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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

(King County Cause No. 07-2-31654-0 SEA)

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

Jeffrey Moore,

Respondent,

vs.

Victor Siegel and Jane Doe Siegel,

Appellants.

REPLY BRIEF OF APPELLANTS

BY: Kelby D. Fletcher, WSBA #5623
Attorneys for Appellant
PETERSON YOUNG PUTRA
2800 Century Square; 1501 Fourth Avenue
Seattle, Washington 98101
Ph: (206) 624-6800 (Fax 206-682-1415)

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INTRODUCTION

In his brief to this Court, Moore does not dispute:

- That summary judgments are reviewed on appeal *de novo*.
Response Brief at 17.
- That state of mind is not susceptible to determination in a motion for summary judgment. (No Mention in Response Brief.)
- That Moore had a contract with Blue Frog preventing voluntary aid to a party in litigation with Blue Frog. Response Brief at 7.
- That Moore voluntarily provided a declaration in support of a party in litigation with Blue Frog in August 2007. Response Brief at 9.
- That proof of damage is not a necessary element for a claim of breach of contract. (No mention in Response Brief.)
- That Siegel cannot be bound by a judgment or settlement obtained by Moore with other defendants in the same case, a position Moore took at great length in the trial court in support of summary judgment. (No mention in Response Brief.)
- That up to August 2007, when Moore provided his declaration to ITL, Blue Frog fully performed under its contract with Moore to pay severance and other benefits. (No mention in Response Brief.)
- That through August 2007, Blue Frog performed under the severance contract by payment of severance of \$104,734.90, attorney's fees of \$10,000.00, a grant of an additional 20,000 shares of stock and accelerated vesting of 66,667 unvested shares and providing health insurance benefits for twelve months. (No

mention in Response Brief of provision of severance pay, payment of legal fees, and provision of new and acceleration of previously granted options.)

- That there was no evidence presented as to whether there is a practice in Seattle of billing for law student or paralegal time nor whether the hourly rate for Moore's counsel built in the overhead of non-lawyer costs.
- That the trial court did not make findings and conclusions with respect to attorney's fees claimed by Moore.

Moore has not demonstrated that there was an absence of material fact which would justify a summary judgment in his favor against Siegel. To the contrary, Siegel has presented substantial evidence that a *bona fide* dispute existed between him and Blue Frog on one side, and Moore on the other side. This dispute arose from Moore's voluntary aid to a party in litigation with Blue Frog. The more precise issue is whether Siegel, the CEO of Blue Frog, reasonably believed that Moore breached his contract with Blue Frog, thereby excusing its further performance under that contract and making any further payment to Moore unnecessary.

ADDITIONAL STATEMENT OF FACTS

The settlement ultimately obtained by ITL and Blue Frog after Moore's Declaration required Blue Frog to pay \$310,000 by September 30, 2007 (\$300,000 if Blue Frog paid by September 10, 2007). CP 538-540. On July 30, 2007, just before Moore's declaration, the parties were negotiating on the basis of payment by Blue Frog of \$150,000 upon settlement and a balance of \$150,000 over six months. CP 849, App. A-1 to Response Brief.

Those terms were obviously preferable, from Blue Frog's perspective, to a lump-sum payment of either \$310,000 or \$300,000. Therefore, Moore is incorrect in his assertion that "Blue Frog Mobile suffered no damage at the hands of Moore...."¹ Response Brief at 12.

Siegel could not raise with the trial court at the time of the hearing on the motion for summary judgment the issue of set-off for amounts received in settlements or by judgment with other defendants. Moore Response Brief at 26. The stipulated judgment with Defendant Blue Frog, CP 582-583, and the dismissal of defendant Maxwell, CP 587-593, were each filed on November 3, 2008. Response Brief at 15. Siegel's response to the motion for summary judgment was also filed on November 3, 2008. CP 594, Response Brief at 16. In his later Response to Moore's Motion for Attorneys Fees, Siegel claimed that Moore made "no mention of the terms of those [earlier] settlements.... Plaintiff should not obtain a double recovery" and that he should be "allowed a set-off for fees and payments on the principal judgment recovered from other parties defendant." CP 750, 758.

Besides the attorney fees of \$10,000, the grant of new stock options and accelerated vesting of other option grants and other benefits paid to Moore by Blue Frog during Siegel's tenure as CEO, severance payments of \$104,734.90 were made through August 31, 2007 after Moore provided his declaration to ITL in its litigation against Blue Frog. CP 5, Complaint at p. 3

¹ As Moore noted in his brief at p. 2, n.1, and in his March 19, 2009, Motion For Extension of Time to File Response Brief at p.2, there were two declarations filed by his counsel in the trial court on the same day. This allowed Siegel's counsel to believe they were duplicates.

(“On August 31, 2007, defendant Blue Frog ceased making severance payments . . .); CP 130-134 (contract obligating total severance of \$167,708.33 plus other consideration and relating lump-sum and other payments totaling \$104,734.90 by August 31, 2007).

ARGUMENT IN REPLY

1. Siegel Has Not Raised New Issues on Appeal.

Moore contends that Siegel raises these two issues for the first time in this appeal: The ‘Business Judgment Rule’ and set-off or credit for amounts paid by other defendants. Response Brief at 23-26.

The Business Judgment Rule was discussed at p. 14-15 of Siegel’s Opening Brief in the context of examining what constitutes a *bona fide* dispute under RCW 49.52. See, *Lunsford v. Saberhagen*, 139 Wn.App. 334, 338, 160 P.3d 1089 (2007) affm’d in No. 80728-I in Supreme Court, June 5, 2009 (Appellate court may consider “newly-articulated theories for the first time on appeal” if “arguably related” to issues raised in trial court). The discussion of the Business Judgment Rule included citation to the Washington Business Corporation Act, RCW 23B.08.420. Opening Brief at 14. Statutory law may be brought to the attention of an appellate court in Washington in aid of its decision of a case regardless of whether the statute was cited to the trial court. *Ellis v. City of Seattle*, 142 Wn.2d 450, 459 n.3, 13 P.3d 1065 (2000).

Siegel was unable to raise the issue of set-off or credit because the judgment against Blue Frog and the dismissal of defendant Maxwell were filed the same day as Siegel’s response to the motion for summary judgment.

Siegel did, however, raise the issue of credit or set-off in his response to Moore's motion for attorney's fees. See p. 3, *supra*.

Siegel raised issues in the trial court which are brought forward to this court.

2. Siegel Did Not Act Intentionally to Withhold Wages.

RCW 49.53.050 prohibits conduct of an employer or agent which “[w]illfully and with intent to deprive an employee of any part of his wages, [pays] any employee a lower wage than the wage such employer is obligated to pay...by any contract[.]” Therefore, the statute requires ‘willful’ behavior and a specified intent: To deprive the employee of wages to which the employee is entitled.

If the employing entity, or its agent, acts to pay an amount different from what the employee believes is owed and if the employer does so because of its good faith belief that a lesser amount, or nothing, is owed, the statute cannot apply because the requisite intent is therefore missing. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160, 961 P.2d 371 (1998).

Schilling states clearly that, “[o]rdinarily, the issue of whether an employer acts ‘willfully’ for purposes of RCW 49.52.070 is a question of fact.” *Id.* The issue in that decision was whether, as a matter of law, the inability of the employing entity to pay wages excused the individual owning the entity from liability. The Court concluded, “we are not free to engraft such an exception [financial inability to pay] to the statute where the plain language of the statute is to the contrary.” *Id.* at 136 Wn.2d 165. There was

no dispute that the employee in that case was owed the wage: “Bingham [defendant] does not dispute that Schilling [plaintiff] is owed \$13,955 in back wages, or that Radio Holdings was contractually liable to Schilling.” *Id.* at 136 Wn.2d 161.

Here, Siegel has presented unrefuted evidence that Moore breached his contract with Blue Frog. Siegel consulted with in-house counsel and with outside counsel before ending further severance payments to Moore. He reasonably believed that because Moore voluntarily aided a party in litigation with Blue Frog that further performance by Blue Frog under the contract was excused and, therefore, that nothing further was owed under the severance contract. (Whether and to what extent Blue Frog could maintain an action to recoup money it previously paid to Moore because of his breach is not present in this case.)

Unlike the situation in *Schilling*, Siegel here takes the position that wages are not due. In *Schilling*, the individual defendants conceded the wages were owed but pointed to other entities as being responsible for their payment.

Siegel’s state of mind is not susceptible to summary judgment, as set forth at Part V.A.2 of the opening Brief.

The Business Judgment rule, discussed at Part V.A.5 of Siegel’s opening Brief also comes into play. An arbitrary act by a corporate officer was not involved. Instead, after Blue Frog paid out more than \$100,000 in severance, payment of Moore’s legal fees of \$10,000, providing him with medical insurance, accelerating existing stock option grants and providing an

additional grant of stock options, Siegel, in consultation with lawyers², decided that Blue Frog should no longer perform under the contract because of what Moore chose to do in violation of the contract he now seeks to enforce.

Siegel and Blue Frog acted in good faith from the formation of the contract in April 2007 in order to perform Blue Frog's obligations under its contract with Moore. Only in late August 2007, after Moore provided assistance to a party in litigation with Blue Frog, did Siegel consider halting Blue Frog's performance. The fact of consultation with two sets of attorneys in the context of this case establishes further that Siegel was acting upon business judgment under RCW 23B.08.420(1). This is not the creation of a *bona fide* dispute, as Moore claims at p. 25, n. 10, of his Response Brief. Rather, it is further demonstration that corporate actions in good faith, preceded by objectively verifiable facts (Moore's involvement in the litigation against Blue Frog), constitute another mode of analysis of *bona fide* dispute under RCW 49.52.

Adding to the credibility of Siegel with respect to this *bona fide* dispute were the circumstances surrounding the formation of the contract between Blue Frog and ITL, the subject of the litigation in which Moore aided ITL. Moore supposedly formed the contract in 2005. Moore was a founder of Blue Frog. The person at ITL with whom he formed the contract

² Moore claims that Siegel would have to waive the corporate attorney-client relationship and provide "all the information the attorney received and the advice that was given." Response Brief at 25. Siegel is not now an officer of the corporation. The privilege is not his to waive.

was the sister of another Blue Frog founder who was, by 2007, in litigation with Blue Frog. Moore was legal counsel for this other founder and worked in various of his businesses. Executives of Blue Frog did not learn of this 2005 ITL/Blue Frog contract until January 2007. Siegel opening Brief at 6. These facts are not disputed by Moore.

3. Siegel Does Not Have to Prove Monetary Damages.

Moore's Response Brief does not dispute the legal authority cited by Siegel that a breach of contract may occur without proof of economic injury (damages). See Siegel Opening Brief at V.A.7.

Section 235(2) of the Restatement (Second) of Contracts states, "When performance of a duty under a contract is due any non-performance is a breach." Comment *b* to that section states, in part, "[w]hen performance is due, however, anything short of full performance is a breach, even if the party who does not fully perform was not at fault and even if the defect in his performance was not substantial." Thus, a breach of contract may occur without proof of injury compensable in damages.

Section 235(2) of the Restatement was cited with approval in *Bear Creek Shopping Center v. PETCO*, 140 Wn.App. 191, 210, 165 P.3d 1271 (2007) ("...a breach need not be material to give rise to a cause of action for damages. Any failure to perform a contractual duty constitutes a breach ...").

A material breach of a contract excuses further performance by the non-breaching party to the contract. Restatement (Second) of Contracts, Section 237: "[I]t is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be

no uncured material failure by the other party to render any such performance due at an earlier time.” The issue of whether a breach is ‘material’ is a question of fact. *Bear Creek Shopping Center, supra*, 140 Wn. App. at 209.

4. Siegel Has Presented Evidence of Injury to Blue Frog.

Moore’s Response Brief contends that there is no evidence of injury to Blue Frog arising from his unquestioned voluntary assistance to a party in litigation with it. (“[T]here was no damage to the company or to its former officer Sigel by any statements or written declarations made by Moore in the unrelated litigation or otherwise....” Response Brief at 1; “*Blue Frog Mobile and Sigel suffered no damages as a result of the Moore Declaration....*” *Id.* at 2, emphasis in original.) While Siegel disputes the necessity for having to prove economic injury, there is evidence of injury to Blue Frog.

This record discloses that in the week before Moore’s participation in the ITL litigation against Blue Frog, Siegel was discussing settlement terms with ITL allowing for a six month pay-out. See pp. 2-3, *supra*. As ultimately agreed, however, the settlement required a lump-sum payment of \$300,000 by September 10, 2007, and, if that did not occur, \$310,000 by September 30, 2007. *Id.* For a corporation which Moore described as “defunct,” Response Brief at 5, foregoing time payments for a lump sum was nothing less than an onerous added condition. Moore has presented no evidence to rebut the inference that the change in settlement conditions was due to anything other than his choice to involve himself in litigation against Blue Frog. This inference, in summary judgment practice, must be made in favor

of Siegel, the non-moving party. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

5. There Is No Competent Evidence Regarding Settlement by Other Defendants.

Speculation is offered by Moore as to what motivated other defendants to settle with him. *See, e.g.*, Response Brief at p. 3, n. 2. “The court may wonder why Blue Frog Mobile stipulated to a Judgment at the eleventh hour...” (speculating that non-disclosure in discovery required settlement, ignoring that Blue Frog is ‘defunct,’ as stated at p. 2 of Response Brief and not disclosing settlement terms); p. 15, n. 8 (same). No evidence was produced on this point and this Court should disregard speculative statements of a party. *See* ER 602 (witness may not testify unless having personal knowledge of the matter); *PUD No. 1 v. International Insurance Co.*, 124 Wn.2d 789, 814, 881 P.2d 1020 (1994) (proper for trial court to exclude “speculative and irrelevant” evidence).

6. Moore Has Abandoned His Claim That Other Settlements and a Stipulated Judgment Made Siegel Liable as a Matter of Law.

In the motion by Moore, emphasis was placed on the supposedly preclusive effect of the settlements and stipulated judgment obtained with other parties. *See, e.g.*, CP 604-610 (“Mr. Siegel is now bound by the judgment against Blue Frog”). The trial court allowed Siegel to respond to legal authority presented by Moore only the day of the hearing on this point. Siegel did respond. CP 658-662.

The Order granting summary judgment does not recite whether the claim that these settlements and stipulated judgment were determinative. CP 672-675. This Court, of course, may affirm the order on any legally sustainable theory as review is *de novo*. ***Folsom v. Burger King***, 135 Wn.2d 658, 958 P.2d 301 (1998). However, the importance placed upon the supposedly preclusive effect by Moore is telling. Equally telling is the abandonment of that claim only in its Response Brief.

Siegel demonstrated in his opening Brief why the stipulated judgment and settlements with other defendants cannot bind him. Siegel Brief at 19-22. Here, there is no alternative legal basis for sustaining the summary judgment against Siegel.

7. Moore Contends that He Is Entitled to Double (or Triple) Recovery.

If the judgment against him is sustained, Siegel contends that he is entitled to a set-off or credit with respect to any money he receives from any settling defendant. According to Moore, “[a]t most it gives Siegel a defense to collection against Moore if Moore has already been paid....” Response Brief at 26. However, there is no mechanism where that can occur. No evidence of the earlier settlements is in the record; the summary judgment against Siegel does not provide for a credit despite Siegel requesting it.

Moore also contends that “[i]t is up to Siegel to get Blue Frog Mobile to contribute it all if he does not want to pay it personally.” *Id.* Siegel is no longer connected with Blue Frog. He has no authority voluntarily to obtain contribution from another party.

Moore has not presented any evidence or assertion of what money was, or will be, recovered as a result of any of his settlements with other defendants.

8. The Attorneys Fee Award Was Improper.

Moore did not seek, nor did the trial court provide, findings and conclusions regarding the attorney's fees claimed by Moore.

There is no way to tell what was deducted by the trial court from the request made by Moore or on what basis it was deducted. This is why this Court is insistent upon findings and conclusions in court ordered awards of litigation expenses. *Morgan v. Kingen*, 141 Wn. App. 143, 165, 169 P.3d 487 (2007), *rvw. granted*, 164 Wn.2d 1002 (2008).

It is clear, for example, that Moore is claiming against Siegel for fees incurred solely with respect to legal services for the claims against other defendants. To require otherwise would 'frustrate' RCW 49.52, according to Moore's Response Brief at 31. However, if Moore's counsel expended discrete time and effort with respect to one defendant and not another and later enters into settlements and stipulated judgments with those defendants, it is not appropriate to charge Siegel with those same fees. There is no frustration of the purpose of RCW 49.52 in those circumstances.

With respect to paralegal and law student time, Moore cited *Trustees of the Construction Industry Trust v. Redland Insurance Co.*, 460 F.3d 1253, 1256-1257 (9th Cir. 2006). However, that decision made clear, based on its analysis of United States Supreme Court precedent, that paralegal and law student time may be billed "if this is 'the prevailing practice in a given

community.” *Id.* at 460 F.3d 1257 (internal citations omitted). The decision notes that it is important to determine “[i]f the attorney’s hourly rate already incorporates the cost of work performed by non-attorneys....” *Id.*

Here, there is no evidence of community custom in the Seattle area for billing separately for the work of law students and paralegals. Nor is there any evidence that, at even a higher hourly rate, an experienced lawyer cannot more efficiently do the work billed by the non-attorneys at a lower hourly rate. Finally, we simply do not know what elements of overhead are built into the hourly rate of Moore’s counsel. It may well be that the firm does not charge clients for the efforts of non-lawyers. Without this information, the trial court and this court are asked to make decisions without facts.

This Court’s decision in *North Coast Electric Co. v. Selig*, 136 Wn.App. 636, 151 P.3d 211 (2007), is consistent with the position taken by the Ninth Circuit in *Trustees, supra*. “Reasonable community standards” were set out as a criterion to be examined in a fee award including services of non-lawyers. *North Coast, supra*, at 644. The decision in *North Coast* also acknowledged that the Washington Supreme Court has not yet spoken on this issue. *Id.* at 643.

Siegel presented evidence that experienced criminal defense counsel in King County and in federal courts are compensated at a lower hourly rate than is claimed by the law students’ billed time in this case. Siegel Brief at App. A.

9. There Is No Liability For Siegel For Other Than Double Damages.

Moore intimates that if double damages are not allowed, then Siegel is liable for the principal amount of Moore's unpaid wages. "Moore should be awarded his fees and costs on appeal even if Siegel partly prevails so that Moore gets his back pay but no penalty wage for willful withholding of wages." Response Brief at 35. There is no legal authority for that assertion.

The claim against Siegel arises only under RCW 49.52. See Complaint at p. 5, CP 7 (prayer for relief against all defendants "jointly and severally...for willful withholding of wages under RCW 49.52.050 and 49.52.070...").³ The corporate entity as the 'employer' could be liable under RCW 49.48.010. That statute makes no reference to personal liability of certain corporate managers as does RCW 49.52.050 and .070.

By its terms, RCW 49.52.050(2) creates misdemeanor liability for certain individuals willfully withholding wages with the intent to deprive an employee of those wages. Civil liability against certain individuals for double the amount of wages withheld in violation of RCW 49.52.050(2) is found at RCW 49.52.070. There is no option to allow for recovery against an individual for only the principal amount of unpaid wages under either RCW 49.48.010 or RCW 49.52.070.

Citation by Moore to *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007), to support his belief that Siegel may be liable for the

³ The order granting summary judgment does refer, however, both to RCW 49.48 and RCW 49.52. CP 674. However, RCW 49.48.010, the provision creating a remedy for wages not paid at the end of employment, applies only against an 'employer.'

principal amount of unpaid wages is unavailing. That case involved claims against an employing entity and an individual brought under the Minimum Wage Act, RCW 49.46, as well as RCW 49.48.030 and RCW 49.52. The Supreme Court determined there was a *bona fide* dispute and denied recovery under RCW 49.52. There is no intimation in that decision that the individual would have any liability in the remand of the case to the trial court after the determination that the claim under RCW 49.52 could not proceed.

10. Reversal and Dismissal of Claims Against Siegel Are Appropriate.

The facts presented here show conclusively that Siegel is entitled to reversal of the summary judgment and dismissal of the claim against him. *Doe v. The Boeing Co.*, 64 Wn.App. 235, 823 P.2d 1159 (1992), rev'd on other grounds, 121 Wn.2d 8, 846 P.2d 531, (1993) (Proper for appellate court to enter judgment on liability for plaintiff after reversing judgment for defendant). As a matter of law, this court may, on the record before it, determine that as a matter of law a *bona fide* dispute existed between Siegel and Moore over whether Moore had any further severance payments due him because of Moore's breach of the severance agreement. There is no dispute about the terms of the contract. There is no dispute that Moore decided voluntarily to aid a party in litigation with Blue Frog.

CONCLUSION

Summary judgment for Moore was inappropriate. Plaintiff entered into a contract requiring him to refrain from certain activities and obligating his employer to pay certain money and other benefits.

Moore chose to avoid his obligation yet seeks to enforce the employer's obligation through its former CEO.

The facts conclusively demonstrate that a *bona fide* dispute existed as to whether the employer had any further obligation to perform. The requisite intent required by RCW 49.52.050(2) and RCW 49.52.070 does not—and cannot—exist.

The judgment should be reversed and judgment of dismissal should instead be ordered in favor of Defendant Siegel.

DATED this 10th day of June, 2009.

PETERSON YOUNG PUTRA



Kelby D. Fletcher, WSBA No. 5623
Of Attorneys for Appellants

CERTIFICATE OF TRANSMITTAL

On this day, the undersigned in Seattle, Washington, sent to the attorneys of record for respondent a copy of this document by ABC Messenger Service. I certify under the penalties of perjury under the laws of the State of Washington that the foregoing is true and correct.

6/11/09
Date


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