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Case No. 363163

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

EAKIN ENTERPRISES, INC., a Washington corporation; and
JOHN W. EAKIN, a single person,

Plaintiffs/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 martial 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; and PATRICK H. BALLEW, a single person,

Defendants/Respondents.

BRIEF OF SVENDSEN RESPONDENTS
(SVENDSEN LEGAL, LLC, AND CHRIS E. SVENDSEN AND
"JANE DOE" SVENDSEN)

JAMES S. BERG (WSBA #7812)
D. R. (ROB) CASE (WSBA #34313)
Larson Berg & Perkins PLLC
Attorneys for "Svensen Respondents"
(Svensen Legal, LLC, and Chris E.
Svensen and "Jane Doe" Svensen)

105 North 3rd Street
Yakima, WA 98901
Phone: (509) 457-1515
Fax: (509) 457-1027

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APPENDIX A

(Plaintiffs' Post Summary Judgment Argument Supplemental Memorandum Opposing Defendant's Motion for Summary Judgment)

APPENDIX B

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APPENDIX C

(Answer of Svendsen Legal, LLC and Chris E. Svendsen and Denise E. Svendsen to [First] Amended Complaint for Legal Malpractice)

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A. INTRODUCTION

This is an interlocutory appeal via CR 54(b). Some, but not all, of appellants'/plaintiffs' claims were dismissed at summary judgment. Then, over respondents'/defendants' objection, the trial court certified a piecemeal appeal and stayed further action on the still-pending claims.¹

The primary claim is legal malpractice related to prosecuting a patent on an invention. Additional, related claims are breach of contract, lack of informed consent, breach of fiduciary duty, and violation of the Consumer Protection Act (the CPA claim was voluntarily dismissed in full after plaintiffs received defendants' summary judgment motion).

Analysis and adjudication of the claims was conceptually split between those based on (what became referred to as) the second prototype of the invention versus those based on (what became referred to as) the third prototype of the invention. Claims based on the second prototype were dismissed, whereas claims based on the third prototype remain pending. However, the distinction between the second and third

¹ The primary defendants are attorney Chris E. Svendsen and his current law firm, Svendsen Legal, LLC, whom are jointly referred as "Svendsen Respondents" and/or "Svendsen Defendants". Mr. Svendsen is the lawyer who, beginning in late 2007, personally represented plaintiffs. CP 81. By contrast, the other defendants are lawyers and/or law firms with whom Mr. Svendsen was associated during certain times. CP 81. The other defendants have participated sparingly during this case and likely will not file any appellate materials. Unless otherwise specifically noted, references to "the parties" are intended to refer to plaintiffs and Svendsen Defendants and references to "defendants" are intended to refer to Svendsen Defendants.

prototypes is over-emphasized and does not warrant a piecemeal appeal. *See infra*, pp.4-5, section B (“Motion to Remand”).

Dismissal of claims based on the second prototype occurred for two distinct time-considerations, each of which was individually dispositive (thus creating redundant bases for dismissal). First, the patentability period for the second prototype had already expired by the date plaintiffs engaged defendants to file a patent application. Second, defendants had no duty (or ability) to file a patent application earlier because an attorney-client relationship had not yet been formed between the parties.

A provisional patent application was filed by defendants on plaintiffs’ behalf in late 2007. Unbeknownst to defendants, however, plaintiffs had put the second prototype into public usage during the summer of 2006. That constituted a “prior art” event under patent law and triggered a one-year deadline for patentability. Plaintiffs kept defendants in the dark, both by never mentioning the earlier public usage and also by overtly lying when defendants directly asked whether public usage had occurred. Defendants did not discover the truth until 2012, which was far too late for curative or alternate action. By that point, it was no longer possible to revise the already-issued patent.

An attorney-client relationship was not formed until late 2007. While preliminary communication occurred in 2006, it was only a conflict check and no details about the invention were discussed, no legal advice was given or sought, and no engagement occurred. Thereafter, subsequent interactions were sporadic, informal and by happenstance: the parties occasionally bumped into each other at social events and exchanged a few seconds of small talk. Plaintiffs never requested or expected any action by defendants until late 2007, when they engaged defendants to file a patent application. Because the attorney-client relationship was not formed until late 2007, no legal malpractice (or other actionable wrong) could have occurred earlier.

In their *Brief of Appellants*, plaintiffs repeat – essentially verbatim – much of what they argued below. In the process, they ignore and misrepresent consequential facts – including vital portions of plaintiff John W. Eakin’s own deposition testimony – just as they did below. They also offer arguments based on invalid and self-serving 20-20 hindsight, as they did below. They make no effort to resolve these and other fundamental deficiencies of their earlier presentation, choosing instead to repeat them. But repetition does not make the invalid valid.

If this court chooses to issue a merits-based ruling (rather than to vacate the CR 54(b) certification and remand this case), it should affirm

each of the trial court's three substantive Orders and thus uphold dismissal of all claims predicated on the second prototype.

B. MOTION TO REMAND

Pursuant to RAP 10.4(d), Svendsen Defendants hereby move to vacate the CR 54(b) certification and to remand this case. Washington courts have a "policy against piecemeal appeals". *See e.g., Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 882, 567 P.2d 230 (1977).

"Piecemeal appeals of interlocutory orders must be avoided in the interests of speedy and economical disposition of judicial business." *Maybury v. City of Seattle*, 53 Wn.2d 716, 721, 336 P.2d 878 (1959).

"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 v. Baypack Fisheries*, 101 Wn. App. 517, 526, 6 P.3d 22 (2000) (Division I). This is precisely the scenario in the instant case.

Plaintiffs did not plead separate claims per prototype, but instead advanced allegations regarding multiple prototypes within each cause of action. *See e.g., CP 50 (Second Amended Complaint for Legal Malpractice*, p.11, ¶XXXVIII). In their *Brief of Appellants*, plaintiffs

offer argument regarding patentability of the third prototype even though claims relative to that prototype are still-pending and thus beyond the scope of this appeal. *See Brief of Appellants*, p.8. Factually, the as-filed patent application included the features of the third prototype and thus was not exclusively based on the second prototype. *See infra*, pp.18-19, section C.8. Accordingly, this case should be remanded for adjudication of the still-pending claims (followed by, potentially, a unified appeal).

C. STATEMENT OF CASE

C.1. Plaintiffs and the Subject Invention. Plaintiff John W. Eakin is the owner of plaintiff Eakin Enterprises, Inc. CP 139, 47 & 36. Mr. Eakin developed the invention at issue, which is a cattle footbath system. CP 139 & 85; *Brief of Appellants*, p.3. The system uses a formaldehyde solution to wash the feet of dairy cows just before the cows are milked. *Brief of Appellants*, p.3.

C.2. Three Prototypes of the Invention. Mr. Eakin began working on the footbath system in 2004. CP 139; *Brief of Appellant*, p.3. Over the ensuing years, he produced at least three variations. During litigation, those variations have been referred as the “first prototype”, “second prototype” and “third prototype”. However, the parties did not use such labels prior to litigation and an earlier prototype may have existed.

The “first prototype” was created in 2005. CP 440. It lacked a metering apparatus to control the flow of undiluted formaldehyde into the wash basin. CP 440 & 140. Excess formaldehyde could (and would) splash onto the human operator, posing a health concern. CP 440, 140 & 187. Mr. Eakin publicly displayed the first prototype during November of 2005 (at an annual Dairymen’s Show held in Boise). CP 140; *Brief of Appellants*, p.3. Plaintiffs admit that the first prototype was “not successful”. *Brief of Appellants*, p.3.

The “second prototype” was created in early 2006. CP 440 & 141. In contrast to the first prototype, it included a metering apparatus to control the formaldehyde flow. CP 440 & 141; *Brief of Appellants*, p.5. In addition, the second prototype utilized a check valve that vented fumes into the air. CP 440 & 141; *Brief of Appellants*, p.5. Mr. Eakin publicly displayed the second prototype during November of 2006 (at the same annual Dairymen’s Show in Boise). CP 424, 440 & 141; *Brief of Appellants*, pp.5-6. Earlier, during the summer of 2006, Mr. Eakin had put the second prototype into public usage at a dairy, which is a fact of major consequence for this case. CP 440 & 141; *Brief of Appellants*, pp.5-6. Another fact of major consequence is that it was not until 2012 that defendants first learned that public usage had occurred during 2006. CP 85-86, 424-425, 436 & 489.

The “third prototype” was conceptualized in late 2006, but not fabricated into a functional operating system until late 2007. CP 440 & 260 (deposition of Eakin, p.116, lns.8-22); *Brief of Appellants*, p.7. In contrast to the second prototype, it utilized a return valve and closed circuit (a/k/a valve interlock) rather than a check valve. CP 440; *Brief of Appellants*, p.6. This captured the fumes and returned them to the storage tank, rather than venting them into the air. CP 440 & 141.²

C.3. The Introductory, Screening Telephone Call and Subsequent Conflict of Interest Check, during August of 2006. The first communication between plaintiffs and defendants occurred in August of 2006. CP 432; *Brief of Appellants*, p.4. Appellants contend that “Eakin met with Svendsen”. *See Brief of Appellant*, p.4. In fact, the first communication was just a brief telephone call. CP 488.

On or about August 2, 2006, Mr. Eakin telephoned defendant Chris E. Svendsen. Mr. Eakin said he was working on a “better” cattle footbath system and that he had received Mr. Svendsen’s name from another attorney (Wes Gano, who does not practice patent law). CP 432 & 488.

² Appellants contend that the third prototype was “perfected” as of “May of 2007”. *See Brief of Appellants*, p.7, citing CP 188 (which, in turn, cites p.117, ln.25 – p.119, ln.1 of the Eakin deposition, found at CP 262). To the contrary, Mr. Eakin’s deposition testimony actually confirms that the system was not perfected even as late as October of 2007. Instead, he described it as merely “a reasonably good system” as of October 5, 2007. *See* CP 262 (deposition of Eakin, p.119, lns.18-20).

However, Mr. Eakin did not provide any details about the system and Mr. Svendsen did not seek any. CP 432, 488 & 560; *Brief of Appellants*, p.4. Also, Mr. Eakin did not seek any immediate legal advice and Mr. Svendsen did not provide any. The initial telephone call was only a preliminary and cursory introduction. CP 488; *Brief of Appellants*, p.4.

Plaintiffs were just prospective clients during and following the initial telephone call (in August of 2006). A conflict of interest check by Mr. Svendsen and the other members of the law firm was necessary before Mr. Svendsen could potentially accept engagement as plaintiffs' lawyer. CP 432 & 488. In patent law, a conflict of interest check is twofold: both the prospective client and the general nature of invention must be screened for potential conflicts. CP 488; *see also* CP 553-554.

Mr. Eakin ended the telephone call by telling Mr. Svendsen to wait to hear back from him, rather than asking Mr. Svendsen to immediately reinitiate contact after the conflict of interest check was completed. CP 432 & 488. Mr. Svendsen drafted very basic notes onto a form labeled "screening interview" dated August 2, 2006. CP 560; *Brief of Appellants*, p.4. The general nature of the system was described as a "hoof sanitization system and formulation for a cattle milking/feeding station". CP 432, 488 & 560; *Brief of Appellants*, p.4. The form did not mention formaldehyde, metering apparatuses, or valves (and some of those features

were not added to the system until many months later). CP 432, 488 & 560; *Brief of Appellants*, p.4. The form also did not reference Eakin Enterprises, Inc. Instead, it recited the name of Mr. Eakin's company as "NW Mortgage and Finance" located in Selah, Washington. CP 560.

The conflict of interest check was completed on or about August 10, 2006, and no disqualifying conflicts were found. Mr. Svendsen inserted Mr. Eakin's contact information into a basic "client information" sheet. CP 561; *Brief of Appellants*, pp.4-5. However, there was no follow-up contact and plaintiffs continued to be only prospective clients.

C.4. Happenstance, Social Interactions Over the Ensuing Year-Plus, Prior to Formation of an Attorney-Client Relationship.

Over the ensuing fourteen months (after August of 2006), there were no attorney-client type interactions between Messrs. Eakin and Svendsen. There were no further telephone calls, no in-person meetings, no attempt to schedule a telephone call or in-person meeting, no emails or other correspondence, and no billings or filings by Mr. Svendsen. *See* CP 488-489 & 433.³ Mr. Eakin did not disclose any details about the invention or provide any drawings of it. Nor did Mr. Eakin say that he was expecting

³ Appellants reference a faxed letter that was sent in December of 2006. *See Brief of Appellants*, pp.6-7. However, that letter is not in evidence and, accordingly, all references to its supposed contents were struck by the trial court. Likewise, this court should disregard appellants' contentions about the letter's supposed contents. *See infra*, pp.20-22, section C.10.

Mr. Svendsen to do anything or to already have done anything. Nor did Mr. Eakin provide any indication that a prototype was ready to be patented and/or that the invention had been used by anyone or displayed anywhere (not even with respect to the first prototype, which had been publicly displayed in back in 2005). *See* CP 488-489 & 433.

Instead, subsequent interactions (after the initial telephone call) between Messrs. Eakin and Svendsen were sporadic, informal and by accident. CP 433. They occasionally bumped into each other at social events, during which time they exchanged a few seconds of small talk. CP 488-489 & 433. Mr. Svendsen casually asked how work on the system was progressing and Mr. Eakin casually responded that he was still “tinkering” with it. CP 488-489 & 433. As before, no details were discussed and no engagement occurred. Mr. Eakin further expressly said that the system “had not yet been put into use”, which is a fact of major consequence. CP 488-489.⁴

⁴ Appellants grossly misstate the facts by contending 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.” *See Brief of Appellants*, pp.21-22. As support for this contention, appellants cite to “*Id.* at Paragraph 9.” *See id.*, p.22. That citation traces to paragraph 9 of the *Declaration of Chris E. Svendsen in Response to Declaration of Mark Lorbiecki*, which paragraph 9 is found at CP 488-489. However, the referenced paragraph does not say that Mr. Eakin “continued to advise” Mr. Svendsen “about improvements and developments” “between August of 2006 and October of 2007”, nor anything close thereto. Rather, that paragraph confirms the facts presented in this brief. *See* CP 488-489.

C.5. Formation of the Attorney-Client Relationship in Late 2007, and Mr. Eakin's Continued Dishonesty About Prior Public Usage (and About Other Facts). The first substantive meeting between the parties occurred in October of 2007. CP 83 & 433. This was more than a year after the introductory and screening telephone call in August of 2006. It was at this time (*i.e.*, October of 2007) that Mr. Eakin first disclosed details about the footbath system to Mr. Svendsen. CP 433. This meeting was also when Mr. Eakin actually engaged Mr. Svendsen as plaintiffs' lawyer and when Mr. Svendsen accepted such engagement. CP 433. That is when the attorney-client relationship was formed.

During his deposition, Mr. Eakin admitted that he waited until October of 2007 to actually engage Mr. Svendsen as the plaintiffs' lawyer:

Q. So I'm putting the time frame together here. You've got those systems installed at some dairies in the spring of 2007. And it's all the way till October [of 2007] before you communicated with the attorney about patent protection. So what as the reason for that delay?

A. Perfection of the system.

CP 269 (deposition of Eakin, p.119, lns.12-17, bracketed material added).

Appellants ignore this portion of Mr. Eakin's testimony, just as they did before the trial court. *See Brief of Appellants*, pp.1-37; CP 424 & 430 (noting that appellants ignored such at the trial court level).

Notably, Mr. Svendsen— upon actually being engaged in October of 2007 – specifically advised Mr. Eakin that if any version of the invention had been in put into public usage and/or had been publicly displayed longer than a year earlier then the invention would be time-barred from patenting. CP 425, 433 & 489. In response, Mr. Eakin assured Mr. Svendsen (as Mr. Eakin had previously done, during their happenstance social interactions) that the invention had not been publicly used and/or publicly displayed. CP 84, 433 & 488-489. As it turns out, those assurances were untrue. By this date, the first prototype had been publicly displayed (which occurred in late 2005) and the second prototype had been both put into public usage (in the summer of 2006) and publicly displayed (in November of 2006). CP 424, 140-141 & 440; *Brief of Appellants*, pp.3 & 5-6.

During his deposition, Mr. Eakin also acknowledged making untrue statements to a third party about the timeline of events:

Q. Okay. As of February 14, 2007, had a patent been applied for [as asserted in one of Mr. Eakin's emails to a third party; a retired OSHA inspector named Ralph Yobp]?

A. Oh, no. Actually, we didn't apply for the patent until later. We -- that was certainly on the books and in the works at that point. That's what we discussed to do. I just didn't know who to get to, to do it.

Q. So you really hadn't applied for a patent at this time?

A. Not at that time, I had not.

CP 258 (deposition of Eakin, p.103, lns.8-15, bracketed material and underscore emphasis added). As to the formation date of the attorney-client relationship, Mr. Eakin would not have testified that he “didn’t know who to get . . . to do it [file a patent application]” as of February of 2017, if plaintiffs had engaged Mr. Svendsen back in 2006 (as appellants contend). As before, appellants ignore this portion of Mr. Eakin’s testimony like they did below. *See Brief of Appellants*, pp.1-37; CP 592-593 (noting that appellants ignored such at the trial court level).

Appellants repeatedly contend that Mr. Svendsen admitted, during his own deposition, that the attorney-client relationship was formed in 2006. *See Brief of Appellants*, pp.5 & 22, citing CP 274 (deposition of Svendsen, p.46, lns.12-19). This is not true. Appellants pull a few lines of testimony out of context and ignore the true substance of what Mr. Svendsen actually said. In preceding answers, Mr. Svendsen flatly denied that an attorney-client relationship was formed in 2006 and thrice confirmed that it was not formed until “the fall of 2007.” *See* CP 273-274 (deposition of Svendsen, p.45, lns.1-23 and p.45, ln.24 – p.46, ln.11).

Unhappy with those three preceding answers, plaintiffs’ counsel posed a repetitive and ambiguous question. Mr. Svendsen’s reply was technically nonresponsive to the question, inherently speculation-based (as to what Mr. Eakin presumably thought), and just a summary of plaintiffs’ position

on this litigation. In these regards, the deposition transcript reads as follows:

- 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.
- 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.
- Q. So between August of 2006 and the fall of 2007, you believe you may have had some social interaction with Mr. Eakin where the patent may have been discussed, but the formal efforts on your part to get him patent would have started in the fall of '07?
- A. That's how I recall, yes.
- 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.

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 273-274 (deposition of Svendsen, p.45, ln.1 – p.46, ln.19, underscore emphases added).

Clearly, Mr. Svendsen's final comments do not have the import that appellants urge and certainly do not trump and negate his prior answers. His prior answers, offered on a firsthand basis, were that "work" on the patent did not begin in August of 2006, that he and Mr. Eakin did not go over any "details" until the fall of 2007, that he was not "retained" until the fall of 2007, and that the only thing that occurred in 2006 was "opening the door" for a potential future engagement. Plaintiffs' counsel then posed a repetitive and ambiguous question asking when "effort to get a patent" began.

Although the final question asked for Mr. Svendsen's personal belief, Mr. Svendsen's answer was technically nonresponsive and speculation-based. Mr. Svendsen noted that Mr. Eakin presumably believed – as alleged in this lawsuit – that the attorney-client relationship began in the fall of 2006. *See e.g.*, CP 50, *Second Amended Complaint for Legal Malpractice*, p.5, ¶XV (alleging that the attorney-client relationship

was formed in 2006). Mr. Svendsen's final answer did not contradict any of his prior answers and Mr. Eakin's own deposition testimony was consistent with Mr. Svendsen's prior answers. Thus, the formation date of the attorney-client relationship was properly resolvable at summary judgment. *See infra*, pp.41-44, section F.5; and pp.47-48, section F.10.⁵

C.6. Filing of the Patent Application and Issuance of a Provisional Patent, in November of 2007. Mr. Svendsen filed a provisional patent application on plaintiffs' behalf on November 21, 2007. CP 84 & 425; *Brief of Appellants*, pp.7-8. This was shortly after Mr. Eakin supplied drawings to Mr. Svendsen for use in a patent filing, which was on or by October 23, 2007. CP 437; *Brief of Appellants*, p.7.⁶

The United States Patent and Trademark Office ("USPTO") issued a provisional patent and assigned it the number 61/004,123. CP 38, 67, 81-82 & 565. Subsequently, Mr. Svendsen submitted two non-provisional utility applications as the next procedural steps for perfecting the patent,

⁵ Also, speculation is never valid evidence. *See infra*, p.41, section F.4.

⁶ Appellants contend, without basis, that the drawings that Mr. Eakin supplied to Mr. Svendsen on October 23, 2007, supposedly were "for the perfected third prototype". *See Brief of Appellants*, p.7 (bold emphasis omitted), citing CP 188-189. However, the portions of the record cited by appellants do not substantiate that contention. Appellants cite to CP 188-189, which is a portion of a Declaration by appellants' retained expert witness Mark Lorbiecki. But Mr. Lorbiecki never saw the drawings. Mr. Lorbiecki cites to pages 119 and 120 of Mr. Eakin's deposition, but those pages do not substantiate appellants' contention either. To the contrary, those pages confirm that Mr. Eakin's testified – repeatedly –he did not recall what the drawings actually were. CP 269 (deposition of Eakin, p.120, lns.4-23). Again, the actual record is contrary to appellants' presentation.

followed by the USPTO ultimately issuing a utility patent that was assigned Patent No. 7,987,820 (and which is referred to via shorthand as the “820 Patent”). CP 84, 51 & 565.⁷

C.7. Patent Applications Have Two Sections – a Narrative

Description and Recited Claim Limitations. Patent applications have two distinct sections. CP 179. The first section is known as the “specification” and it includes a narrative description of how the invention works and a drawing of the invention. CP 179. The second section recites any “claim limitations” (which are also sometimes referred to simply as “claims”). CP 440-441 & 179. Claim limitations narrow the scope of a patent’s exclusionary effect toward competing (potentially “infringing”) devices. CP 441.

If a feature of the invention is specified as a claim limitation, then competing devices will fall within the exclusionary effect of the patent (and thus infringe upon the patent) only if they utilize the same feature. By contrast, if a feature is not specified as a claim limitation but still is referenced within the narrative description, competing devices may still

⁷ For this appeal, the utility patent applications are irrelevant. Also irrelevant is a typographical error that occurred within those applications. Appellants advanced arguments on those topics at the trial court level, but they do not mention them at all within their “Assignments of Error” and/or “Issues Pertaining to Assignments of Error”, nor otherwise within the body of their “Brief of Appellants”. See *Brief of Appellants*, pp.1-3 and pp.1-37.

fall within the exclusionary effect of the patent (and thus infringe upon the patent) whether they use the same feature or not. In this sense, it is easier to legally sidestep a patent that has more claim limitations than it is to sidestep a patent that has fewer claim limitations; a patent with more claim limitations is narrower in effect than a patent with fewer claim limitations. CP 82-83, 441, 487 & 179-180.

C.8. The Return Valve and Closed Circuit Were Mentioned in the Narrative Description on the Patent Application, Which was Logical Based on What Mr. Svendsen Knew at the Time. The patent application drafted and filed by Mr. Svendsen specifically included the return valve and closed circuit features. Those features were referenced within the narrative description, but not as a recited claim limitation. CP 440 & 487. Mr. Svendsen's aim was to seek and obtain a broad patent, rather than a narrower and, thereby, less-valuable patent. CP 440 & 487. That was both a logical and tactical decision based on the information that Mr. Svendsen had at the time. CP 440 & 487.

Mr. Svendsen had been repeatedly assured by Mr. Eakin that the invention had not been publicly used and/or publicly displayed (whether in 2006 or any other year). CP 84, 434, 441 & 488-489. Mr. Svendsen relied on the truth of those assurances, not knowing of Mr. Eakin's misrepresentations. Mr. Svendsen was, therefore, unaware that time had

already expired for patenting the second prototype. Mr. Svendsen drafted the patent application to seek the broadest possible coverage (*i.e.*, by referencing the return valve and closed circuit within the narrative description, rather than as a claim limitation). CP 442.

C.9. Plaintiffs Did Not Request a Patent Application to be Filed Based on, and Did Not Advance Any Allegations Specific to the Possibility of Patenting, the First Prototype. Appellants write as follows: “Had a patent application been filed shortly after . . . August of 2006 . . . [it] would have protected the first prototype of the footbath which had been displayed at the 2005 Dairymen’s Show in November of 2005.” *See Brief of Appellants*, p.7 (ellipses and bracketed material added; bold emphasis omitted). This misleading assertion is belied by the actual timeline of events and the allegations of plaintiffs’ lawsuit. It is also based on invalid and self-serving 20-20 hindsight.

As previously explained, plaintiffs did not engage Mr. Svendsen in August of 2006. CP 432-433 & 488. Plaintiffs were only prospective clients at that point, and Mr. Eakin continued to “tinker” with the system for another fourteen months before finally providing drawings of the invention and asking Mr. Svendsen to file a patent application. CP 433 & 437; *Brief of Appellants*, p.7. Furthermore, the first prototype from 2005 was “not successful” by appellants’ own admission, and by 2006 Mr.

Eakin had moved on to the second prototype. *Brief of Appellants*, p.3; CP 440 & 141. For these reasons, Mr. Svendsen could not have filed a patent application “shortly after” August of 2006, vis-à-vis the first prototype.

Moreover, Mr. Svendsen did not know that the first prototype had ever been publicly displayed. Mr. Eakin never mentioned the public display from 2005, nor that he had attended the 2005 Dairymen’s Show. Mr. Eakin affirmatively (but falsely) told Mr. Svendsen that the system “had not yet been put into use” and Mr. Svendsen did not learn the truth until many years later (specifically, during 2012). CP 488-489. Logically and legally, Mr. Svendsen’s actions must be evaluated in context of the information that he had, not via hindsight. *See infra*, p.47, section F.9.

Plaintiffs did not advance any allegations specific to patenting the first prototype. *See* CP 46-62 (*Second Amended Complaint for Legal Malpractice*, pp.1-17). Thus, the trial court’s summary judgment order only mentions the second and third prototypes. *See* CP 604-608 (*Order on Cross Motions for Summary Judgment and Motions to Strike*). Plaintiffs cannot expand the scope of their lawsuit via this appeal.

C.10. The Faxed Letter of December 7, 2006, is Not in Evidence. All References to it Should be Disregarded. Appellants refer to a December 7, 2006 faxed letter allegedly authored by Mr. Eakin. *See Brief of Appellants*, p.6. More fully, appellants contend:

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.

. . . 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.

Brief of Appellants, pp.6-7 (ellipsis added).

All references to the supposed contents of this letter were struck by the trial court (*see* CP 607), and should likewise be disregarded by this court. The letter is not in evidence and Mr. Eakin has no recollection of its contents, as appellants concede. *See Brief of Appellants*, pp.6-7. Thus, appellants' contentions regarding the letter are both speculation and inadmissible hearsay.⁸

Appellants argue against this, contending that the letter and other pieces of evidence "were destroyed by defendant attorney Patrick Ballew". *Brief of Appellants*, p.7, citing CP 551 & 553. To the contrary, the record only confirms that Mr. Ballew purged dormant files – including some related to plaintiffs – several years before the instant litigation was filed. CP 81 & 551-553; *Brief of Appellants*, p.8. However, there is no evidence that the letter was among the items purged by Mr. Ballew, nor that he

anticipated that litigation would later occur. Moreover, appellants have never explained why Mr. Eakin – as sender of the alleged fax – does not possess the original document. Finally, appellants did not seek any spoliation ruling from the trial court (*see* RP 17, lns.14-19), do not advance a spoliation argument on this appeal (*see Brief of Appellants*, pp.1-37) and the facts would not support such an argument anyway.⁹

C.11. Appellants’ Arguments Regarding a Possible Patent Application “For the Third Prototype” are Misleading and Irrelevant, Yet Confirm that a Piecemeal Appeal is Not Warranted. Appellants further contend the patent application supposedly “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.” *See Brief of Appellants*, p.8 (bold emphases omitted). Continuing further, appellants criticize defendants for “never fil[ing] a patent application for the third prototype footbath.” *See Brief of Appellants*, p.8 (bracketed change made; bold emphasis omitted). These contentions are misleading and irrelevant to the true scope of this appeal, and illustrate why a piecemeal appeal is unwarranted.

⁸ *See* ER 801(c) (definition of hearsay).

⁹ Spoliation applies only if the party who destroyed the evidence acted in bad faith or in violation of a duty to continue preserving the evidence. *See e.g., Homeworks Const., Inc. v. Wells*, 133 Wn. App. 892, 900, 138 P.3d 654 (2006) (Division II).

The as-filed patent application included the features of the third prototype (*i.e.*, the metering apparatus and return valve). CP 440 & 487; *see also supra*, pp.18-19, C.8. Accordingly, when appellants refer to the possibility of a patent application “for the third prototype”, what they are arguing is that the as-filed application should have listed those features as a claim limitation rather than identifying them within the narrative description of the invention. Not only is that argument based on hindsight, it is irrelevant to this appeal because claims based on the third prototype were not dismissed and remain pending. Plaintiffs did not plead separate claims per prototype, but instead advanced allegations regarding multiple prototypes within each claim. *See e.g.*, CP 50 (*Second Amended Complaint for Legal Malpractice*, p.11, ¶XXXVIII).

Because the dismissed claims and the still-pending claims “are closely related and stem from essentially the same factual allegations”, a piecemeal appeal is not warranted. *See Nelbro Packing v. Baypack Fisheries*, 101 Wn. App. at 526; *see also supra*, pp.4-5, section B (“Motion to Remand”).

C.12. The Patent Infringement Lawsuit and Discovery that the Provisional Patent was Invalid, in 2011 and 2012. In September of 2011, it was discovered that a third-party (*i.e.*, Specialty Sales, LLC) was engaged in activity that seemed to violate the patent. *Brief of Appellants, Brief of Svendsen Respondents - 23*

p.8. Appellants contend that Mr. Svendsen “advised Eakin to pursue” a patent infringement lawsuit. *See Brief of Appellants*, p.8, citing CP 402. To the contrary, appellants’ citation does not substantiate that contention. Appellants cite to one of their legal memoranda from below, but the cited page (CP 402) contains no source citations to a deposition, declaration or other evidence. And, there is nothing from Mr. Eakin.

In fact, Mr. Svendsen repeatedly advised against filing an infringement lawsuit because he believed the costs of litigating the case would outweigh any potential returns. CP 425 & 497. Supporting this, Eakin Enterprises was not actively pursuing sales of the footbath system itself, only sales of formaldehyde for use in the system. CP 497 & 84.¹⁰ Mr. Eakin refused to heed Mr. Svendsen’s advice and insisted on filing suit. CP 497. An infringement lawsuit was filed on September 23, 2011. *Brief of Appellants*, p.8.

Appellants contend that “[d]uring the patent infringement lawsuit Svendsen advised Eakin that he did not have a valid patent” due to expiration of the one-year patentability period prior to the patent application being filed. *See Brief of Appellants*, p.8. This is misleading,

¹⁰ Appellants contend, without basis, that the second prototype was “sold” during the summer of 2006 (in addition to having been publicly displayed). *See Brief of Appellants*, p.24. However, no supporting factual citation is offered and none exists. Once again, the actual factual record is contrary to appellants’ presentation.

as it implies that Mr. Svendsen had known all along that the patent was invalid. In truth, Mr. Svendsen learned for the first time – when Mr. Eakin was deposed – that use and display of the second prototype had occurred during 2006. It was only at that point, and because of such testimony, that Mr. Svendsen advised Mr. Eakin that the patent was invalid and that it was too late to salvage things (because the original, previously-filed provisional application could no longer be amended).

Mr. Eakin was deposed in September of 2012. In response to pointed questioning about the chronology of his invention, Mr. Eakin unexpectedly testified – for the first time – that he put a version of the invention into public use at a dairy during the summer of 2006 (and also he had publicly displayed the invention during November of 2006). CP 436 & 489-490; *see also* CP 455-456 (deposition of Eakin, p.68, ln.8 – p.69, ln.11), 463-464 (deposition of Eakin, p.166, ln.8 – p.167, ln.10) & 466 (deposition of Eakin, p.170, lns.2-14). Not only did this contradict the repeated assurances Mr. Eakin had previously given to Mr. Svendsen, it directly contradicted sworn declarations and verified written discovery responses Mr. Eakin submitted during earlier stages of the patent infringement case. CP 436 & 489. Due to Mr. Eakin's sudden and unexpected disclosure, the patent infringement lawsuit became a lost cause

and a stipulated dismissal was quickly effectuated. CP 497-498; *Brief of Appellants*, p.8.

D. PROCEDURAL HISTORY

D.1. Interlocutory Appeal. As stated in the “Introduction” section, this is an interlocutory appeal via a CR 54(b) certification following summary judgment dismissal of some, but not all, claims.

D.2. Cross-Motions for Summary Judgment. At the trial court level, the parties filed cross-motions for summary judgment. Svendsen Defendants’ motion was filed first, on February 23, 2018. CP 63-64 (*Defendants’ Motion for Summary Judgment*). The filing date was 62 days in advance of the scheduled hearing (April 25, 2018), rather than the permitted minimum of 28 days. See CR 56(c). Plaintiffs’ cross-motion was filed on March 27, 2018. CP 138-160 (*Plaintiffs’ Motion and Memorandum for Partial Summary Judgment*). This was just 30 days before the scheduled hearing. CP 138-160.¹¹

D.3. Motion to Strike Portions of Plaintiffs’ Summary Judgment Materials. Svendsen Defendants filed a motion to strike plaintiffs’ references to, among other things, the alleged faxed letter of

¹¹ The corresponding *Note for Motion Docket* for each cross-motion are not included in the transmitted Clerk’s Papers. But *Plaintiff’s/Appellant’s Designation of Clerk’s Papers* confirms the filing dates of the cross-motions. CP 698-703.

December 7, 2006. CP 419-421 (*Svendsen's Motion to Strike Portions of Plaintiffs' Summary Judgment Materials*).

D.4. Substantive Hearing of April 25, 2018 and Trial Court's Oral Rulings. The trial court held a substantive hearing on April 25, 2018, for consideration of the cross-motions for summary judgment and defendants' motion to strike related thereto. *Brief of Appellants*, p.10; RP 18-65. The trial court orally ruled in defendants' favor on most, but not all, issues. RP 18-65. More specifically, the trial court struck all speculative references to the supposed contents of the faxed letter, ruled that the attorney-client relationship was not formed until October of 2007, and ruled that all claims based on patentability of the second prototype should be dismissed. RP 17-18, 53-57 & 61-65. However, a written Order was not immediately entered.

D.5. Plaintiffs' "Supplemental" Submissions, and an Additional Motion to Strike by Svendsen Defendants. On May 10, 2018, prior to any Order being entered but 15 days after the trial court's oral rulings, plaintiffs filed supplemental submissions. *Brief of Appellants*, p.10. Specifically, they filed a proposed declaration by Mr. Eakin and an additional legal memorandum. CP 601-603 (*Declaration of John W. Eakin in Opposition to Defendant's Motion for Summary Judgment*). Curiously, plaintiffs' supplemental memorandum was listed

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within *Plaintiff's/Appellant's Designation of Clerk's Papers* (see CP 700), but the superior court clerk's office was apparently unable to locate a copy. See *Index*, p.4 ("After a diligent search of the Trial Court file, the document is not located.").¹²

In response, Svendsen Defendants filed another motion to strike. CP 589-600 (*Svendsen Defendants' Motion to Strike Declaration of John W. Eakin and Plaintiffs' Supplemental Memorandum*). That motion argued, among other things, that plaintiffs' submissions were untimely and that the proposed declaration by Mr. Eakin improperly sought to contradict his prior testimony. See CP 592-599.

D.6. Entry of Two Orders on May 11, 2018. On May 11, 2018, the trial court held a hearing to enter a written Order as to the previous oral rulings and also to consider and rule upon defendants' new motion to strike. *Brief of Appellants*, p.11; RP 66-96.

The first Order entered was the *Order on Cross Motions for Summary Judgment and Motions to Strike*, which is found at CP 604-608.

¹² Pursuant to RAP 9.6 and 9.10, the defendants have filed "Svendsen Defendants' Designation of Supplemental Clerk's Papers" with the Yakima County Clerk's Office so as to include, among other things, a copy of *Plaintiffs' Post Summary Judgment Argument Supplemental Memorandum Opposing Defendant's Summary Judgment Motion*. A copy of such pleading is also appended to this brief as "Appendix B". As later explained, it is necessary for Division Three to have a copy of such pleading because other materials reference it (including an additional motion to strike by Svendsen Defendants found at CP 589-600, and a resultant Order found at CP 609-611).

Consistent with the prior oral rulings, this Order struck all speculative references to the supposed contents of the faxed letter, ruled that the attorney-client relationship was not formed until October of 2007, and dismissed all claims based on patentability of the second prototype. CP 607-608; *Brief of Appellants*, p.11. By contrast, this Order denied defendants' motion for summary dismissal of any claims predicated on the third prototype. CP 608.

The second Order – *Order on Svendsen Defendants' Motion to Strike Declaration of John W. Eakin and Plaintiffs' Supplemental Memorandum*, which is found at CP 609-611 – struck plaintiffs' supplemental submissions as untimely, lacking any reasonable excuse or explanation for such untimeliness, and because the proposed declaration by Mr. Eakin was conclusory, speculative and contradictory of both his deposition testimony and a declaration submitted during the infringement case. CP 611; *Brief of Appellants*, p.11; RP 85.¹³

D.7. Plaintiffs' Motion for Reconsideration. On May 18, 2018, seven days after entry of the two preceding Orders, plaintiffs filed a motion for reconsideration. *Brief of Appellants*, p.11. A copy of the actual motion is not included in the Clerk's Papers, but a copy of the

¹³ The trial court issued findings on each mandatory factor. CP 611 (¶5); *see also* RP 82-86; *Keck v. Collins*, 184 Wn.2d 358, 362, 357 P.3d 1080 (2015) (factors).

supporting legal memorandum is. CP 612-631 (*Plaintiffs' Memorandum in Support of Motion for Reconsideration*).

D.8. Entry of a Third Order, on May 22, 2018. On May 22, 2018, the trial court entered the *Order for Motion for Reconsideration*, which is found at CP 632. That Order denied plaintiffs' motion for reconsideration. *Brief of Appellants*, p.11.

D.9. Plaintiffs' Motion to Certify CR 54(b) Appeal, Opposition by Svendsen Defendants, and Trial Court's Certification on August 17, 2018. Plaintiffs next filed a motion to certify a piecemeal appeal under CR 54(b). CP 633-634. Svendsen Defendants filed opposition materials. CP 653-671.

On August 17, 2018, the trial court held an additional hearing to consider the motion to certify. Over defendants' objections (*see* RP 108-116), the trial court granted plaintiffs' motion to certify. CP 674-677 (*Findings of Fact and Order Granting Plaintiffs' Motion to Certify the Court's Order Entering Partial Summary Judgment of May 11, 2018 as a CR 54(b) Order*); *Brief of Appellants*, p.11.

D.10. The Instant Appeal. On September 10, 2018, plaintiffs initiated the instant appeal. CP 677-680; *Brief of Appellants*, p.12.

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E. STANDARDS OF REVIEW

It is well known that a *de novo* standard of review applies to a trial court's summary judgment decision. *See e.g., Plese-Graham, LLC v. Loshbaugh*, 164 Wn. App. 530, 541, 269 P.3d 1038 (2001) (Division III); *Brief of Appellants*, p.12. However, a trial court's decision to allow or strike untimely submissions – even those pertaining to a pending motion for summary judgment – is reviewed under the deferential abuse of discretion standard. *Garza v. McCain Foods, Inc.*, 124 Wn. App. 908, 917, 103 P.3d 848 (2004) (Division III). And while a trial court's certification of an interlocutory appeal is also reviewed under an abuse of discretion standard, (*see e.g., Lindsay Credit Corp. v. Skarperud*, 33 Wn. App. 766, 772, 657 P.2d 804 (1983) (Division III)), interlocutory appeals are disfavored and Washington courts have long had a “policy against piecemeal appeals”. *Doerflinger v. New York Life*, 88 Wn.2d at 882.

F. ARGUMENT

F.1. The Formation Date of the Attorney-Client Relationship Was Raised by Svendsen Defendants' Original Moving Papers, by Plaintiffs' Own Original Moving Papers, by Plaintiffs' Response Papers, and by Many Other Submissions. Appellants' primary argument is that Svendsen Defendants “made no argument”, “offered no

evidence” and “made no evidentiary citation” regarding the formation date of the attorney-client relationship until submission of their reply materials, thereby prejudicing plaintiffs’ ability to argue in opposition. *See Brief of Appellants*, p.15 (underscore emphases omitted); *see also id.*, pp.13-15.

This argument is an overt misrepresentation.

Not only was the formation date of the attorney-client relationship specifically addressed in defendants’ original moving papers, plaintiffs’ response specifically acknowledged such reference. Then, it was raised again in plaintiffs’ moving papers on their cross-motion, as well as in many subsequent submissions by both sides, including response and reply materials. And it was also in dispute from the outset of this case.

The chronology of how and when the formation date issue was raised is as follows:

1. Plaintiffs’ Complaint. Plaintiffs’ lawsuit alleged that the attorney-client relationship was formed “[i]n or about 2006”. CP 50 (*Second Amended Complaint for Legal Malpractice*, p.5, ¶XV).¹⁴
2. Svendsen Defendants’ Answer. Svendsen Defendant denied that allegation. CP 564 (*Answer of Svendsen Legal, LLC and*

¹⁴ The same allegation was advanced via the *[First] Amended Complaint for Legal Malpractice*. A copy thereof is not yet included in the Clerk’s Papers. Pursuant to RAP 9.6 and 9.10, the defendants have filed “Svendsen Defendants’ Designation of Supplemental Clerk’s Papers” with the Yakima County Clerk’s Office so as to include, among other things, a copy of such pleading. A copy of such pleading is also appended to this brief as “Appendix B”.

Chris E. Svendsen and Denise E. Svendsen to Second Amended Complaint for Legal Malpractice, p.3, ¶8).¹⁵

3. Svendsen Defendants' Original Moving Papers. Svendsen Defendants' original moving papers on their motion for summary judgment included a declaration by Mr. Svendsen wherein he testified that he was plaintiffs' attorney "[f]rom October, 2007, until December, 2015" and that he "began working with John Eakin related to seeking a patent on his cattle footbath system in early October, 2007, although significant work did not occur until November of that year." CP 81 (*Declaration of Chris E. Svendsen in Support of Defendants' Motion for Summary Judgment*, p.2, ¶2) & 83 (*id.*, p.4, ¶12).
4. Plaintiffs' Own Moving Papers. Next, plaintiffs filed their own moving papers in support of a cross-motion for summary judgment. Plaintiffs' legal memorandum contended that Mr. Svendsen became plaintiffs' attorney during 2006. CP 141 (*Plaintiffs' Motion and Memorandum for Partial Summary Judgment*, p.4, lns.14-21). In addition, a declaration by plaintiffs' retained expert witness directly cited and challenged that portion of Mr. Svendsen's preceding declaration wherein he said he was plaintiffs' lawyer only from October 2007 to December 2015. CP 193 (*Declaration of Mark Lorbiecki*, p.19, ¶38). Continuing further, the declaration by plaintiffs' retained expert argued that Mr. Svendsen owed a duty to provide legal services to plaintiffs "commencing in August 2006". CP 193-914 (*id.*, pp.19-20, ¶39).
5. Svendsen Defendants' Response Materials. In response to plaintiffs' cross-motion, Svendsen Defendants filed a legal memorandum expressly arguing that "a full attorney-client relationship was not formed between Messrs. Svendsen and

¹⁵ Svendsen Defendants likewise denied the allegation via their *Answer of Svendsen Legal, LLC and Chris E. Svendsen and Denise E. Svendsen to [First] Amended Complaint for Legal Malpractice*. A copy thereof is not yet included in the Clerk's Papers. Pursuant to RAP 9.6 and 9.10, the defendants have filed "Svendsen Defendants' Designation of Supplemental Clerk's Papers" with the Yakima County Clerk's Office so as to include, among other things, a copy of such pleading. A copy of such pleading is also appended to this brief as "Appendix C".

Eakin as of the August 2006 telephone discussion (nor during the ensuing weeks and months)” and that the screening telephone call “does not mean that Mr. Svendsen was already Mr. Eakin’s lawyer under a full attorney-client relationship”. CP 438 (*Svendsen’s Response Memorandum to Plaintiffs’ Cross-Motion for Partial Summary Judgment*, Ins.3-5 & 10-12). As factual support, that argument cited to an additional declaration by Mr. Svendsen wherein he testified that “the sole purpose” of screening telephone call was to enable a conflict check and, therefore, that Mr. Lorbiecki’s contention that Mr. Svendsen “owed a duty shortly after August, 2006” was factually incorrect. CP 488 (*Declaration of Chris E. Svendsen in Response to Declaration of Mark Lorbiecki*, Ins.21-22) & 490 (*id.*, Ins.15-21).¹⁶

6. Plaintiffs’ Response Materials. In response to Svendsen Defendants’ motion, plaintiffs filed a legal memorandum contending, again, that Mr. Svendsen became plaintiffs’ attorney during 2006. CP 399 (*Plaintiffs’ Memorandum in Opposition to Defendants’ Motion for Summary Judgment*, p.4, Ins.14-15).
7. Svendsen Defendants’ Reply Materials. Svendsen Defendants’ reply materials included a legal memorandum expressly arguing, via a bold subsection heading, that “Mr. Eakin was merely a prospective client as of the August 2006 telephone discussion (and until October of 2007)”. CP 522 (*Svendsen’s Reply Memorandum in Support of Defendants’ Motion for Summary Judgment*, p.9, Ins.1-2).
8. Plaintiffs’ Reply Materials. Plaintiffs’ reply materials further addressed the topic, as their legal memorandum falsely asserted that “it is undisputed that an attorney-client relationship existed between John Eakin and the defendants going back to 2006.” CP 538 (*Plaintiffs’ Reply in Support of Motion for Partial Summary Judgment*, p.3, Ins.16-18).

¹⁶ Appellants contend, without basis, that “Svendsen did not disagree with or dispute the expert opinions offered by Mr. Lorbiecki.” See *Brief of Appellants*, p.32. To the contrary, Mr. Svendsen disputed nearly everything said by Mr. Lorbiecki as being factually untrue and/or legally invalid. See CP 485-499 (*Declaration of Chris E. Svendsen in Response to Declaration of Mark Lorbiecki*).

9. Plaintiffs' Motion for Reconsideration. Of particular note, the legal memorandum submitted by plaintiffs in support of their motion for reconsideration said the following: "In response to defendants' motion for summary judgment the Plaintiffs submitted competent evidence, including a Declaration from their expert giving his opinion, on a more probable than not basis, that an attorney-client relationship was formed in 2006." CP 621 (*Plaintiffs' Memorandum in Support of Motion for Reconsideration*, p.10, lns.22-25).

Clearly, appellants' contention that Svendsen Defendants "made no argument", "offered no evidence" and "made no evidentiary citation" regarding the formation date of the attorney-client relationship until submission of their reply materials (*see Brief of Appellants*, p.15) is manifestly wrong. The formation date was timely raised by Svendsen Defendants, it was thoroughly argued by both sides, and no unfair surprise occurred. Inexplicably, plaintiffs and their counsel failed to submit a declaration by Mr. Eakin until after the trial court ruled. Instead, they relied exclusively on a declaration from their retained expert, even though he had no firsthand knowledge of anything pertinent to the issue.¹⁷

They did so because, as they admitted in their "supplemental" memorandum after receipt of an adverse ruling, they did not believe a

¹⁷ Presumably, plaintiffs chose to attempt to rely on Mr. Lorbiecki's declaration because they knew that Mr. Eakin had, via his deposition testimony, confirmed Mr. Svendsen's own testimony to the effect that the attorney-client relationship was not formed until October of 2007, and thus that any contrary assertion by Mr. Eakin via a declaration would run the risk of being struck as a sham (which is precisely what ultimately happened). *See* CP 610-611 (*Order on Svendsen Defendants' Motion to Strike Declaration of John W. Eakin and Plaintiffs' Supplemental Memorandum*, pp.2-3, ¶¶2-5).

declaration from Mr. Eakin was necessary in order to create an issue of fact as to the formation date of the attorney-client relationship. *See Appendix A* to this brief (*Plaintiffs' Post Summary Judgment Argument Supplemental Memorandum Opposing Defendant's Motion for Summary Judgment*, p.2, lns.17-19). Then, well after the fact, plaintiffs offered a proposed declaration by Mr. Eakin, thus attempting a proverbial second bite at the apple. CP 601-603 (*Declaration of John W. Eakin in Opposition to Defendant's Motion for Summary Judgment*). The trial court struck that declaration as untimely, lacking any reasonable excuse or explanation for such untimeliness, and conclusory, speculative and contradictory of both Mr. Eakin's deposition testimony and a declaration Mr. Eakin submitted during the infringement case. CP 610-611 (*Order on Svendsen Defendants' Motion to Strike Declaration of John W. Eakin and Plaintiffs' Supplemental Memorandum*, pp.2-3, ¶¶2-5).

As demonstrated herein, appellants' primary argument – specifically that the formation date was supposedly not raised until Svendsen Defendants' reply materials – is without merit and should be rejected. No unfair surprise occurred vis-à-vis summary judgment on the formation date of the attorney-client relationship.

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F.2. The Trial Court Did Not Abuse Its Discretion When It Struck the Plaintiffs’ Untimely Submissions, Including Mr. Eakin’s Sham Declaration. Appellants’ secondary argument is that their untimely submissions – most notably Mr. Eakin’s proposed declaration –should have been accepted by the trial court. *See Brief of Appellants*, pp.15-18. In this regard, appellants argue that “there was no reason to file such a declaration from Eakin [earlier] because Svendsen did not seek summary judgment on the issue of when the attorney-client relationship was formed in the initial summary judgment pleadings.” *Brief of Appellants*, p.16 (bracketed material added).

To the contrary, the notion that such issue was not raised by Svendsen Defendants’ original moving papers is manifestly wrong, as demonstrated in the preceding subsection of this brief. *See supra*, pp.31-36, section F.1. Moreover, the trial court’s rejection of plaintiffs’ untimely submissions was not erroneous under the deferential abuse of discretion standard. *See e.g., Garza v. McCain Foods*, 124 Wn. App. at 917 (Division III).

When the trial court struck plaintiffs’ untimely submissions, the Order expressly noted not only that those submissions were “untimely” but also that plaintiffs and their counsel had offered “no reasonable excuse or explanation” for the untimeliness. CP 610-611 (*Order on Svendsen*

Defendants' Motion to Strike Declaration of John W. Eakin and Plaintiffs' Supplemental Memorandum, pp.2-3, ¶¶2-5). That was a sound decision because, as previously noted, plaintiffs and their counsel simply chose to not submit a declaration from Mr. Eakin until it was too late. As they said in their “supplemental” memorandum: “It was the belief of plaintiffs that there was clearly enough evidence in the record to create an issue of fact as to whether or not a relationship existed between the parties [as of 2006]”. See *Appendix A* to this brief (*Plaintiffs' Post Summary Judgment Argument Supplemental Memorandum Opposing Defendant's Motion for Summary Judgment*, p.2, lns.17-19, bracketed material added). That was the only “explanation” offered, and it was clearly insufficient. One is not permitted to wait out a final decision before deciding how much evidence is necessary. See *e.g.*, *Shows v. Pemberton*, 73 Wn. App. 107, 113, 868 P.2d 164 (1994) (Division III) (summary judgment is appropriate “if there is a complete failure of proof concerning an essential element of the nonmoving party’s case”).

Moreover, the content of Mr. Eakin’s proposed declaration sought to contradict his own under oath statements regarding the formation date of the attorney-client relationship in hopes of creating a genuine issue of fact on such issue. But it is well-established that “genuine issues of fact cannot be created by a declarant who submits an affidavit that contradicts

his or her own deposition testimony.” *Baldwin v. Silver*, 165 Wn. App. 463, 472, 269 P.3d 284 (2011) (Division III); *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999) (Division II); *Selvig v. Caryl*, 97 Wn. App. 220, 225, 983 P.2d 1141 (1999) (Division I); *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002); *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 66 (9th Cir. 1991); *see also* CP 592 (wherein Svendsen Defendants made this argument and cited these authorities at the trial court level). As explained by the Ninth Circuit, “[I]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.” *Kennedy v. Allied Mut. Ins.*, 952 F.2d at 266 (quoting *Foster v. Arcata Associates*, 772 F.2d 1453, 1462 (9th Cir. 1985)).

Again, if this court reaches the merits, it should affirm the trial court’s *Order on Svendsen Defendants’ Motion to Strike Declaration of John W. Eakin and Plaintiffs’ Supplemental Memorandum*, which is found at CP 609-611. The trial court did not abuse its discretion when it struck the plaintiffs’ untimely submissions, including Mr. Eakin’s proposed declaration that sought to contradict his own under oath statements.

F.3. The Trial Court Did Not Fail to Consider the Opinions

Offered by the Plaintiffs' Retained Expert Witness. An additional argument by appellants, which is advanced multiple times, is that the trial court "did not appropriately consider the opinions and issues of fact created by Eakin's expert Mark Lorbiecki." *See Brief of Appellants*, p.16; *see also id.*, pp.18, 23-29 & 34. This too is patently false.

The trial court's *Order of Cross-Motions for Summary Judgment and Motions to Strike* recites that the declaration by Mr. Lorbiecki was among the materials received and considered. *See* CP 605 (#4). Appellants' own brief also confirms that the trial court considered Mr. Lorbiecki's opinions. *See e.g., Brief of Appellants*, p.32 (reciting a portion of the trial court's oral ruling that said, "I think that there's seven points that Mr. Lorbiecki brings up about falling below the standard of care") & p.34 (saying, "In making its oral findings at the time of the summary judgment hearing the trial court expressly acknowledged that patent expert Mark Lorbiecki raised seven points about Svendsen falling below the standard of care"). And the transcript from the hearing of April 25, 2018, further confirms that the trial court thoroughly considered Mr. Lorbiecki's contentions and argument by counsel related thereto. *See* RP 44 (lns.10-11), 45 (lns.14), 48 (lns.1-7 & 13-23), 50 (lns.20-25), 51 (lns.1-4), 53 (lns.11-20), 54 (lns.7-13), 58 (lns.7-12), 59 (lns.2-14) & 64 (lns.1-3).

Ultimately, 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 (without any timely declaration having been offered by Mr. Eakin himself). RP 54 (lns.3-13); *see also* RP 55-56. Appellants' contention that the trial court failed to even consider Mr. Lorbiecki's opinions is obviously false.

F.4. Speculation, Even by an "Expert", is Not Valid Evidence.

It is well known that a party resisting summary judgment may not rely on speculation, argumentative assertions, or having its affidavits considered at face value. *See e.g., Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Moreover, speculation is not admissible simply because it is offered by an expert. *State v. Lewis*, 141 Wn. App. 367, 389, 166 P.3d 786 (2007) (Division I) ("speculative testimony is not rendered less speculative . . . simply because it comes from an expert", ellipsis added); *Safeco v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991) (Division I) ("It is well established that conclusory or speculative expert opinions lacking adequate foundation will not be admitted.").

F.5. Mr. Lorbiecki's Contentions Did Not Create Any Genuine Dispute as to the Formation Date of the Attorney-Client Relationship.

At page 35 of their brief, appellants write as follows: "The evidence of

the non-moving party must be believed at summary judgment.” *See Brief of Appellants*, p.35 (bold emphasis omitted). In support for this contention, appellants cite the following: *Larson v. Nelson*, 118 Wn. App. 797, 810 n.17, 77 P.3d 671 (2003) (Division II) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505 (1986)). *See Brief of Appellants*, p.35. However, this citation does not say what appellants represent, and *Larson v. Nelson* does not contain any citations to *Anderson v. Liberty Lobby*. Instead, the cited page from *Larson v. Nelson* merely notes that weighing conflicting “evidence” is a matter for trial rather than for summary judgment. *See Larson v. Nelson*, 118 Wn. App. at 810 n.17.

Mr. Lorbiecki did not (and could not) offer any “evidence” because he possessed no firsthand knowledge of the facts. Instead, he twisted the facts to fit his self-serving conclusions. For example, he purported to summarize the contents of the (non-existent and ultimately struck) faxed letter of December 7, 2006. *See CP 188 (Declaration of Mark Lorbiecki*, p.14, ¶¶29-30). Yet, even Mr. Eakin – the sender of the alleged fax – could not recall its contents, which appellants concede. *See Brief of Appellants*, p.6. Another equally glaring example is that Mr. Lorbiecki tried to contradict Mr. Svendsen’s firsthand account of the nature and content of his communications with Mr. Eakin. CP 192-194 (*Declaration of Mark Lorbiecki*, ¶¶35-39); *compare with CP 488-490*

(Declaration of Chris E. Svendsen in Response to Declaration of Mark Lorbiecki, pp.4-6, ¶¶7-11). However, Mr. Lorbiecki was in no position to contradict Mr. Svendsen because, quite simply, Mr. Lorbiecki was neither a witness nor participant to such communications.

Mr. Lorbiecki also offered conclusory opinions not based on any source authority. Most notably, he claimed that Mr. Svendsen was obligated, due to the screening telephone call of August 2, 2006 and even before a conflict check was completed, to substantively advise Mr. Eakin about patent law's one-year patentability deadline for prior art. *See* CP 192-193 (*Declaration of Mark Lorbiecki*, pp.18-19, ¶¶35-36 & 39-40); *see also* *Brief of Appellants*, pp.23-24 & 26-28. But that contention lacked foundation and was properly rejected by the trial court. *See e.g., Safeco v. McGrath*, 63 Wn. App. at 177 (Division I) ("It is well established that conclusory or speculative expert opinions lacking adequate foundation will not be admitted."); *Tiger Oil Corp. v. Yakima County*, 158 Wn. App. 553, 242 P.3d 936 (2010) (Division III) ("Conclusory opinions lacking adequate factual support are insufficient to defeat a motion for summary judgment."); *Briggs v. Washington Metropolitan Area Transit Authority*, 81 F.3d 839, 847, 375 U.S.App.D.C. 343 (2007) ("An expert's own conclusory opinion . . . without any showing that the proffered standard has been promulgated, or is generally known . . . is insufficient" and "an

expert must do more than simply state that a purported standard sets a . . . norm”, ellipses added).

For these reasons, Mr. Lorbiecki’s contentions did not (and could not) create any genuine dispute as to the formation date of the attorney-client relationship.¹⁸

F.6. A Lawyer is Not Obligated to Give Substantive Advice to Prospective Clients. Contrary to Mr. Lorbiecki’s contentions, the law does not impose any duty on a lawyer to give substantive advice to prospective clients, which is what plaintiffs were as of August of 2006. Rather, the Washington Practice treatise confirms that a lawyer’s conversations with prospective clients are typically limited in depth, aimed toward enabling a conflict check, and often leave both sides free to proceed no further:

A lawyer’s consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. . . .

. . .

In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only

¹⁸ Appellants contend that “the trial court was not permitted to disregard the opinions of Eakin’s expert on the applicable standard of care” and that the trial court improperly weighed credibility by doing so. *See Brief of Appellants*, pp.34-35. To the contrary, the legal authorities cited herein confirm the trial court was justified in rejecting Mr. Lorbiecki’s baseless contentions, and credibility was not the reason they were struck.

such information as reasonably appears necessary for that purpose

....

2 Wash. Prac., Rules Practice RPC 1.18 (8th ed.), Comments [1] and [4] (ellipses added); *see also* CP 522 (wherein the Svendsen Defendants made this argument and cited this authority at the trial court level).

F.7. Performing a Conflict Check Does Not Create an Attorney-Client Relationship. The first *prima facie* element of a claim for legal malpractice is the existence of an attorney-client relationship. *See e.g., Hizey v. Carpenter*, 119 Wn.2d 251, 260, 830 P.2d 646 (1992); *see also* CP 521-522 (wherein Svendsen Defendants made this argument at the trial court level).

It is axiomatic that performing a conflict check does not create an attorney-client relationship, because if it did the conflict check would be self-defeating and the relationship would always be triggered even if a conflict existed. *See e.g.,* 19 Wash. Prac., Fam. And Community Prop. L. §1:1 (“mere discussion with a potential client about the nature of the case . . . does not form an attorney-client relationship”, ellipsis added); *accord Bohn v. Cody*, 119 Wn.2d 357, 364, 832 P.2d 71 (1992) (attorney-client relationship is not formed by general discussion of subject matter). Mr. Lorbiecki’s unsourced contentions to the contrary are wrong.

F.8. An Attorney-Client Relationship Exists Only if

Confidential Information is Exchanged or if Legal Advice is Sought

and Received. Washington Practice further confirms that “[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is [only] a prospective client”. 2 Wash. Prac., Rules of Practice RPC 1.18 (8th ed.), ¶(a) (bracketed changes and material added). Rather, it is when “confidential information is obtained from the potential client, or . . . specific advice concerning the case is given” that an attorney-client relationship is formed. 19 Wash. Prac., Fam. And Community Prop. L. §1:1. This makes sense, because “[t]he essence of the attorney/client relationship is whether the attorney’s advice or assistance is sought and received on legal matters.” *Bohn v. Cody*, 119 Wn.2d at 363.

As of August of 2006, plaintiffs did not provide any “confidential information” to Mr. Svendsen. Plaintiffs also did not seek any “advice or assistance” from Mr. Svendsen and Mr. Svendsen did not provide any. Rather, it was not until October of 2007 that such things occurred, as confirmed by Mr. Eakin’s own deposition testimony. CP 258 (deposition of Eakin, p.103, lns.8-15) & 269 (deposition of Eakin, p.119, lns.12-17). Thus, as argued repeatedly in this brief, plaintiffs were prospective clients until October of 2007, and malpractice could not have occurred earlier.

F.9. A Lawyer's Actions Cannot be Evaluated via Hindsight.

Logically and legally, a lawyer's actions must be evaluated based on the information he had at the time and not on 20-20 hindsight. *See e.g., State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052 (1984), relative to effective assistance of counsel, “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”).

Plaintiffs’ continual attempt to judge Mr. Svendsen’s actions based on self-serving 20-20 hindsight is unavailing and should be rejected by this court just as it was by the trial court.

F.10. The Formation Date of the Attorney-Client Relationship Was Properly Resolvable Via Summary Judgment. Appellants suggest that the “sole test” for determining the existence of an attorney-client relationship is the putative client’s subjective belief. *See Brief of Appellants*, p.19. This is not true, as appellants later concede. Rather, the putative client’s subjective belief must be “reasonably formed based on the attending circumstances.” *Bohn v. Cody*, 119 Wn.2d at 363.

In the instant case, there was no valid evidence from plaintiffs to show that Mr. Eakin subjectively believed that an attorney-client relationship had been formed in 2006. Rather, Mr. Eakin's deposition testimony confirmed that he did not consider the plaintiffs to be represented by counsel as of the much later date of February 14, 2007, and that he did not provide any details to Mr. Svendsen and/or request any action from Mr. Svendsen until October of 2007. CP 258 (deposition of Eakin, p.103, lns.8-15) & 269 (deposition of Eakin, p.119, lns.12-17). By his untimely proposed declaration, Mr. Eakin sought to contradict his deposition testimony but that declaration was properly struck by the trial court. *See supra*, pp.37-39, section F.2.

Accordingly, the formation date of the attorney-client relationship was properly resolvable at summary judgment even though it was a factual issue. *See e.g., Bohn v. Cody*, 119 Wn.2d at 363 (summary judgment is proper on a factual issue "if reasonable minds could reach but one conclusion on it").

F.11. The Instant Case is Not Comparable to a Hypothetical Personal Injury Case. Yet, appellants urge the court to view the instant case as analogous to a prospective client consulting a personal injury lawyer five days prior expiration of the applicable three-year statute of limitations relative to an automobile accident. *See Brief of Appellants,*

pp.24-26. In a footnote, appellants then refer to the introductory, screening telephone call of August 2, 2006. *See id.*, p.26, n.2. This urged analogy is inapposite and misleading.

An automobile accident has a certain date and is a completed occurrence. By contrast, Mr. Eakin's work on the invention was still ongoing as of August of 2006. A personal injury client would presumably request the lawyer to file suit. By contrast, Mr. Eakin did not request any action from Mr. Svendsen during August of 2006. Without citation to any authority, appellants contend that a personal injury lawyer must provide substantive advice to a prospective client about the applicable statute of limitations. *See Brief of Appellants*, p.25. To the contrary, the duty of advice is only triggered once a formal attorney-client relationship exists; it is not triggered by a preliminary contact and/or by performance of a conflict check. *See supra*, p.45, section F.7.

What occurred between Messrs. Eakin and Svendsen in August of 2006 is not comparable to a personal injury client hiring a lawyer five days before expiration of the statute of limitations. Even if it were, Mr. Lorbiecki offers nothing but an unsourced, self-serving viewpoint. And, why should plaintiffs be allowed to speculate that Mr. Eakin might have said something different in August of 2006, if he had been pressed at the

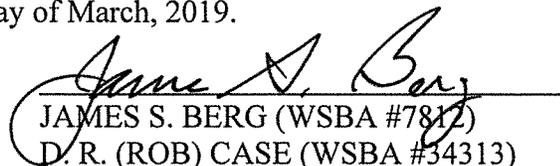
time regarding prior usage and/or display, than the lies he told over the following six-plus years on such topics (until his deposition in 2012)?

G. CONCLUSION

Appellants accuse Mr. Svendsen of committing legal malpractice before he actually became plaintiffs' lawyer which, of course, makes no sense. In the process, appellants and their "expert" repeatedly distort the factual record and speculate as to the contents of missing evidence (*i.e.*, the faxed letter). They seek to rely on invalid and self-serving 20-20 hindsight, rather than what actually transpired. They chose to not submit a timely declaration by Mr. Eakin, only to later offer an untimely sham.

Procedurally, this court should vacate the CR 54(b) certification and to remand this case to the trial court until all claims relative to all prototypes are adjudicated. *See supra*, pp.4-5, section B ("Motion to Remand"). If this court chooses to issue a merits-based ruling, it should affirm each of the trial court's three substantive Orders and thus uphold dismissal of all claims predicated on the second prototype.

DATED this 8th day of March, 2019.


JAMES S. BERG (WSBA #7812)
D. R. (ROB) CASE (WSBA #34313)
Larson Berg & Perkins PLLC
Attorneys for "Svendsen Respondents"
(Svendsen Legal, PLLC, and Chris E.
Svendsen and "Jane Doe" Svendsen)

DECLARATION OF SERVICE

I, TIFFANY FORD, do hereby declare and state: On the date specified below, I electronically filed the original of this brief (including its appendices) via the Washington State Appellate Courts' Portal, and I also sent copies to the following recipients via the methods specified:

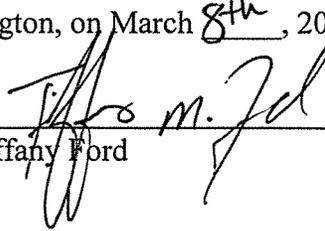
Vernon W. Harkins
Michael J. Fisher
RUSH, HANNULA, HARKINS & KYLER, L.L.P.
4710 South 19th Street, Suite 300
Tacoma, WA 98405
(via email to VHarkins@rhhk.com)
(and via regular mail, with postage prepaid)

Rex B. Stratton
Lynch & Foley, P.C.
7 Washington Street
Middlebury, Vermont 05753
(via email to rstratton@lynchandfoley.com)
(and via regular mail, with postage prepaid)

Helga Kahr
6007 Palatine Avenue N.
Seattle, WA 98103-5350
(via email to orcawild@aol.com)
(and via regular mail, with postage prepaid)

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Yakima, Washington, on March 8th, 2019.



Tiffany Ford

APPENDIX A

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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

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

Plaintiffs,

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,

Defendants.

NO. 15-2-02682-7

PLAINTIFFS' POST SUMMARY
JUDGMENT ARGUMENT
SUPPLEMENTAL MEMORANDUM
OPPOSING DEFENDANT'S SUMMARY
JUDGMENT MOTION

Hearing Date: 05/11/18 @ 2:00 pm

In the Court's oral ruling regarding defendants' summary judgment to dismiss
plaintiffs' claims, the Court indicated that it wasn't until October 2007 that any
meaningful attorney/client relationship was created between plaintiff Eakin and

1 defendant Svendsen. The Court indicated it did not find anything from Mr. Eakin in the
2 record that indicated a relationship developed into a full blown attorney/client
3 relationship until October 2007.

4 This conclusion was reached by the Court despite the fact that the record included
5 factual evidence that Mr. Eakin contacted Mr. Svendsen in August 2006 to hire him as
6 an attorney to obtain a patent for his cattle foot bath system and that following Mr.
7 Svendsen's conclusion that no conflict of interest existed, he opened a file to represent
8 the plaintiff in obtaining a patent for him. The records further show that Svendsen
9 acknowledged in his deposition testimony that Eakin would have considered that a
10 relationship was established at that time period: See P. 14 of Plaintiff's Motion and
11 Memorandum for Partial Summary Judgment quoting Svendsen Deposition Testimony.)
12

13 Page 46 Line 12 through Line 19:

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

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

20 It was the belief of plaintiffs that there was clearly enough evidence in the record to
21 create an issue of fact as to whether or not a relationship existed between the parties,
22 and that the standard of care for a reasonably prudent patent attorney at that point
23 required Svendsen to ask questions to determine when a patent application needed to
24 be filed in reference to any actual or potential public displays of Eakin's invention.

25 Based upon the Court's statement in the oral ruling that there was nothing from
Eakin in the record indicating when he believed the attorney/client relationship was
established, plaintiffs have now submitted a declaration from John Eakin on these
issues.

1 This is offered as further evidence in opposition to the defendants' motion for
2 summary judgment. If the record was not previously adequate to create a basis for the
3 Court to conclude that an attorney client relationship was established in August 2006,
4 the statements of Mr. Eakin in his declaration should fully clarify that.

5 Further, based upon the expert witness testimony of patent attorney, Mark
6 Loribecki, the standard of care of a reasonably prudent patent lawyer in August 2006
7 required Mr. Svendsen to ask questions of Eakin to determine that a prototype of his
8 invention was on display in a dairy farm in the summer of 2006 and further that Mr.
9 Eakin intended to display his prototype at the Boise Dairy Show in the fall of 2006. The
10 failure to do so violated the standard of care in Mr. Lorbiecki's expert opinion. If
11 Svendsen had asked these questions in 2006 after opening a file to represent Eakin
12 and had learned the information about the public display of the invention in 2006 rather
13 than in Eakin's deposition for the first time in 2012, then the standard of care would
14 have required Svendsen to counsel Eakin regarding the critical time periods for filing a
15 patent application for his invention before the one-year deadline expired.

16 In support of the plaintiff's submission of this declaration from John W. Eakin,
17 which is being presented before the court enters an order on the motion, plaintiffs rely
18 upon *Cole v. Pierce County*, 8 Wn. App. 258, 505 P.2d 476 (1973). On an identical
19 issue the Court of Appeals ruled in that case as follows:

20 Before we reach the principle issue in this appeal, we must note
21 that the court correctly considered the affidavit of counsel. Under
22 normal circumstances **it is not desirable to file affidavits after**
23 **argument is heard on the motion, but it is a party's right to do so.**
24 Until a formal order granting or denying the motion for summary judgment
25 is entered, a party may file affidavits to assist the court in determining the
existence of an issue of materials fact.

Cole v. Pierce County, 8 Wn. App. 258, 261, 505 P.2d 476 (1973) (emphasis added);
Fellsmann 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).

1 The *Cole* case has never been overruled and remains good law. Based upon the
2 holding of *Cole*, the Court should consider the Declaration of John W. Eakin filed in
3 Opposition to the Defendant's Motion for summary Judgment, and based upon said
4 Declaration, the Court should find that factual issues exist that when construed in favor
5 of the non-moving party (Eakin) preclude the entry of summary judgment and should
6 deny Defendants' Motion.

7 RESPECTFULLY SUBMITTED this 8th day of May, 2018.

8
9
10 RUSH, HANNULA, HARKINS & KYLER, L.L.P.
Attorneys for Plaintiffs

11
12 By: 
13 Vernon W. Harkins, WSBA 6689

APPENDIX B

FILED
SEP 18 2015

YAKIMA COUNTY CLERK

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

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

Plaintiffs,

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,

Defendants.

NO. 15-2-02682-7

AMENDED COMPLAINT FOR LEGAL
MALPRACTICE

COME NOW the plaintiffs, by and through their attorneys of record, Vernon W.
Harkins and Michael J. Fisher, of Rush, Hannula, Harkins & Kyler, L.L.P., and for
complaint against the defendants, state and allege as follows:

COPY

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I.

The court has jurisdiction over the subject matter hereto and the parties herein.

II.

At all times material hereto, Plaintiff Eakin Enterprises, Inc., was a corporation, licensed and authorized to do business in the State of Washington, with its principal place of business in Selah, Yakima County, Washington.

III.

At all times material hereto, Plaintiff John W. Eakin was a resident of Selah, Yakima County, Washington, and was the sole shareholder, officer and director of Eakin Enterprises, Inc.

IV.

At all times material hereto, defendants Chris E. Svendsen and "Jane Doe" Svendsen were husband and wife, forming a marital community under the laws of the State of Washington. All negligent acts or omissions committed by defendant Chris E. Svendsen, as alleged herein, were committed by and on behalf of the marital community for which it is legally liable.

V.

At all times material hereto, defendant Chris E. Svendsen was an attorney, licensed to practice law in the state of Washington, and held himself out to the public as an experienced, capable attorney practicing in the area of Patent Law.

VI.

At all times material hereto, defendants Rex B. Stratton and "Jane Doe" Stratton were husband and wife, forming a marital community under the laws of the State of Washington. All negligent acts or omissions committed by defendant Rex B. Stratton,

1 as alleged herein, were committed by and on behalf of the marital community for which
2 it is legally liable.

3 VII.

4 At all times material hereto, defendant Rex B. Stratton was an attorney, licensed
5 to practice law in the state of Washington, and held himself out to the public as an
6 experienced, capable attorney practicing in the area of Patent Law.

7 VIII.

8 At all times material hereto, defendant Patrick H. Ballew was an attorney,
9 licensed to practice law in the state of Washington, and held himself out to the public as
10 an experienced, capable attorney practicing in the area of Patent Law.

11 IX.

12 At all times material hereto, defendant Stratton Ballew, PLLC, was a professional
13 limited liability company, licensed and authorized to do business in the State of
14 Washington, and doing business in Yakima, Yakima County, Washington. All acts,
15 omissions and conduct of the Members, Managers, Employees, Agents,
16 Representatives or Individuals of defendant Stratton Ballew, PLLC, including specifically
17 Rex Stratton, Patrick Ballew and Chris Svendsen, were by and on behalf of defendant
18 Stratton Ballew, PLLC, for which it is legally liable on the basis of employer/employee,
19 respondeat superior, vicarious liability and/or agency or apparent agency.

20 X.

21 At all times material hereto, defendant Svendsen Legal, LLC, was a limited
22 liability company, licensed and authorized to do business in the State of Washington,
23 and doing business in Yakima, Yakima County, Washington. All acts, omissions and
24 conduct of the Members, Managers, Employees, Agents, Representatives or Individuals
25 of defendant Svendsen Legal, LLC, were by and on behalf of defendant Svendsen

1 Legal, LLC, for which it is legally liable on the basis of employer/employee, respondeat
2 superior, vicarious liability and/or agency or apparent agency.

3 XI.

4 At all times material hereto, defendant Stratton Law & Mediation, P.S., was a
5 professional services corporation, licensed and authorized to do business in the State of
6 Washington, and doing business in Vashon Island, King County, Washington as well as
7 in other counties of this state including Yakima County. All acts, omissions and conduct
8 of the Officers, Shareholders, Managers, Employees, Agents, Representatives or
9 Individuals of defendant Stratton Law & Mediation, P.S., were by and on behalf of
10 defendant Stratton Law & Mediation, P.S., for which it is legally liable on the basis of
11 employer/employee, respondeat superior, vicarious liability and/or agency or apparent
12 agency.

13 XII.

14 At all times material hereto, defendants Chris Svendsen, Rex Stratton and
15 Patrick Ballew were Members, Managers, Employees, Agents, Representatives or
16 Individuals of defendant Stratton Ballew, PLLC.

17 XIII.

18 At all times material hereto, defendants Chris Svendsen and Rex Stratton were
19 Members, Managers, Employees, Agents, Representatives or Individuals of defendant
20 Svendsen Legal, LLC.

21 XIV.

22 At all times material hereto, defendants Chris Svendsen and Rex Stratton were
23 Officers, Shareholders, Managers, Employees, Agents, Representatives or Individuals
24 of defendant Stratton Law & Mediation, P.S.

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XV.

In or about 2006, plaintiff John Eakin retained defendant attorney Chris Svendsen and the law firm of Stratton Ballew, PLLC, to handle all matters associated with applying for and obtaining a United States Patent for a cattle footbath delivery system.

XVI.

On or about November 21, 2007, defendants Chris Svendsen and Stratton Ballew, PLLC, filed for and obtained a provisional patent application to patent the cattle footbath delivery system on behalf of John W. Eakin under Provisional Patent Application No. 61/004,123. Mr. Eakin had 12-months, or until November 21, 2008, to convert Provisional Patent Application No. 61/004,123 to a Utility (non-provisional) Patent.

XVII.

On or about November 21, 2008, defendants Chris Svendsen and Stratton Ballew, PLLC, filed for a Utility (non-provisional) Patent for the cattle footbath delivery system on behalf of John W. Eakin under Utility Patent Application No. 12/313,601.

XVIII.

The Utility Patent Application No. 12/313,601 that was filed by defendants Chris Svendsen and Stratton Ballew, PLLC, claimed the benefit of Provisional Patent Application No. 60/004,125 and failed to claim the benefit of Provisional Patent Application No. 61/004,123.

XIX.

On or about August 1, 2011, United States Patent No. 7,987,820 for the cattle footbath system was issued to plaintiff John W. Eakin. United States Patent No. 7,987,820 was issued pursuant to Utility Patent Application No. 12/313,601 and claimed

1 the benefit of Provisional Patent Application No. 60/004,125 rather than Provisional
2 Patent Application No. 61/004,123.

3 XX.

4 On or about August 1, 2011, defendants Chris Svendsen and Stratton Ballew,
5 PLLC, filed for a second Utility (non-provisional) Patent for the cattle footbath delivery
6 system on behalf of John W. Eakin under Utility Patent Application No. 13/136,475.

7 XXI.

8 The second Utility Patent Application No. 13/136,475 that was filed by
9 defendants Chris Svendsen and Stratton Ballew, PLLC, claimed the benefit of
10 Provisional Patent Application No. 60/004,125 and failed to claim the benefit of
11 Provisional Patent Application No. 61/004,123.

12 XXII.

13 Plaintiff John W. Eakin granted an exclusive License to plaintiff Eakin
14 Enterprises, Inc., to manufacture and sell the cattle footbath system covered by United
15 States Patent No. 7,987,820 which had been issued to John W. Eakin.

16 XXIII.

17 To the best information and belief of plaintiffs, at some time between 2007 and
18 2011, defendant attorneys Chris Svendsen and Rex B. Stratton ceased their
19 relationship with defendant Stratton Ballew, PLLC.

20 XXIV.

21 In or about 2011, plaintiffs discovered that a competitor company, Specialty
22 Sales, LLC, was engaged in the manufacture and sale of a cattle footbath system
23 covered by United States Patent No. 7,987,820 which had been issued to John W.
24 Eakin.

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XXV.

2

In or about September of 2011, plaintiffs retained defendant attorney Chris Svendsen, defendant Svendsen Legal, LLC, defendant attorney Rex B. Stratton and defendant Stratton Law & Mediation, P.S., (hereinafter collectively "Defendants") to assist them in pursuing a claim against Specialty Sales, LLC, (hereinafter "Specialty") for patent infringement, damages and injunctive relief.

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XXVI.

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On September 23, 2011, Defendants filed a lawsuit for patent infringement, damages and injunctive relief against Specialty on behalf of Eakin Enterprises, Inc., in the United States District Court for the Eastern District of Washington.

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XXVII.

12

On December 1, 2011, the lawsuit against Specialty was transferred to the United States District Court for the Eastern District of California.

13

14

XXVIII.

15

On January 6, 2012, Specialty filed an Answer denying that it had infringed United States Patent No. 7,987,820, alleging that United States Patent No. 7,987,820 was not valid or enforceable because the Utility Patent Application No. 12/313,601 that was filed by defendants Chris Svendsen and Stratton Ballew, PLLC, claimed the benefit of Provisional Patent Application No. 60/004,125 but failed to claim the benefit of Provisional Patent Application No. 61/004,123 which was the Provisional Patent Application actually filed on behalf of John W. Eakin. Specialty also asserted Counter-Claims against Eakin Enterprises, Inc., for declaratory judgment that United States Patent No. 7,987,820 was neither valid nor enforceable as well as claims for damages, attorney's fees and costs.

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XXIX.

Thereafter the Defendants filed a petition with the U.S. Patent and Trademark Office to amend the patent to address the priority claim and also filed Reissue Application No. 13/385,815, seeking to correct the error by requesting that the United States Patent and Trade Office reissue United States Patent No. 7,987,820 to claim the benefit of Provisional Patent Application No. 61/004,123 which was the Provisional Patent Application actually filed on behalf of John W. Eakin.

XXX.

The petition to address the priority claim was dismissed by U.S. Patent and Trademark Office prior to May of 2012.

XXXI.

On April 3, 2012, the parties to the lawsuit against Specialty filed a Joint Scheduling Report, including a Statement of the Case, as required by the United States District Court. The Statement of the Case filed by Specialty stated that United States Patent No. 7,987,820 was neither valid nor enforceable because it failed to claim the benefit of Provisional Patent Application No. 61/004,123 and that the defective priority could not be corrected by the Reissue Application No. 13/385,815 filed by Defendants.

XXXII.

On April 26, 2012, Specialty filed a motion to dismiss and motion for summary judgment seeking to dismiss the lawsuit filed by Defendants because United States Patent No. 7,987,820 does not contain a necessary priority claim to an earlier filed provisional patent application and without this priority claim, the patent was invalid under 35 USC § 102(b).

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XXXIII.

In response to Specialty's motion to dismiss, on May 23, 2012, defendant Chris Svendsen filed a Declaration under penalty of perjury with the Court which stated, in part, as follows:

U.S. Patent application 12/313,601, which issued as U.S. Patent No. 7,987,820 included a claim for domestic priority of a provisional patent application filed on November 21, 2007. The provisional patent date was correct, however there was a typographical error in the serial number of the provisional patent application which erroneously entered as 60/004,125 instead of 61/004,123. . . Omitting the priority reference to provisional application No. 61/004,123 on the published face of the patent potentially renders the patent partially inoperative. Until amended and corrected by the pending reissue, the patent is not entitled to the benefit of the filing date of the provisional application.

XXXIV.

On or about September 25 and 26, 2012, the deposition of John W. Eakin was taken by the attorneys for Specialty. At the conclusion of the deposition, the attorney for Specialty advised John W. Eakin that United States Patent No. 7,987,820 was neither valid nor enforceable because it failed to claim the benefit of Provisional Patent Application No. 61/004,123. Mr. Eakin disagreed and requested that defendant Chris Svendsen show Specialty's attorney the documents to establish the Patent was valid and enforceable. Defendant Chris Svendsen advised Mr. Eakin of the error in which United States Patent No. 7,987,820 claimed the benefit of Provisional Patent Application No. 60/004,125 but failed to claim the benefit of Provisional Patent Application No. 61/004,123 which was the Provisional Patent Application actually filed on behalf of John W. Eakin. This was the first time that John W. Eakin learned of the error and learned that the Patent was neither valid nor enforceable.

1 XXXV.

2 On September 27, 2012, Plaintiffs entered into a Settlement Agreement with
3 Specialty which required the Plaintiffs to dismiss the patent infringement lawsuit and pay
4 damages to Specialty. The Plaintiffs were required to further agree that Specialty could
5 continue to manufacture and sell the cattle footbath delivery system covered by United
6 States Patent No. 7,987,820 and that the Plaintiffs would not pursue a claim for patent
7 infringement against Specialty in the future.
8

9 FIRST CAUSE OF ACTION
10 (Legal Malpractice)

11 XXXVI.

12 Defendants Chris Svendsen and Stratton Ballew, PLLC, were negligent and their
13 conduct in representing their client John W. Eakin in obtaining a Patent for his cattle
14 footbath delivery system fell below the standard of practice expected of a reasonable,
15 experienced patent attorney practicing in Washington State under the same or similar
16 circumstances. This negligence includes, but is not limited to, improperly preparing
17 and/or filing Utility Patent Application No. 12/313,601 which claimed the benefit of
18 Provisional Patent Application No. 60/004,125, but failed to claim the benefit of
19 Provisional Patent Application No. 61/004,123, which was the Provisional Patent
20 Application actually filed on behalf of John W. Eakin.

21 XXXVII.

22 Defendant attorney Chris Svendsen, defendant Svendsen Legal, LLC, defendant
23 attorney Rex B. Stratton and defendant Stratton Law & Mediation, P.S., were negligent
24 and their conduct in representing their clients John W. Eakin and/or Eakin Enterprises,
25 Inc., fell below the standard of practice expected of a reasonable, experienced patent
attorneys practicing in Washington State under the same or similar circumstances. This

1 negligence includes, but is not limited to, their failure to properly or successfully correct
2 or perfect United States Patent No. 7,987,820 and/or Utility Patent Application No.
3 12/313,601 to claim the benefit of Provisional Patent Application No. 61/004,123, the
4 Provisional Patent Application actually filed on behalf of John W. Eakin. This
5 negligence further includes, but is not limited to, their failure to properly counsel or
6 advise the Plaintiffs regarding the filing, prosecution and/or dismissal of the lawsuit
7 against Specialty Sales, LLC.

8 SECOND CAUSE OF ACTION
9 (Breach of Contract)

10 XXXVIII.

11 Defendants Chris Svendsen and Stratton Ballew, PLLC, entered into a contract
12 with their client John W. Eakin to provide him legal representation to obtain a Patent for
13 his cattle footbath delivery system, however they breached their contract with John W.
14 Eakin by not complying with the requirements to properly file, obtain and perfect the
15 Patent such that United States Patent No. 7,987,820 was invalid and unenforceable.

16 XXXIX.

17 Defendant attorney Chris Svendsen, defendant Svendsen Legal, LLC, defendant
18 attorney Rex B. Stratton and defendant Stratton Law & Mediation, P.S., entered into a
19 contract with their clients John W. Eakin and Eakin Enterprises, Inc., to provide them
20 legal representation to properly or successfully correct or perfect United States Patent
21 No. 7,987,820 and/or Utility Patent Application No. 12/313,601 to claim the benefit of
22 Provisional Patent Application No. 61/004,123, the Provisional Patent Application
23 actually filed on behalf of John W. Eakin, and to properly counsel or advise the Plaintiffs
24 regarding the filing, prosecution and/or dismissal of the lawsuit against Specialty Sales,
25 LLC.

1 XLIII.

2 Defendant attorney Chris Svendsen, defendant Svendsen Legal, LLC, defendant
3 attorney Rex B. Stratton and defendant Stratton Law & Mediation, P.S., violated RCW
4 19.86 *et. seq.* by engaging in unfair and deceptive acts and practices in commerce that
5 have a potential for repetition to the detriment of the public. The Defendants unfairly
6 and deceptively failed to advise their clients, John W. Eakin and Eakin Enterprises, Inc.,
7 of their acts and omissions alleged herein, creating the impression that they were
8 competently handling Mr. Eakin's Patent application and the lawsuit against Specialty,
9 failed to provide them the opportunity to protect themselves or seek other counsel, and
10 ultimately caused Mr. Eakin's Patent to be invalid and unenforceable, and caused Eakin
11 Enterprises, Inc., to incur the cost, fees, expense and risk of pursuing a lawsuit against
12 Specialty, all without their clients' knowledge of said acts or omissions. John W. Eakin
13 and Eakin Enterprises, Inc., as consumers, were deceived to their detriment and
14 suffered substantial damages as a direct and proximate result. They entitled to their
15 actual attorney's fees and costs herein, plus treble damages, pursuant to RCW 19.86
16 *et. seq.*

17 FIFTH CAUSE OF ACTION
18 (Breach of Fiduciary Duty)

19 XLIV.

20 The defendants owed their client, Mr. Eakin, a duty of candor and a duty to
21 disclose material information in a timely manner. Prior to September 27, 2012, and at
22 all times material hereto, the defendants advised Mr. Eakin that the error and/or
23 typographical error in the Utility Patent Application No. 12/313,601, which failed to claim
24 the benefit of Provisional Patent Application No. 61/004,123, was an error made by the
25 U.S. Patent and Trademark Office and that the error could be fixed or corrected.

////

1 XLV.

2 The defendants failed to disclose to Mr. Eakin that the error in Utility Patent
3 Application No. 12/313,601, which failed to claim the benefit of Provisional Patent
4 Application No. 61/004,123, was an error made by the defendants. The defendants
5 further failed to disclose to Mr. Eakin that the error could not be fixed or corrected. The
6 actions of the defendants constitute a breach of their fiduciary duties to their client, Mr.
7 Eakin, and relate to the manner in which they interacted with their client, rather than the
8 manner in which they performed the underlying legal work or pursued the underlying
9 case. These breaches represent breaches of fiduciary duty, separate and apart from
10 the legal malpractice referenced in Plaintiff's First Cause of Action.

11 XLVI.

12 Defendant Stratton Ballew, PLLC, defendant attorney Chris Svendsen, defendant
13 Svendsen Legal, LLC, defendant attorney Rex B. Stratton and defendant Stratton Law
14 & Mediation, P.S., are jointly and severally liable for all injuries and damages suffered
15 by the plaintiffs as a direct and proximate result of their negligence, which damages
16 include all damages plaintiffs would have been entitled to claim in the lawsuit against
17 Specialty and as further alleged below.

18 XLVII.

19 Plaintiffs have suffered injuries and damages related to the invalid and
20 unenforceable Patent, and continue to suffer injuries and damages, much of which are
21 permanent, all in an amount to be proven at the time of trial.

22 XLVIII.

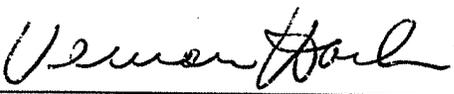
23 Plaintiffs have incurred attorney's fees, costs and expenses, will incur attorney's
24 fees, costs and expenses in the future, have sustained a loss of income and have
25 sustained other out-of-pocket costs, all in an amount to be proven at the time of trial.

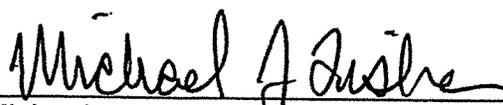
1 WHEREFORE, plaintiffs John W. Eakin and Eakin Enterprises, Inc., pray for
2 judgment against the defendants jointly and severally as follows:

- 3 1. For all general and non-economic damages suffered by the plaintiffs;
- 4 2. For all special and economic damages suffered by the plaintiffs;
- 5 3. For disgorgement, relinquishment and repayment of all attorney's fees
6 received by defendants;
- 7 4. For an award of all costs and expenses incurred by plaintiffs associated
8 with the Patent process and/or the lawsuit against Specialty;
- 9 5. For pre-judgment interest on the liquidated sums;
- 10 6. For all costs and disbursements incurred herein including a reasonable
11 attorney's fee;
- 12 7. For their actual attorney's fees and costs pursuant to RCW 19.86 *et. seq.*;
- 13 8. For treble damages pursuant to RCW 19.86 *et. seq.*; and
- 14 9. For such other and further relief as the court may deem just and equitable.

15 DATED this 15th day of September, 2015.

16 RUSH, HANNULA, HARKINS & KYLER, L.L.P.
17 Attorneys for Plaintiffs

18 By: 
19 Vernon W. Harkins, WSBA 6689

20
21 By: 
22 Michael J. Fisher, WSBA #32778

APPENDIX C

RECEIVED

NOV 09 2015

Larson Berg & Perkins

FILED
NOV 06 2015

YAKIMA COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

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

Plaintiffs,

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,

Defendants.

NO. 15-2-02682-7

ANSWER OF SVENDSEN LEGAL, LLC and CHRIS E. SVENDSEN and DENISE E. SVENDSEN TO AMENDED COMPLAINT FOR LEGAL MALPRACTICE

COMES NOW defendants, SVENDSEN LEGAL, LLC and CHRIS E. SVENDSEN and DENISE E. SVENDSEN, husband & wife, (hereinafter referred to as "Svensden," except as otherwise noted) by and through their attorneys, LARSON BERG & PERKINS PLLC, and James S. Berg, and as their Answer to Plaintiffs' Amended Complaint for Legal Malpractice, admit, deny and allege as follows:

ANSWER OF SVENDSEN LEGAL, LLC and CHRIS E. SVENDSEN and DENISE E. SVENDSEN TO AMENDED COMPLAINT FOR LEGAL MALPRACTICE - 1

LARSON BERG & PERKINS PLLC
105 North 3rd Street
P.O. Box 550
Yakima, WA 98907
(509) 457-1515
(509) 249-0619 (fax)

1 1. Svendsen admits paragraphs I and III of Plaintiffs' Amended Complaint.

2 2. Answering paragraph II of Plaintiffs' Amended Complaint, Svendsen is
3 without knowledge or information sufficient to form a belief as to the truth of the
4 reference to "[A]t all times material hereto," and therefore denies same. Svendsen admits
5 the remaining allegations of said paragraph II.

6 3. Answering paragraph IV of Plaintiffs' Amended Complaint, Svendsen
7 generally admits the first sentence thereof, but further alleges that the true and legal
8 name of "Jane Doe" Svendsen is Denise E. Svendsen. Svendsen denies that defendant
9 Chris E. Svendsen or the marital community is liable for any negligent acts or omissions
10 alleged in Plaintiffs' Amended Complaint.

11 4. Svendsen admits paragraph V of Plaintiffs' Amended Complaint.

12 5. Answering paragraph VI of Plaintiffs' Amended Complaint, Svendsen admits
13 the first sentence thereof. Svendsen is without knowledge or information sufficient to
14 form a belief as to the truth of the allegations contained in the second sentence of said
15 paragraph VI, and therefore denies same.

16 6. Answering paragraph VII of Plaintiffs' Amended Complaint, Svendsen
17 admits that at times material hereto, Defendant Rex Stratton has been, and continues to
18 be, an attorney licensed to practice in the state of Washington. Further answering said
19 paragraph VII, Svendsen alleges that Defendant Rex Stratton is not a Registered Patent
20 Attorney, and for that reason, Svendsen is without knowledge or information sufficient to
21 form a belief as to the truth of the remaining allegations contained therein, and therefore
22 denies same.

23 7. Answering paragraph VIII of Plaintiffs' Amended Complaint, Svendsen
24 admits that at times material hereto, Defendant Patrick H. Ballew has been, and continues
25 to be, an attorney licensed to practice in the state of Washington. Further answering said
26 paragraph VII, Svendsen alleges that Defendant Patrick H. Ballew is not a Registered
27 Patent Attorney, and for that reason, Svendsen is without knowledge or information
28 sufficient to form a belief as to the truth of the remaining allegations contained therein,
29 and therefore denies same.

1 8. Answering paragraph IX of Plaintiffs' Amended Complaint, Svendsen denies
2 the first sentence thereof as related to the reference to "[A]t all times material hereto,"
3 and further denies that defendant Chris E. Svendsen was ever a member, manager,
4 employee or individual of defendant Stratton Ballew, PLLC. Svendsen is without
5 knowledge or information sufficient to form a belief as to the truth of the remaining
6 allegations contained in said paragraph IX, and therefore denies same.

7 9. Answering paragraph X of Plaintiffs' Amended Complaint, Svendsen denies
8 the first sentence thereof as related to the reference to "[A]t all times material hereto,"
9 and further denies that defendant Svendsen Legal, LLC, or any member, manager,
10 employee, agent, representative or individual thereof, is liable for any acts, omissions
11 and/or conduct alleged in said Amended Complaint.

12 10. Answering paragraph XI of Plaintiffs' Amended Complaint, Svendsen denies
13 the first sentence thereof as related to the reference to "[A]t all times material hereto."
14 Svendsen is without knowledge or information sufficient to form a belief as to the truth of
15 the remaining allegations contained in said paragraph XI, and therefore denies same.

16 11. Answering paragraph XII of Plaintiffs' Amended Complaint, Svendsen
17 denies the reference to "[A]t all times material hereto." Subject to that denial, Svendsen
18 further admits the allegations as related to defendants Rex Stratton and Patrick Ballew
19 and denies the allegations as related to defendant Chris E. Svendsen.

20 12. Answering paragraph XIII of Plaintiffs' Amended Complaint, Svendsen
21 denies the reference to "[A]t all times material hereto." Subject to that denial, Svendsen
22 admits the allegations as related to defendant Chris E. Svendsen and denies the
23 allegations as related to defendant Rex Stratton.

24 13. Answering paragraph XIV of Plaintiffs' Amended Complaint, Svendsen
25 denies the reference to "[A]t all times material hereto." Subject to that denial, Svendsen
26 denies the allegations as related to defendant Chris E. Svendsen and admits the
27 allegations as related to defendant Rex Stratton.

28 14. Answering paragraph XV of Plaintiff's Amended Complaint, Svendsen
29 admits that plaintiff John Eakin retained defendant Chris Svendsen and Stratton Ballew ,
30

1 PLLC to handles matters associated with applying for and obtaining a Patent for a cattle
2 footbath delivery system. Svendsen is without knowledge or information sufficient to
3 form a belief as to whether such retention was related to "all matters" and whether it
4 occurred "in or about 2006," and therefore denies same, and Svendsen specifically denies
5 any implication that defendant Chris E. Svendsen was a member, manager, employee or
6 individual of defendant Stratton Ballew, PLLC.

7 15. Svendsen generally admits the allegations in paragraphs XVI, XVII and XVIII
8 of Plaintiffs' Amended Complaint, but specifically denies any implication that defendant
9 Chris E. Svendsen was a member, manager, employee or individual of defendant Stratton
10 Ballew, PLLC.

11 16. Answering paragraph XIX of Plaintiffs' Amended Complaint, Svendsen
12 admits the first sentence thereof and that the subject Patent was issued pursuant to
13 Utility Patent Application No. 12/313,601. Svendsen denies each and every other
14 allegation contained in said paragraph XIX.

15 17. Svendsen admits paragraphs XX, XXI and XXII of Plaintiffs' Amended
16 Complaint, but specifically denies any implication in paragraphs XX and XXI that
17 defendant Chris E. Svendsen was a member, manager, employee or individual of
18 defendant Stratton Ballew, PLLC.

19 18. Answering paragraph XXIII of Plaintiffs' Amended Complaint, Svendsen
20 admits that defendant Chris E. Svendsen ceased his relationship with defendant Stratton
21 Ballew, PLLC, but further alleges that this occurred on or about April, 2009. Svendsen
22 denies each and every other allegation contained in said paragraph XXIII.

23 19. Answering paragraph XXIV of Plaintiffs' Amended Complaint, Svendsen
24 generally admits that plaintiffs discovered that Specialty Sales, LLC, was engaged in the
25 manufacture and sale of a cattle footbath system that became covered by the subject
26 Patent. Svendsen is without knowledge or information sufficient to form a belief as to the
27 date of such discovery, but generally believes that it occurred prior to the issue date of the
28 subject Patent.

1 20. Svendsen generally admits paragraph-XXV, of Plaintiffs' Amended
2 Complaint as related to defendant Chris E. Svendsen. Further answering said paragraph
3 XXV, Svendsen is without knowledge or information sufficient to form a belief as to the
4 truth of the allegations of paragraph XXV as related to defendant Rex Stratton, and
5 therefore denies same.

6 21. Answering paragraph XXVI of Plaintiffs' Amended Complaint Svendsen
7 admits that on September 23, 2011 a complaint was filed in the Eastern District of
8 Washington, Civil Cause No. 2:11-cv-03908-EFS, and that such complaint included, but
9 was not limited to, claims for patent infringement, injunctive relief and damages.

10 22. Svendsen admits paragraph XXVII of Plaintiffs' Amended Complaint.

11 23. Answering paragraph XXVIII of Plaintiffs' Amended Complaint, Svendsen
12 admits that defendant Specialty Sales, LLC filed a document on January 6, 2012, entitled
13 SPECIALTY SALES, LLC'S ANSWER TO EAKIN ENTERPRISES' COMPLAINT AND
14 COUNTERCLAIMS AGAINST EAKIN ENTERPRISES, INC. AND JOHN W. EAKIN, and further
15 alleges that said document speaks for itself and need not be characterized as alleged by
16 plaintiffs. All other allegations of said Paragraph XXVIII are denied, and Svendsen further
17 specifically denies any inference that defendant Chris E. Svendsen was ever a member,
18 manager, employee or individual of defendant Stratton Ballew, PLLC.

19 24. Svendsen admits paragraph XXIX and XXX of Plaintiffs' Amended Complaint.

20 25. Answering paragraph XXXI of Plaintiffs' Amended Complaint, Svendsen
21 admits that on April 3, 2012 a JOINT SCHEDULING REPORT, was filed in Case No. 1:11-CV-
22 02008-LJO-SKO, but further alleges that said document speaks for itself and need not be
23 characterized as alleged by plaintiff. All other allegations of said Paragraph XXXI are
24 denied.

25 26. Answering paragraph XXXII of Plaintiffs' Amended Complaint Svendsen
26 admits that on April 26, 2012, Specialty Sales, LLC filed a motion to dismiss and motion
27 for summary judgment, but further alleges that each motion speaks for itself, need not be
28 characterized as alleged by plaintiffs and that said motions were ultimately denied by the
29 court. All other allegations of said Paragraph XXXII are denied.

1 27. Answering paragraph XXXIII of Plaintiffs' Amended Complaint, Svendsen
2 admits that on May 23, 2012 the DECLARATION OF CHRIS E. SVENDSEN IN SUPPORT OF
3 PLAINTIFF'S RESPONSE TO MOTION TO DISMISS AND ALTERNATIVE MOTION FOR
4 PARTIAL SUMMARY JUDGMENT, was filed, but further alleges that the document speaks
5 for itself and that the quoted passage of the subject Declaration is incomplete and leaves
6 out language relevant to the defense of the claims alleged in said Amended Complaint.

7 28. Answering paragraph XXXIV of Plaintiffs' Amended Complaint, Svendsen is
8 without knowledge or information sufficient to form a belief as whether there occurred
9 any conversation or communication between the attorney for Specialty and plaintiff John
10 W. Eakin as alleged in the second sentence thereof. Svendsen denies each and every other
11 allegation contained in said paragraph XXXIV.

12 29. Svendsen generally admits paragraph XXXV of Plaintiffs' Amended
13 Complaint, but alleges that said paragraph is incomplete in describing the terms of the
14 settlement. Svendsen further alleges that the Settlement Agreement speaks for itself and
15 need not be characterized as alleged by plaintiffs.

16 30. Svendsen denies paragraphs XXXVI and XXXVII of Plaintiffs' Amended
17 Complaint.

18 31. Answering paragraph XXXVIII of Plaintiffs' Amended Complaint, Svendsen
19 alleges that Defendant Chris Svendsen and Plaintiff John W. Eakin had an attorney-client
20 relationship related to applying for and obtaining a Patent for the subject cattle footbath
21 delivery system and further alleges that a clerical error in the initial Utility Patent
22 Application rendered the initial Patent for that cattle footbath delivery system wholly or
23 partially inoperative or invalid. Svendsen is without knowledge or information sufficient
24 to form a belief as the presence or absence of a contract between John W. Eakin and
25 Stratton Ballew, PLLC, and therefore denies same. Svendsen denies each and every other
26 allegation contained within said paragraph XXXVIII, and further specifically denies any
27 implication that defendant Chris E. Svendsen was a member, manager, employee or
28 individual of defendant Stratton Ballew, PLLC.

1 32. Answering paragraph XXXIX of Plaintiffs' Amended Complaint, Svendsen
2 alleges that Defendants Chris Svendsen and Svendsen Legal, LLC, and Plaintiffs John W.
3 Eakin had an attorney-client relationship related to seeking to correct or perfect the
4 United States Patent for the subject cattle footbath delivery system, as revised, and to
5 further represent Plaintiffs in a federal lawsuit against Specialty Sales, Inc. Svendsen is
6 without knowledge or information sufficient to form a belief as the presence or absence of
7 a contract between Plaintiffs and Defendants Rex B. Stratton and Stratton Law &
8 Mediation, P.S., and therefore denies same. Svendsen denies each and every other
9 allegation contained within said paragraph XXXIX, and further specifically denies any
10 implication that defendant Chris E. Svendsen was a member, manager, employee, agent,
11 representative or individual of defendant Stratton Law & Mediation, P.S.

12 33. Svendsen denies paragraph XL of Plaintiffs' Amended Complaint and
13 further specifically denies any implication that defendant Chris E. Svendsen was a
14 member, manager, employee or individual of defendant Stratton Ballew, PLLC.

15 34. Svendsen denies paragraph XLI of Plaintiffs' Amended Complaint and
16 further specifically denies any implication that defendant Chris E. Svendsen was a
17 member, manager, employee, agent, representative or individual of defendant Stratton
18 Law & Mediation, P.S.

19 35. Svendsen denies paragraph XLII of Plaintiffs' Amended Complaint and
20 further specifically denies any implication that defendant Chris E. Svendsen was a
21 member, manager, employee or individual of defendant Stratton Ballew, PLLC.

22 36. Svendsen denies paragraph XLIII of Plaintiffs' Amended Complaint and
23 further specifically denies any implication that defendant Chris E. Svendsen was a
24 member, manager, employee, agent, representative or individual of defendant Stratton
25 Law & Mediation, P.S.

26 37. Answering paragraph XLIV of Plaintiffs' Amended Complaint, Svendsen
27 admit that Defendants Chris Svendsen and Svendsen Legal, LLC, owed Plaintiff John W.
28 Eakin all duties legally required by the attorney-client relationship that existed between
29 them. Svendsen is without knowledge or information sufficient to form a belief as to what
30

1 duties did and did not exist between said Plaintiff and the other Defendants, and therefore
2 denies same. Svendsen denies each and every other allegation contained in said
3 paragraph XLIV, and further specifically denies any implication that defendant Chris E.
4 Svendsen was a member, manager, employee, agent, representative or individual of
5 defendant Stratton Law & Mediation, P.S. or was a member, manager, employee or
6 individual of defendant Stratton Ballew, PLLC.

7 38. Answering paragraph XLV of Plaintiffs' Amended Complaint, Svendsen is
8 without knowledge or information sufficient to form a belief as to what was and was not
9 disclosed by defendants Stratton Law & Mediation, P.S. and Stratton Ballew, PLLC, and
10 therefore denies same. Svendsen denies each and every other allegation contained in said
11 paragraph XLV, and further specifically denies any implication that defendant Chris E.
12 Svendsen was a member, manager, employee, agent, representative or individual of
13 defendant Stratton Law & Mediation, P.S. or was a member, manager, employee or
14 individual of defendant Stratton Ballew, PLLC.

15 39. Svendsen denies paragraph XLVI of Plaintiffs' Amended Complaint, and
16 further specifically denies any implication that defendant Chris E. Svendsen was a
17 member, manager, employee, agent, representative or individual of defendant Stratton
18 Law & Mediation, P.S. or was a member, manager, employee or individual of defendant
19 Stratton Ballew, PLLC.

20 40. Svendsen denies paragraphs XLVII and XLVIII of Plaintiffs' Amended
21 Complaint.

22 **AFFIRMATIVE AND/OR ADDITIONAL DEFENSES**

23 Subject to discovery and without shifting the burden of proof on any issue for
24 which Plaintiffs bear that burden, Svendsen alleges and asserts the following affirmative
25 and/or additional defenses.

26 41. One or more of Plaintiffs' claims and causes of action fail to state a claim on
27 which relief can be granted.

28 42. Some or all of Plaintiffs' claims and causes of action are barred by laches
29 and/or by applicable statutes of limitation.

1 43. Some or all of Plaintiffs' claims and causes of action may be barred by the
2 doctrine of equitable estoppel.

3 44. The contributory and/or comparative fault of Plaintiffs, or one of them, may
4 be the proximate cause of some or all of Plaintiffs' alleged damages, and such damages, if
5 any, should be diminished in proportion as the damages are attributable to the fault of
6 one or both Plaintiffs.

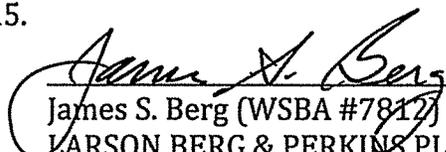
7 45. The contributory and/or comparative fault of third parties, including but
8 not limited to one or more of the other Defendants in this action, may be the proximate
9 cause of some or all of Plaintiffs' alleged damages, and such damages, if any, should be
10 diminished in proportion as the damages are attributable to the fault of such third
11 party(ies).

12 46. Any other matter constituting an avoidance or affirmative defense revealed
13 up to and through the time of trial.

14
15 WHEREFORE, Svendsen prays for judgment against Plaintiffs, and each of them, as
16 follows:

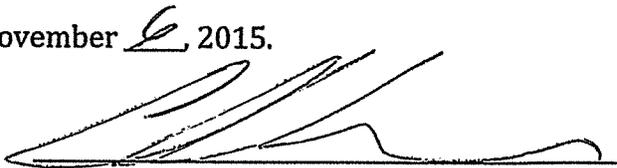
- 17 a. That Plaintiffs take nothing by way of their Amended Complaint and that
- 18 the same be dismissed with prejudice;
- 19 b. That Svendsen be awarded its costs and statutory attorneys' fees in this
- 20 action; and
- 21 c. Such other and further relief as the Court deems just and equitable.

22
23 DATED this 6th day of November, 2015.

24
25 
26 James S. Berg (WSBA #7812)
27 LARSON BERG & PERKINS PLLC
28 105 North Third Street
29 PO Box 550
30 Yakima, Washington 98907
31 509-457-1515
jsberg@lbplaw.com

I declare under penalty of perjury under the laws of the State of Washington that I am a defendant above named, I have read the foregoing ANSWER OF SVENDSEN LEGAL, LLC AND CHRIS E. SVENDSEN AND DENISE E. SVENDSEN TO AMENDED COMPLAINT FOR LEGAL MALPRACTICE, know the contents thereof, and the foregoing is true and correct.

Signed at Yakima, Washington, on November 6, 2015.



CHRIS E. SVENDSEN, Defendant

I declare under penalty of perjury under the laws of the State of Washington that I am the member of SVENDSEN LEGAL, LLC, defendant herein, and that I am authorized to make this verification for and on behalf of defendant; I have read the foregoing ANSWER OF SVENDSEN LEGAL, LLC AND CHRIS E. SVENDSEN AND DENISE E. SVENDSEN TO AMENDED COMPLAINT FOR LEGAL MALPRACTICE, know the contents thereof, and the foregoing is true and correct.

Signed at Yakima, Washington, on November, 6, 2015.

SVENDSEN LEGAL, LLC, a Washington limited liability company, Defendant



By
It's Member

CERTIFICATE OF TRANSMITTAL

On this day, the undersigned in Yakima, Washington, sent copies of this document to the following parties:

Vernon W. Harkins
Michael J. Fisher
RUSH, HANNULA, HARKINS & KYLER, L.L.P.
4701 S 19th Street, Suite #300
Tacoma, WA 98405

Helga Kahr
6007 Palatine Avenue, N.
Seattle, WA 98103

Rex B. Stratton
Stratton Law & Mediation
P.O. Box 636
Vashon Island, WA, 98070

by U.S. Mail, postage prepaid. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Nov 6, 2015
DATE

Diana L. Dewey
SIGNED

U:\Svendsen 5187-001\Answer to Amended Complaint.doc

LARSON BERG & PERKINS

March 08, 2019 - 10:55 AM

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

The following documents have been uploaded:

- 363163_Answer_Reply_Reply_to_Motion_20190308105256D3502333_9957.pdf
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- rob@lbplaw.com
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Comments:

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Address:
PO BOX 550
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