wn. App. 258, 261, 505 P.2d 476 (1973) (emphasis added); *Fellsman vs Kesler*, 2 Wn.App. 493, 468 P.2d 691 (1970) *Nicacio v. Yakima Chief Ranches, Inc.*, 63 Wn.2d 945, 389 P.2d 888 (1964).

The issue of the timing of the attorney-client relationship between Eakin and Svendsen was not raised in Svendsen's motion for summary judgment, yet the trial court chose to consider the issue. Svendsen, having submitted no evidence on the question, did not establish the absence of genuine questions of material fact regarding the timing of the attorney-client relationship, yet the trial court indicated its intent to make written factual findings on the issue. Therefore, consistent with the guidance provided by *Cole v. Pierce County, supra.*, Eakin submitted the Declaration of John Eakin to "assist the court in determining the existence of an issue of material fact." *Cole*, 8 Wn. App. at 261.

The trial court erred in striking the Declaration of John Eakin and failing to consider Eakin's declaration before making factual findings on the timing of the attorney-client relationship between Eakin and Svendsen.

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D. Whether or not the Trial Court Considered the Later Filed Materials, Eakin Submitted Evidence that Created a Genuine Issue of Fact Whether an Attorney-Client Relationship Existed Before October of 2007 which made Summary Judgment Improper.

1. The Sole Test for Determining the Existence of an Attorney-Client Relationship is Whether the Putative Client Subjectively and Reasonably Believed Himself to be a Client.

An attorney-client relationship is deemed to exist if the conduct between an individual and an attorney is such that the individual subjectively believes such a relationship exists. *In the Matter of the Disciplinary Proceeding Against McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). However, the belief of the client will control only if it "is reasonably formed based on the attending circumstances." *State v. Hansen*, 122 Wn.2d 712, 720, 862 P.2d 117 (1993), quoting *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). The determination of whether an attorney-client relationship exists is a question of fact. *Bohn*, 119 Wn.2d at 363.

In *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992), a case in which a putative client was held not to be a client and therefore not entitled to sue for legal malpractice, the Supreme Court described the test for the existence of an attorney-client relationship as follows:

The essence of the attorney-client relationship is whether the attorney's advice or assistance is sought and received

on legal matters. The relationship need not be formalized in a written contract, but rather may be implied from the parties conduct. Whether a fee is paid is not dispositive. The existence of the relationship turns largely on the client's subjective belief that it exists. The client's subjective belief, however, does not control the issue unless it is reasonably formed based on the attending circumstances.

Bohn, 119 Wn.2d at 363 (citations omitted).

Similarly, and as the Supreme Court stated five years later when addressing the potential availability of attorney-client privilege to a putative client:

An attorney-client relationship is deemed to exist if the conduct between an individual and an attorney is such that the individual subjectively believes such a relationship exists. However, the belief of the client will control only if it is reasonably formed based on the attending circumstances.

Dietz v. Doe, 131 Wn.2d 835, 843-44, 938 P.2d 611 (1997).

Svendsen did a conflicts check in August of 2006 and identified Eakin as a client in internal documents from his law firm. Svendsen also sent out a "Thank You" to attorney Wes Gano for the referral. The actions and conduct of Eakin and Svendsen during and after the August 2, 2006 meeting demonstrate and imply that Eakin reasonably believed an attorney-client relationship existed. In his declaration in response to the Lorbiecki declaration, Svendsen states that Eakin was referred to him by another attorney regarding patent protection for the cattle footbath system

and that Eakin "told me he was working on a system for a "better" footbath system and **he would keep me posted on its development.**" (emphasis added).

By Svendsen's own testimony Eakin (1) wanted to patent his cattle footbath system; (2) was referred to a patent lawyer; (3) contacted the patent lawyer about obtaining a patent; (4) had an invention that he had already created and built, and (5) advised the patent lawyer that he would advise him of future developments of the cattle footbath system. This begs the question why would Eakin advise a patent lawyer he was just referred to that he would continue to advise him of further developments of the invention he wanted to patent unless Eakin subjectively believed an attorney-client relationship existed with the patent lawyer?

Since the trial Court must consider all of the material evidence and **all inferences therefrom most favorably to the non-moving party** and, when so considered, if reasonable persons might reach different conclusions, for purposes of summary judgment the trial Court must infer that Eakin told Svendsen he would keep him advised of developments in the cattle footbath because Eakin subjectively believed an attorney-client relationship existed.

This is further supported by the fact that Svendsen acknowledges that between August of 2006 and October of 2007, Eakin continued to

advise Svendsen about developments and improvements in the cattle footbath system. In his declaration in response to the Lorbiecki declaration, Svendsen states:

I saw Mr. Eakin several times over the next 12 to 14 months, although always in a social setting. I periodically inquired about how his work on the cattle footbath system was proceeding. Mr. Eakin responded that he was still "tinkering" with it but it had not yet been put into use.

Id. at Paragraph 9.

Moreover, Svendsen himself admitted at his deposition 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.**

Washington 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 Wn.2d 393, 410-11, 98 P.3d 477 (2004); *In re Disciplinary Proceeding Against McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983) (the existence of

the attorney-client relationship “turns largely on the client’s subjective belief that it exists”).

2. Eakin Submitted Evidence That Created a Genuine Issue of Material Fact Whether an Attorney-Client Relationship Existed Before October of 2007 Whether or not the Trial Court Considered the Declaration of Eakin.

Even though the trial court did not consider the Declaration of John Eakin filed after oral argument, Eakin met the legal burden, in that the evidence submitted in opposition to the Motion for Summary Judgment, including the Declaration of expert Mark Lorbiecki and the deposition testimony of Svendsen, was sufficient to show the trial court there were genuine issues of disputed fact on the issue of when the attorney-client relationship was formed.

Following the hearing on Svendsen’s motion for summary judgment, the Court made a factual finding that a formal attorney-client relationship did not exist between the Eakin and Svendsen until October of 2007. RP 53/21 – 54/22. This was a critical factual finding because it determines whether Svendsen’s entire motion for summary judgment as it relates to the **second prototype** cattle footbath should succeed or fail.

In his Declaration Mr. Lorbiecki opined that upon learning that Eakin sought a patent for his cattle footbath system, Svendsen had a duty at that time to both:

1. Advise Mr. Eakin about the one-year time limitation to file a patent application after the display or sale of an invention; and
2. To question and inquire of Mr. Eakin about any prior public display or sale of the invention prior to meeting with defendant Svendsen.

At the hearing on summary judgment, both Svendsen and the trial Court focused on when a formal attorney-client relationship began between Eakin and Svendsen. The argument of Svendsen, and the subsequent findings of the trial Court, were that Svendsen did not have a duty to question Eakin about prior display of the invention, or to advise Eakin about the one-year time limitation to file a patent application, until such time as a formal attorney-client relationship was formed. Therefore, if the attorney-client relationship had been formed in August of 2006, as argued by Eakin, and a patent application filed at that time, the **second prototype** footbath would have been patentable. However, since the trial Court made a factual finding that the formal attorney-client relationship was not formed until October of 2007, the Court found that the **second prototype** footbath, which had been sold and displayed in the summer of 2006, was not patentable in October of 2007.

The scenario referenced above is analogous to the victim of a motor vehicle collision coming to see a plaintiff's personal injury lawyer about possible representation for injuries sustained in the collision. If the meeting between the lawyer and the collision victim occurs 5-days prior

to the expiration of the three-year statute of limitations for personal injury claims, the standard of care for a reasonably prudent personal injury lawyer likely requires the lawyer to advise the collision victim that a lawsuit must be filed or the claim settled within 5-days, before the statute of limitations expires, even if the collision victim has not hired the lawyer and no formal attorney-client relationship exists.

The case at bar does not involve a personal injury matter, it involves a patent. As has been referenced in the declarations of Mr. Lorbiecki and Mr. Svendsen, and has also been acknowledged by counsel and the trial Court at the summary judgment hearing, patent law is very highly specialized. Most people, including most lawyers and judges, aren't familiar with patent law unless they work in the patent law field. Therefore, unlike the statute of limitations for a personal injury claim, which many people are somewhat familiar with, someone consulting a patent lawyer about obtaining a patent must be advised by the patent lawyer about the one-year time limitation and must be questioned in detail about any past or future public display or sale of the invention.

One additional significant factor that the trial Court should have considered in evaluating this issue is the distinction between someone

with an “idea” that they want to patent versus someone with an actual invention that has been constructed or assembled. In this case Eakin did not contact Svendsen about an “idea” for a cattle footbath system. Rather, Eakin advised Svendsen that he had actually constructed a cattle footbath system that he wanted to patent². This was a tangible product that Eakin had invented, was working on and tinkering with to make improvements. Unlike the situation where someone merely has an “idea” which could not have been displayed, Eakin presented to patent attorney Svendsen with an actual product that clearly could have been previously displayed or sold, which thereby increased the necessity and urgency on the part of Svendsen to advise about the one-year time limitation and to conduct a detailed interrogation about the invention’s prior display or sale of the invention.

In opposition to summary judgment Eakin submitted the declaration of patent law expert Mark Lorbiecki providing the following opinions on a more probable than not basis:

Because the inventor may create disqualifying art by disclosure to the public, such as prior publication or offer for sale occurring one year prior to filing an application, **questioning the inventor as to these activities is central to an initial interview and throughout the interval**

² The footbath system was identified on the screening interview document prepared by Svendsen during the August 2, 2006 meeting with Eakin as Eakin’s need for patent protection for “Hoof Sanitization System and Formulation for a Cattle Milking/Feeding Station.” CP 192, 395.

between that initial interview and the filing of the patent application. A practitioner must be mindful of the critical date in order to time the filing such that any disclosing act falls after the critical date. Actions of the inventor to expose the invention to the public that fall before the critical date serve to invalidate claims of a patent. **In the initial interview, then, the prudent patent practitioner must always inquire of the inventor to identify all potential prior art,** including all the inventor's own related publications and showings . . .

Dec. of Lorbiecki, Paragraph 21 (emphasis added). CP 184.

As is evident from the primer on patent law set out above, timing is a central issue in patent law. It is uncontested that Mr. Svendsen interviewed Mr. Eakin at least on August 2, 2006 (if not earlier) as is confirmed by a document used to check for conflicts. When confronted with this document [at deposition] Mr. Svendsen admitted the interview. On the document itself, Mr. Eakin identified his need for patent protection advice. That advice concerned "Hoof Sanitization System and Formulation for a Cattle Milking/Feeding Station." **The obligation to explore prior and planned disclosure events began, at least, on August 2, 2006.**

Dec. of Lorbiecki, Paragraph 35 (emphasis added). CP 192.

In my opinion, because this interview occurred within the one-year grace period relative to the Sun Ridge Dairy installation in Nampa, Idaho . . . Mr. Svendsen had it within his power, at that time, to draft and file an application which would have been valid as against any of these identified events as they are presented in the chronology set forth above. . . **Once the attorney client relationship had begun, the duty to act expeditiously to secure rights to the invention also began. . . Mr. Svendsen had a duty to inquire** as to each exposition to the public of any embodiment of the invention prior to and during the interval of representation and, further, to counsel his client as to the consequences of any such exposition.

Dec. of Lorbiecki, Paragraph 36 (emphasis added). CP 192-193.

Thus, commencing in August of 2006, Mr. Svendsen owed an obligation to diligently and timely file a patent application on the footbath.

Dec. of Lorbiecki, Paragraph 39. CP 193.

Because of the arcane nature of the statutes that govern the granting of patent rights (almost certainly unknown to the client), **it is the practitioner's duty to ask the inventor/client what prior art exists and to inform as to the legal impact of the inventor's own disclosures.**

Dec. of Lorbiecki, Paragraph 40 (emphasis added). CP 194.

It is my professional opinion that Mr. Svendsen either did not interview sufficiently to discern appropriate facts or he did not inform Mr. Eakin of the need to file an application within one year of reduction to practice of the footbath invention. **The standard of care within the community of patent practitioners is such to have required the timely filing of that utility application.**

Dec. of Lorbiecki, Paragraph 43 (emphasis added). CP 195.

If the attorney-client relationship existed in August of 2006, as asserted by Eakin, then the standard of care required Svendsen to question Eakin about the invention, whether any version of it had been displayed and when, and to advise Eakin about the one year deadline following a public display to file a patent application.

If the attorney-client relationship did not exist until the fall of 2007, as found by the trial court, then the **second prototype** was not

patentable because more than one-year had passed since a version of the **second prototype** was installed at a dairy in the summer of 2006. This was the very reason why Eakin's patent infringement lawsuit was dismissed.

The record before the trial Court contained both facts and reasonable inferences from those facts that when taken in favor of Eakin, as the non-moving party on summary judgment, create a genuine issue of material fact an attorney-client relationship had been created and that Eakin had a reasonable subjective belief that an attorney-client relationship existed with Svendsen in the fall of 2006. In such a case summary judgment is not appropriate and the issue should be resolved by the jury at trial.

E. The Trial Court Improperly Weighed Evidence and Made Factual Findings when it Granted Summary Judgment.

1. Determining the Existence of an Attorney-Client Relationship is a Question of Fact for the Jury.

The question of the existence or non-existence of any attorney-client relationship in 2006 remains a disputed material factual issue which precludes the entry of summary judgment in defendants' favor. This is especially true here as all of the facts and reasonable inferences from the facts must be construed in favor of Eakin as the non-moving party.

In *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992), the Washington Supreme Court stated as follow:

Determining whether an attorney/client relationship exists necessarily involves questions of fact. Summary-judgment is proper on a factual issue only if reasonable minds could reach but one conclusion on it.

Bohn, 119 Wn. 2d at 363 (emphasis added).

There are an abundance of other authorities which explain that determination of the existence of an attorney-client relationship is a question of fact. *See, e.g., Tega v. Saran*, 60 Wn. 2d 793, 846 P.2d 1375 (1993); *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992) (the determination of whether an attorney-client relationship exists is a question of fact); *Dietz v. Doe*, 131 Wn.2d 835, 843-46, 938 P.2d 611 (1997) (existence of attorney-client relationship is entirely a question of fact that cannot be resolved on summary judgment unless the facts are undisputed).

In *Dietz*, our Supreme Court declined to rule on appeal that an attorney-client relationship existed when the facts were disputed and the trial court had not resolved that factual issue. *Id.* at 845-46.

In the present case Eakin presented evidence that an attorney-client relationship was formed in 2006. That evidence was disputed by Svendsen. At best, this disputed factual question comes down to a matter

of credibility between Eakin and Svendsen. On summary judgment motions where issues of credibility arise, summary judgment is usually not available.

In *Orland & Tegland*, 4 Washington Practice, CR 56 (1992 Ed.), it is stated:

Since cases involving negligence, state of mind, or facts within the knowledge of the moving party lend themselves to further development through the use of cross examination, the courts are likely to be more conservative in granting a motion for summary judgment in such cases, particularly where reasonably full discovery by the opposing party is for any reason impossible...

Credibility issues exist if there is contradictory evidence or if the movant's evidence is impeached. *March v. Kissling*, 56 Wn. App. 312, 783 P.2d 601 (1989). Summary judgment should not be granted when credibility of material witnesses is at issue. It is also not appropriate when material facts are particularly within knowledge of the moving party. *Gingrich v. Unigard Sec. Inc. Company*, 57 Wn. App. 424, 788 P.2d 1096 (1990).

2. The Trial Court Erred in Making Factual Findings when there were Genuine Issues of Material Fact in Dispute.

At the time of the summary judgment hearing there were facts, evidence and reasonable inferences from the facts that, when taken in favor of Eakin as the non-moving party, that upon meeting with Svendsen

in August of 2006, Eakin reasonably believed that an attorney-client relationship was formed. As set forth above, Svendsen himself admitted at his deposition that Eakin likely had a reasonable subjective belief that an attorney-client relationship existed as of the fall of 2006.

Eakin submitted expert testimony of patent attorney Mark Lorbiecki that an attorney-client relationship was formed when Eakin met with Svendsen in August of 2006. Mr. Lorbiecki further opined that the standard of care applicable to a reasonably prudent patent lawyer required Svendsen, upon meeting with Eakin in August of 2006, to advise Eakin about the one-year time period to file a patent application and to make a detailed inquiry of Eakin about any prior display or sale of the cattle footbath system. Svendsen did not disagree with or dispute the expert opinions offered by Mr. Lorbiecki. The only response from Svendsen was that he was not obligated to do so until October of 2007. Thus, there was clearly a genuine issue in dispute between the parties which precludes summary judgment.

Following oral argument, the trial court made the following oral findings:

What I am going to do at this point is, because there's just so much here and it just, **I think that there's seven points that Mr. Lorbiecki brings up about falling below the standard of care, what I will do is make a finding at this point** that the, based on the summary judgment standards,

there does appear to the Court that there's no genuine issue of material fact existing as, **whether reasonable minds could differ on some of the facts controlling the outcome of the litigation**, and those include the following.

So, first of all, Mr. Svendsen and Mr. Eakin had a preliminary conversation in August of 2006 that was, as far as I could tell, a, basically a conflicts introduction, telephonic introduction, with a screening check for conflicts that occurred, and then there was some internal information that was created as a result of that. That occurs in a lot of law firms, and then a thank-you note went out for the referral. **It wasn't until October of 2007**, and I can't remember the date of it, **that there appears to this Court to have been a meaningful attorney/client relationship created at that point.**

Additionally, and **there doesn't seem to be any dispute about that, although there is some speculation on Mr. Lorbiecki's part about that occurring before that**, I don't find anything from Mr. Eakin that would indicate that the relationship developed into a fully, full-blown attorney/client relationship until there was some communication in October of 2007.

RP 53/11 – 54/13 (emphasis added).

Following the summary judgment hearing the trial court entered a written Order which states, in part, as follows:

6. On Svendsen's Motion for Summary Judgment, it appears that there is **no genuine issue of material fact on which reasonable minds could differ as relates the following facts** controlling the outcome of the litigation, **in part because Plaintiffs submit nothing from John Eakin refuting Chris Svendsen's statements:** (1) that the contact and communication between John Eakin and Chris Svendsen on or about August 2, 2006, was only in the nature of a screening check for conflicts and the subsequent internal documentation and issuance of a thank-you letter

was related to that screening check; (2) the first meaningful contact and communication between John Eakin and Chris Svendsen establishing an attorney-client relation relating to the pursuit of patent protection for Mr. Eakin's cattle foot-bath system did not occur until October, 2007

CP 607 (emphasis added).

In making its oral findings at the time of the summary judgment hearing the trial court expressly acknowledges that patent expert Mark Lorbiecki raised seven points about Svendsen falling below the standard of care for a patent attorney and that Mr. Lorbiecki has given his expert opinion that an attorney-client relationship was created and existed between Eakin and Svendsen as of August 2, 2006. In the face of those acknowledged opinions of plaintiffs' expert, the Court ostensibly judges the credibility of and disregards those expert opinions and orally states that is no factual dispute on those issues. This is followed by the trial Court's written order which completely disregards the opinions of expert Mark Lorbiecki and states there are no factual disputes solely because no declaration of John Eakin was submitted at summary judgment.

For purposes of ruling on summary judgment, the trial court was not permitted to disregard the opinions of Eakin's expert on the applicable standard of care. 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)). Even if the trial court itself had some concerns about the opinions of Mr. Lorbiecki, on summary judgment the trial court is not permitted to make credibility determinations and factual findings. That is the role of the jury at trial.

By ignoring the numerous genuine issues of material fact that were disputed, and by making a factual finding in the face of these disputed factual issues, the trial court erred because disputed issues of fact are to be resolved by the jury. The trial court finding that the **second prototype** footbath was not patentable in October of 2007 flowed directly from the trial court's error in making a factual finding of no attorney-client relationship prior to October of 2007.

These errors were critical because upon finding that an attorney-client relationship was not created until October of 2007, and by finding that the **second prototype** footbath was not patentable in October of 2007 the trial court effectively dismissed the bulk of Eakin's claims for

damages in this case which center on the patentability of the **second prototype** of the cattle footbath system.

The trial court erred in disregarding the genuine issues of material fact in question regarding the timing of the attorney-client relationship between Eakin and Svendsen and in making a factual finding rather than submitting the disputed factual issues to the jury.

VII. CONCLUSION

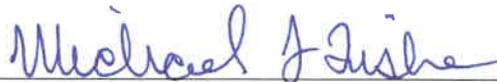
This Court should reverse the Trial Court and grant this appeal.

Respectfully submitted this 22nd day of January, 2019.

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



Vernon W. Harkins, WSBA #6689



Michael J. Fisher, WSBA #32778

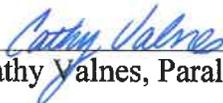
CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2019, I electronically filed the foregoing 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 AND KYLER, LLP

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