No. 98466-2

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

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

Appellants/Respondents

vs.

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

Respondents/Petitioners

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

OTHER JURISDICTIONS

RULES AND REGULATIONS

OTHER AUTHORITIES

I. IDENTITY OF RESPONDENTS

This Answer to Petition for Review is filed on behalf of Respondents Eakin Enterprises, Inc., and John W. Eakin (hereinafter "Eakin"). The Respondents in this Court were the Plaintiffs in the trial court and Appellants in the Court of Appeals, with respect to the decision challenged by Petitioners Svendsen Legal, LLC and Chris E. Svendsen and "Jane Doe" Svendsen (hereinafter "Svendsen Defendants").

II. COUNTER-STATEMENT OF THE CASE

At the trial court level, the Svendsen Defendants brought a motion for summary judgment to dismiss Eakin's claims. As the moving party on summary judgment, the Svendsen Defendants faced the heavy burden of proving the absence of a genuine issue of material fact in dispute. In ruling on summary judgment, the Trial Court was required consider all of the material evidence and all inferences therefrom most favorably to the non-moving party, Eakin.

The issues before the Court of Appeals were relatively simple and straight forward. The unpublished opinion of the Court of Appeals at issue in the Petition for Review addressed two main issues; (1) whether the trial court properly certified the summary judgment order as a CR 54(b) order for immediate review by the Court of Appeals and, (2)

whether the trial court properly granted summary judgment dismissing one of several claims of legal malpractice against the Svendsen Defendants.

The Petition for Review filed by the Svendsen Defendants does not seek review of the Court of Appeals holding that the trial court properly certified the summary judgment order as a CR 54(b) order and that issue is not before this Court.

It is also important for this Court to be mindful that the issue being decided by the Court of Appeals was not when the attorney-client relationship between Eakin and Svendsen was formed, but whether or not there were genuine issues of fact on this issue that were in dispute and must be decided by the jury, which would preclude summary judgment. This is also the only issue before the Court on this Petition for Review.

The Court of Appeals decision to reverse the trial court's granting of summary judgment is easily understandable when summarized as "there were multiple issues of disputed material facts in the record before the trial court which precluded summary judgment from being granted to any party." Such a summary is supported by the very language of the Court of Appeals decision itself which states as follows:

> We take the unusual step of reversing based on factual uncertainty. We remand for further proceedings on the bases that **the parties failed to fully develop and present important facts needed to resolve the issue on summary**

> **judgment, assuming the issue should be resolved summarily**.

See Court of Appeals decision, p.2 (1st full ¶) (emphasis added).

> The trial record before us, although lengthy, leaves a vacuum of critical facts.

See Court of Appeals decision, p.50 (2nd ¶)

> We have listed some important factual questions that the record fails to answer. Summary judgment serves as a proper and valuable instrument for preventing useless trials, but the procedure should not be used when a real doubt exists as to decisive factual issues.

See Court of Appeals decision, p.53 (3rd ¶) (citations omitted).

> To satisfy his burden on summary judgment, the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issues of material fact. A summary judgment should not be granted unless the facts are so crystalized that nothing remains but questions of law. **Summary judgment should not be granted in the face of "many factual uncertainties**." A court may deny a summary judgment motion when it deems further inquiry into the facts is desirable.

See Court of Appeals decision, p.54 (1st ¶) (emphasis added) (citations omitted).

> The law does not favor the use of summary judgment, when factual development is necessary to clarify the application of the law.

See Court of Appeals decision, p.54 (2nd ¶) (citations omitted).

In August of 2006 Eakin had an invention (cattle footbath system) that he wanted to patent. Eakin contacted attorney Wes Gano who

referred Eakin to patent lawyer Chris Svendsen. CP 241. Eakin contacted patent lawyer Svendsen in August of 2006 about obtaining a patent for his invention. Svendsen advised Eakin in August of 2006 that he had no conflicts and that he could assist Eakin in obtaining the patent that Eakin wanted for his invention. Svendsen also sent a "Thank You" to attorney Gano for the referral. Svendsen also opened a file in his system identifying Eakin as client "EA 12.P01" who sought a patent for his invention. CP 395.

The question was not whether Svendsen would represent Eakin as a client, but rather the timing of completing the paperwork for the patent application. The actions and conduct of Eakin and Svendsen during and after August of 2006 demonstrate and imply that Eakin reasonably believed an attorney-client relationship existed. In his declaration in response to the Lorbiecki declaration filed in the trial court, defendant Svendsen testifies that Eakin was referred to him by another attorney regarding patent protection for the cattle footbath system and that Eakin "told me he was working on a system for a "better" footbath system and **he would keep me posted on its development**." *Id.* at Paragraph 8 (emphasis added).

By Svendsen's own testimony Eakin (1) wanted to patent his cattle footbath system; (2) was referred to a patent lawyer; (3) contacted the

patent lawyer about obtaining a patent; (4) Svendsen confirmed he had no conflicts in representing Eakin; (5) Svendsen opened a file identifying Eakin as client "EA 12.P01" and (6) Eakin advised Svendsen that he would advise him of future developments of the cattle footbath system. This begs the question why would Mr. Eakin advise a patent lawyer he was just referred to that he would continue to advise him of future developments of the invention he wanted to patent unless Mr. Eakin subjectively believed an attorney-client relationship existed with the patent lawyer?

At that point both the client (Eakin) and the patent lawyer (Svendsen) agree that Eakin reasonably believed that an attorney-client relationship had been established. The only issue left unresolved in August of 2006 was the timing of when the paperwork for the patent would be completed and filed.

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

This is further supported by the fact that the Svendsen Defendants acknowledge that between August of 2006 and October of 2007, Eakin continued to advise Svendsen about developments and improvements in the cattle footbath system. In his declaration in response to the Lorbiecki declaration, defendant Svendsen testifies as follow:

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

Id. at Paragraph 9.

In the record before the trial court on summary judgment, Eakin, the party against whom summary judgment was being sought, presented competent evidence that together with reasonable inferences created issues of fact that an attorney-client relationship was formed in 2006. That evidence was disputed by the Svendsen Defendants. At best, it came down to a matter of credibility between Eakin and Svendsen. On summary judgment motions where issues of credibility arise, summary judgment is usually not available.

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

> Since cases involving negligence, state of mind, or facts within the knowledge of the moving party lend themselves to further development through the use of cross

> examination, the courts are likely to be more conservative in granting a motion for summary judgment in such cases, particularly where reasonably full discovery by the opposing party is for any reason impossible...

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

As a result of the multitude of disputed issues of fact the Court of Appeals appropriately reversed the trial court's summary judgment order and remanded for further proceedings. Because neither CR 56 nor reason, common sense or public policy support the Svendsen Defendants' Petition for Review, Eakin respectfully asks the Court to reject their Petition for Review.

III. ARGUMENT

1. NONE OF THE PURPORTED "ISSUES" IN THE PETITION MEET THE CRITERIA IN RAP 13.4.

A petition for review will be accepted by the Supreme Court

> (1)If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of

> the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by.the Supreme Court.

RAP 13.4(b).

The thrust of the Petition for Review is the Svendsen Defendants' claim that the Court of Appeals erred in reversing a summary judgment of dismissal. The Washington Supreme Court is not a court of error. Discretionary review is appropriate only if one or more of the criteria in RAP 13.4 have been met. The Petition for Review filed by the Svendsen Defendants does not specifically address any of the RAP 13.4 criteria that govern review by this court and they present no substantive argument as to how or why the RAP 13.4 criteria are met in this case.

The unpublished decision of the Court of Appeals does not warrant review under RAP 13.4. Accordingly, the Court should decline to exercise discretionary review.

2. IN REVERSING THE SUMMARY JUDGMENT ORDER ISSUED BY THE TRIAL COURT THE COURT OF APPEALS PROPERLY APPLIED THE RULES GOVERNING SUMMARY JUDGMENT WHICH REQUIRE AN ABSENCE OF MATERIAL FACTS IN DISPUTE.

The timing of the formation of the attorney-client relationship between Eakin and Svendsen is the critical central inquiry in this case. If the attorney-client relationship began in August of 2006, then the **second**

prototype of the cattle footbath was patentable at that point. If the attorney-client relationship did not begin until October of 2007, then the **second prototype** of the cattle footbath was not patentable at that time.

In the trial court the Svendsen Defendants filed a motion seeking summary judgment of dismissal on the following three grounds:

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

Significantly, these were the only three grounds asserted by the Svendsen Defendants in their motion for summary judgment of dismissal. Eakin voluntarily agreed to withdraw the cause of action for violation of the Consumer Protection Act and the Svendsen Defendants withdrew their claim that of exclusive federal jurisdiction at the hearing on summary judgment.

Therefore, at the time of the hearing, the only remaining basis for summary judgment asserted by the Svendsen Defendants was the claim that the second prototype was unpatentable because it was displayed in the summer of 2006.

In their summary judgment motion, the Svendsen Defendants did not raise any issues regarding the existence of an attorney-client

relationship and specifically defendants failed to make any argument that no attorney-client relationship existed until 2007. Frankly, the issue of the attorney-client relationship was completely absent from the Svendsen Defendants' motion for summary judgment.

In response to the Svendsen Defendants' motion for summary judgment Eakin submitted competent evidence, including a Declaration from their patent expert Mark Lorbiecki giving his opinion, on a more probable than not basis, that an attorney-client relationship was formed in 2006. At that point the burden was on the defense, as the moving party, to identify those portions of the record, together with the affidavits, if any, which they believe **demonstrate the absence of a genuine issue of material fact**. *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 170, 810 P.2d 4, 9 (1991) (emphasis added); *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wash.2d 127, 132, 769 P.2d 298 (1989).

It was not until they filed their Reply materials that the Svendsen Defendants for the first time addressed the issue of the timing of the attorney-client relationship with Eakin. In their Reply brief the Svendsen Defendants argued that Eakin was a prospective client in 2006 and did not become an actual client until October of 2007. Significantly defendant Svendsen, who has been held out as both the defendant and an expert witness in patent law, failed in his Reply Declaration to give an opinion,

on a more probable than not basis, that no attorney-client relationship was formed in 2006.

In essence, the Reply materials filed by the Svendsen Defendants did nothing more than identify and confirm that there were genuine issues of material fact in dispute, i.e., when the attorney-client relationship was formed between Eakin and defendant Svendsen, thereby making summary judgment inappropriate. As the Court in *White, supra,* noted:

> Defendants only marginally complied with this requirement. Their claim that White had no competent expert testimony regarding the applicable standard of care was not substantiated by reference to any pleadings, documents, or deposition testimony. **Not until they submitted their "rebuttal documents"** did Defendants point out those parts of the depositions upon which they relied to support their lack of evidence claim We emphasize, however, that only rarely will a moving party comply with the strict requirements of *Celotex*, *Young*, and *Baldwin* **without having made specific citations to the record in its opening materials.**

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

A review of the pleadings before the trial court shows that there was simply no effort on the part of the Svendsen Defendants to meet their burden under *Young* and *White* as it relates to the issue of when the attorney-client relationship between Eakin and the Svendsen Defendants was formed. In their summary judgment motion the Svendsen Defendants

made no argument, offered no evidence and made no evidentiary citation to support the notion that there was an absence of any genuine issue of material fact about when the attorney-client relationship was formed.

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

Second, unless and until the Svendsen Defendants, as the moving party on summary judgment, meet their burden to **demonstrate the absence of a genuine issue of material fact** on the issue of when the attorney-client relationship was formed, summary judgment may not be granted, regardless of whether Eakin submitted a Declaration of John Eakin. "If the moving party does not meet their initial burden, summary judgment may not be entered, **regardless of whether the opposing party submitted responding materials**." *White, supra* (emphasis added);

Jacobsen v. State, 89 Wash.2d 104, 108, 569 P.2d 1152 (1977); *see also, Baldwin*, 112 Wn.2d at 132.

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

In its decision reversing the summary judgment, the Court of Appeals agreed that there were clearly genuine issues of material fact in dispute regarding the timing of the formation of an attorney-client relationship which should have precluded summary judgment being granted for any party.

3. IN REVERSING THE SUMMARY JUDGMENT ORDER ISSUED BY THE TRIAL COURT THE COURT OF APPEALS PROPERLY APPLIED THE RULES GOVERNING SUMMARY JUDGMENT WHICH REQUIRE THAT ALL FACTS AND ALL REASONABLE INFERENCES FROM THE FACTS BE CONSTRUED IN FAVOR OF THE NON-MOVING PARTY.

Significantly, it is critical that this Court keep in mind that the issue being decided by the Court of Appeals was not when the attorney-client relationship was formed, but whether or not there are genuine issues of fact on this issue that were in dispute and needed to be decided by the

jury, which would preclude summary judgment. In making that determination, all facts and reasonable inferences therefrom must be construed in favor of Eakin, as the non-moving party on summary judgment. When the excerpts of Svendsen's deposition testimony quoted below are construed in favor of the Plaintiffs, there are clearly genuine issues of material fact which should have precluded summary judgment.

The Svendsen Defendants went to great lengths to argue that the initial meeting between Eakin and Svendsen was nothing more than a screening interview, and thus no formal attorney-client relationship was formed. Again, the question before the Court of Appeals was whether there were genuine issues of material fact in dispute on this issue which should have precluded summary judgment. The Svendsen Defendants' position on this issue was undermined by the very evidence cited in the *Brief of Svendsen Respondents,* beginning at Page 14, in which they includes excerpts of the deposition testimony of Svendsen[1] in which Svendsen acknowledges the attorney-client relationship started in August of 2006.

> **Q So do you believe you started the process of working on getting a patent in August of 2006?**
> A No, I think it was -- it just opened the door so that we could -- we could discuss in -- in -- for the purpose of -- of obtaining a patent certainly.

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

The Svendsen Defendants sought to have the Court of Appeals focus on the first word of Svendsen's answer to the question about whether the process of obtaining a patent started in August of 2006, in which Svendsen says "no." However, a close reading of the entire answer to the question reveals that the process of obtaining a patent did, in fact, start in August of 2006. Svendsen's answer, read in totality, says that the telephone call in August of 2006 opened the door for the purpose of obtaining a patent certainly.

> **Q Do you know how long after August 2nd of 2006 you would have actually met with Mr. Eakin to go through the details?**
> A You know, I'm sure I met with him socially many times after that -- or several times at least after that. What the -- the process to start the patent can be considered as when you first are given a general disclosure or general description of the idea from the client. When you actually get down to making diagrams, typing up the detail description, et cetera, that -- that didn't take place as I recall until -- until the fall of 2007.

In answer to this question Svendsen again confirms that the process of obtaining a patent, the specific reason for which Eakin contacted a patent lawyer (Svendsen), began in August of 2006. Svendsen testified that "**the process to start the patent can be considered as when you are first given a general disclosure or general description of the idea from the client.**" During the phone call in August of 2006, Svendsen was given a general disclosure and description of the cattle

footbath system that Eakin wanted to patent. Thus the process, and hence the attorney-client relationship, began in August of 2006.

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

> **Q So when do you believe you were officially retained to obtain a patent on behalf of -- or a patent for this cattle foot-bath system?**
> A Well, retainer, I -- I seldom charge retainers. My -- my relationships with my clients generally begin with the -- with the understanding that they've contacted me and I'm going to be helping them in a -- in a – in a certain project. What -- the -- as I recall it would have been in the fall of 2007 that there would have been a formal -- more formal, Okay, we're going to file this and it's going to cost this amount. And we're going to -- and we're going to go forward with it.

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

advised Eakin he had no conflicts and could assist Eakin in obtaining a patent.

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

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

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

Page 46 Line 12 through Line 19:

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

A I -- I would -- I would say that that would have been in the mind of John Eakin and -- and is a big part of that. And I'm -- I'm sure he

considered this in the fall here of 2006. That that -- that relationship was -- a formal relationship had started.

CP 274.

The relevance and significance of this testimony by Svendsen goes to the ultimate question that must be resolved in this lawsuit, i.e, are there genuine issues of material fact in dispute regarding whether Eakin had a reasonable belief that an attorney-client relationship existed with Svendsen in August of 2006. In conducting that inquiry for purposes of summary judgment all facts and inferences from the facts must be construed in favor of Eakin, as the non-moving party. Therefore, the fact that defendant Svendsen himself testified that Eakin likely believed that an attorney-client relationship existed beginning in August of 2006 is not only relevant, it is significant because it creates an issue of fact on that issue which should have precluded summary judgment.

IV. CONCLUSION

None of the "Issues" identified in the Petition for Review fit within the RAP 13.4 criteria for the acceptance of review by this Court. The issues before the Court of Appeals were simple and straightforward. Were there genuine issues of material fact which precluded summary judgment? The Court of Appeals correctly answered "yes" and reversed the summary judgment order.

Eakin respectfully requests that the Court reject the Petition for Review.

Respectfully submitted this 21st day of May, 2020.

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