

67046-8

67046-8

No. 67046-8

WASHINGTON STATE COURT OF APPEALS, DIVISION I

JEFFREY MOORE,  
Appellant,

vs.

VICTOR SIEGEL and JANE DOE SIEGEL,  
Respondents,

Blue Frog Mobile, Inc., et al, Defendants.

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COURT OF APPEALS DIVISION I  
CLERK OF COURT

On appeal from King County Superior Court, Hon. Mariane C. Spearman

JEFF MOORE'S OPENING BRIEF

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## I. INTRODUCTION.

Two years ago this Court reversed summary judgment for Appellant Jeff Moore, holding an issue of fact required trial in his wage claim against the CEO of his former employer, and remanded. A new trial court on remand misconstrued that decision and effectively overruled it by granting summary judgment in favor of Respondent Victor Siegel, contrary to RAP 12.2. This error must be reversed.

This Court granted the central part of Siegel's appeal: "[b]ecause there is a genuine issue of material fact as to whether a bona fide dispute existed, we reverse the trial court's summary judgment order [in favor of Moore] and its award of attorney fees and costs." *Moore v. Blue Frog Mobile, Inc.*, 153 Wn. App. 1, 10, 221 P.3d 913 (2009), *rev. den.*, 168 Wn.2d 1020 (2010) ("*Moore I*"). However, despite Siegel's strenuous arguments seeking summary judgment in his favor, this Court did **not** grant summary judgment for Siegel as it could have on appeal, and assuredly would have to avoid a useless trial if, in fact, a trial was not necessary and dismissal was appropriate. Instead, this Court ruled there must be a trial on the merits in the Moore/Siegel wage dispute.

The trial court's associated (and erroneous) evidence-related rulings also must be vacated to permit admission of relevant evidence as determined appropriate in the context of trial, and to insure Moore can conduct necessary, limited discovery on Siegel's key defense.

## II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL.

### A. Assignments of Error.

1. The trial court erred in granting summary judgment to Siegel following this Court's reversal and remand for trial in *Moore I*.
2. The trial court erred in excluding the testimony of Siegel's assistant Holli Baxter that showed malice and motive by respondent Siegel in withholding Moore's wages.
3. The trial court erred in not allowing a CR 56(f) continuance so that Moore could obtain additional evidence regarding Siegel's "business judgment rule" defense.

### B. Statement of Issues.

1. Must the appellate court reverse summary judgment because the trial court misconstrued and thus, in effect, overruled *Moore I*, contrary to RAP 12.2 and case law?
2. Must this Court reverse the trial court's grant of summary judgment to Siegel because the trial court failed to recognize that determination of the defendant's state of mind and the reasonableness of his position are disputed issues of fact?
3. Must this Court reverse the trial court's grant of summary judgment because the "law of the case" doctrine actually required trial under *Moore I's* holding that reversed the summary judgment granted Moore and denied the summary judgment requested by Siegel "[b]ecause there is a genuine issue of material fact as to whether a bona fide dispute existed?"
4. Must the trial court's exclusion of Siegel's assistant Holli Baxter's testimony be vacated because: 1) it properly helps address Siegel's claim that Moore disparaged Blue Frog and/or Siegel under *Momah v. Bharti*, 144 Wn. App. 731 (2008), and otherwise was not properly excluded; and/or 2) it is a decision that should be reserved for trial and evaluated in that fuller factual context?
5. Must the trial court's denial of a continuance under CR 56(f) be vacated to permit discovery by Moore of the basis for Siegel's central defense prior to trial?

### III. STATEMENT OF THE CASE.

#### A. Substantive Facts Overview.

Jeff Moore was one of the founders of Blue Frog Mobile (“Blue Frog”) and was employed as Blue Frog’s Chief Operating Officer until January 9, 2007, when Blue Frog terminated his employment. CP 4, Complaint, ¶¶ 3.1, 3.2; CP 231-32, Moore Dec., ¶ 4. Victor Siegel became the CEO of Blue Frog two months after Moore was terminated, “from about mid-March, 2007 until about early January, 2008,” and then was succeeded by Gabriel Giordani. CP 142-43, Siegel Dec., ¶¶ 2, 3. Brett Maxwell, a former defendant, was a board member of Blue Frog “from mid-2006 until [his] resignation on January 16, 2008.” CP 862, Maxwell Aff., ¶ 1. According to Maxwell’s undisputed testimony, Siegel was responsible for negotiating and contracting with employees on behalf of Blue Frog, including Jeff Moore’s severance agreement. *Id.*, ¶ 10.

Moore was originally entitled to severance pay and other benefits as a result of his January, 2007, termination pursuant to the terms of a written employment agreement with Blue Frog, but the pay was stopped by Blue Frog. CP 4-5, ¶¶ 3.2-3.3. Moore and Blue Frog negotiated a severance agreement in April 2007. CP 5, ¶ 3.4. *See* CP 110-14 (“Severance Agreement”). Under the terms of the Severance Agreement, which Siegel approved, Moore’s termination date was January 9, 2007,

and Blue Frog agreed to pay eleven and a half months' severance, including lump sums for missed payments and semi-monthly payments of \$7,291.67 through December 2007. *Id.* Under the Severance Agreement Moore also received confirmation that 150,000 stock options were vested, of other benefits he would receive, and \$10,000 to pay his attorney's fees incurred by that first failure to pay his severance wages. *Id.* Moore still also owned 500,000 shares of Blue Frog. CP 871, Moore 2011 Dec., ¶ 4. In return, Moore gave Blue Frog a waiver and general release of claims (¶ 3), a covenant not to sue (¶ 4), and agreed to the non-disparagement clause (¶ 9).

But on August 31, 2007, Blue Frog again stopped paying Moore his severance wages, even though no provision in the Severance Agreement authorized Blue Frog to unilaterally stop those wages. Blue Frog's stated reason for withholding was Moore had caused Blue Frog damage by signing a declaration on August 8 ("ITL Declaration", CP 116-19) that made Blue Frog pay settlement money to a vendor of Blue Frog, ITL, in separate litigation. *See* CP 143-44, Siegel Dec. ¶ 7; CP 102-03, Giordani Aff., ¶ 11. The decision to withhold Moore's severance at the end of August 2007 was made by Blue Frog's CEO, Siegel. CP 144, Siegel Aff., ¶ 8.

The following month, September 2007, Moore sued Blue Frog and three individuals – Maha Ibrahim, Brett Maxwell, and Victor Siegel. CP 1-8. Ibrahim and Maxwell were Blue Frog Board Members and Siegel

was CEO. Moore settled with Maxwell and Ibrahim, and eventually took a Judgment against Blue Frog in November 2008; Siegel was the lone remaining defendant. CP 571-575. The total unpaid severance due to Moore that Siegel willfully chose to not pay was \$62,973.43. *See* CP 110, Severance Agreement, ¶ 2.

**B. The ITL Dispute and Moore's ITL Declaration.**

Siegel, the Blue Frog CEO at the time of the dispute with ITL in 2007, stated in his October 24, 2008, declaration that:

Ultimately Blue Frog paid a large amount of money, \$300,000 to settle the ITL claim. ITL gained value for purposes of its claim from the declaration Mr. Moore produced.

CP 144, Siegel Dec., ¶ 7.

But the truth and undisputed fact was that Blue Frog had been trying to settle with ITL long before Moore's ITL declaration was written in August 2007, since at least March 2007 -- five months earlier -- discussing a \$300,000 settlement amount<sup>1</sup> at that time. Importantly, Moore's ITL Declaration contained no damaging and disparaging facts, just the truth: that a contract existed between Blue Frog and ITL. In fact, Blue Frog had already offered to pay ITL \$300,000 long *before* Moore's ITL Declaration was signed. This was confirmed by Siegel's July 30,

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<sup>1</sup> *See* CP 233, Moore Dec., ¶ 7, and associated documents, CP 514-49, which include proposed terms sheets with various ways to reach the \$300,000 settlement amount beginning in March, 2007.

2007, email to ITL, CP 189: “After further consideration, BFM is willing to settle its dispute for \$300,000.” That \$300,000 is what the final settlement amount was. *See* Settlement Agreement and Release in the ITL matter, CP 549 (page 1) & 543-546, which was signed by Siegel, CP 546.<sup>2</sup> Moore’s August 8, 2007, ITL Declaration merely confirmed there was a contractual relationship between Blue Frog and ITL, CP 116-18, a fact that Giordani – Siegel’s successor as CEO – testified in deposition Blue Frog was aware of in at least January, 2007, eight months earlier. *See* CP 88-89, Moore’s motion; CP 74, Giordani Dep., pp 17-18.

Equally important, the evidence before the trial court showed that Blue Frog suffered no damage, a fact which Blue Frog also admitted in discovery. Given Moore’s remaining severance wages and large holdings of stock and options, his incentive was for Blue Frog to thrive.

**C. Blue Frog Admitted that Moore’s ITL Declaration Caused No Damage, Stipulated to a Judgment, and Dismissed Its Counterclaim; Siegel Delayed His Defense.**

After Moore filed his lawsuit under the Washington Wage Statutes, Chs. 49.48 and 49.52 RCW, CP 6, all four original defendants answered jointly through the same attorney at Stoel Rives in October 2007. CP 9-16. Only the corporate defendant, Blue Frog, stated a counterclaim for

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<sup>2</sup> The settlement amount increased to \$310,000 if Blue Frog did not make the full payment by September 10, 2007 and required Blue Frog to execute a confession of judgment in the penalty amount. CP 536.

damage against Moore. CP 13-14. Defendants' joint counsel then abruptly withdrew on January 23, 2008. CP 890.

Siegel did not engage new counsel nor respond to discovery. *See* CP 19-21 (June, 2008, order compelling discovery). He had resigned as the CEO of Blue Frog in early 2008, about the same time Blue Frog began winding down its operations and his original counsel withdrew. CP 142.

Blue Frog finally engaged new counsel and responded to discovery requests from Moore in June 2008. Blue Frog's discovery responses demonstrated that Blue Frog could not support its allegations and counterclaim that it suffered damage as a result of Moore's ITL Declaration. *See* CP 40-63, Blue Frog's interrogatory responses.

In fact, Blue Frog's then-CEO, Giordani, admitted in a 30(b)(6) deposition in June 2008 that Blue Frog knew of the ITL contract and Blue Frog's obligation to ITL *a full eight months before Moore's ITL Declaration*. CP 74, Giordani Dep., p. 17:5-21; p. 18:1-8; p. 19:1-19. Giordani also admitted that he could not quantify or demonstrate any damage Moore had caused to Blue Frog, as alleged in Blue Frog's counterclaim. CP 73, Giordani Dep., p. 16:12-18.

Moore then continued with discovery and obtained additional evidence from a third-party which independently confirmed that Blue Frog had suffered no damage from Moore's statements so that there was no basis for withholding Moore's severance wages. *See* CP 189, Siegel's

July 30, 2007 e-mail which Blue Frog and Siegel each should have produced in discovery. ITL produced the e-mail in which Siegel himself offered, on behalf of Blue Frog, to pay \$300,000 to ITL to settle their contract dispute. This written offer was made by Siegel *one week prior to Moore's August 8, 2007 ITL declaration. Again, this key document was not produced in discovery by either Blue Frog or Siegel. See CP 169, McDowall Aff., ¶ 9.*

After this revelation in October 2008 following Moore's motion for summary judgment, Blue Frog stipulated to a Judgment in favor of Moore and dismissed with prejudice its counterclaim that Moore had caused damage to Blue Frog. In the Stipulation, Blue Frog agreed severance wages were due of \$178,941.56, including double damages and attorney fees. CP 629-34. By then, Moore had also settled with the other two defendants, Maxwell and Ibrahim.

Siegel finally hired his own personal counsel in late October 2008 and opposed Moore's summary judgment motion on November 3, 2008. CP 579-586 (Siegel's brief); CP 578-588 (Supp. Siegel Aff.).

Siegel never denied that his ceasing to pay Moore's wages was willful, *i.e.*, that he knew what he was doing, intended to do it, and he chose to do it. *See Morgan v. Kingen*, 166 Wn.2d 526, 534, 210 P.3d 995 (2009). His defense was there was a "bona fide dispute" over whether the wages continued to be owed to Moore, based on Siegel's contention that,

even though he had no knowledge about the ITL contract, he was nevertheless justified in withholding Moore's wages because Moore had caused damage to both him and to Blue Frog by breaching the Severance Agreement with the ITL Declaration, even though that declaration did no more than state the truth. *See* CP 142-144, Siegel Dec., esp. ¶8. Notably, however, Siegel himself never stated a counterclaim or claimed any damage.

In response, Moore provided the sworn testimony from one of Blue Frog's vendors, Brian Johnson of mBlox, which refuted Siegel's claim that Moore had disparaged Siegel to Johnson in late April, 2007, and hurt Siegel in mBlox's eyes. CP 638-640, Johnson Dec., ¶¶ 3-6.

Moore also offered additional evidence demonstrating that Siegel had previously sworn under oath that Blue Frog's debt to ITL was a valid debt,<sup>3</sup> and demonstrating that at least two of Blue Frog's CEOs who had preceded Siegel had knowledge of Blue Frog's contract and obligation to ITL, and that Blue Frog, in fact, was not damaged. *See* CP 231-34, Moore Dec. ¶¶ 3-9, and associated documents.

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<sup>3</sup> *See* the Judgment by Confession signed by Siegel under oath on August 29, 2007, to end the ITL dispute. CP 551-54.

**D. Procedural History.**

Moore's motion for summary judgment was filed on October 3, 2008. CP 85-99. Although Blue Frog responded to Moore's motion, it then stipulated to judgment and agreed to dismiss its counterclaim after receipt of Moore's October 27 reply (CP 161-166). *See* CP 571-575 (Nov. 3, 2008, judgment); CP 576-578 (dismissal of counterclaim).

Moore then proceeded against Siegel, who did not answer the outstanding discovery but just filed his response on November 3. CP 579-586; CP 587-588. After argument, Judge Lum granted Moore summary judgment on liability and damages of \$125,946.86 by order filed on November 25, CP 672-75, about three weeks after he entered the stipulated judgment against Blue Frog. Judge Lum later awarded a total of \$51,043.82 in fees and costs. CP 645-47.

Siegel appealed and argued that summary judgment for Moore was error and, as a part of his argument, that he, Siegel, should be granted summary judgment in *his* favor. *See* App. A, pp. A-2 to A-3 & App. B, excerpts from Siegel's briefs in *Moore I*. Judge Lum's decision was reversed by this Court in *Moore I*, which also rejected Siegel's repeated request, including at oral argument, that summary judgment and dismissal be granted to him. Instead, this Court's decision rejected summary judgment for either party. 153 Wn. App. at 9-10. The Supreme Court denied review and the mandate issued in June 2010. CP 649-650.

On remand, the case was re-assigned to Judge Spearman because Judge Lum was on the criminal calendar. Siegel was slow to complete his outstanding discovery obligations and resisted any new ones. *See* CP 699-702, 707-710 and attachments. Siegel moved for summary judgment under the law of the case doctrine, CP 660-687, and opposed Moore’s discovery efforts. CP 783-93. Despite this Court’s determination that a trial was required, Judge Spearman granted summary judgment in favor of Siegel (RP 21; CP 807-09), and denied Moore’s request for a continuance to conduct discovery of the attorneys central to Siegel’s “business judgment rule” defense (CP 799-801). Judge Spearman later ruled that the challenged Baxter evidence was excluded. CP 823-825. This appeal followed. CP 826-843.

#### **IV. ARGUMENT.**

##### **A. Standard of Review.**

This Court knows well that the standard of review for summary judgment motions on appeal is *de novo* and that all inferences are drawn in the non-moving party’s favor, here, Appellant Jeff Moore. *Moore I*, 153 Wn. App. at 6-7; *Bostain v. Food Express Inc.*, 159 Wn.2 700, 708, 153 P.3d 846 (2007) (affirming trial court’s grant of summary judgment for employee’s wage claim after reversal by the Court of Appeals).

**B. This Court Did Not Grant Summary Judgment To Siegel In Moore I When it Could Have And Despite Siegel’s Impassioned Argument That It Should. Instead, This Court Held An Unsettled Issue of Material Fact Required A Trial.**

An appellate court may order summary judgment in favor of a non-moving party on appeal. *See Impeccoven v. Dept. of Revenue*, 120 Wn.2d 357, 365, 842 P.2d 470 (1992); *Barber v. Peringer*, 75 Wn. App. 248, 255, 877 P.2d 223 (1994). The Court of Appeals did not grant summary judgment for Siegel in *Moore I* based on essentially the same record. Rather this Court stated that the issues presented in this case are for a trier of fact to decide, *i.e.*, this case was to be tried:

¶ 15 Viewing these facts in the light most favorable to Siegel, a reasonable jury **could** find that Siegel genuinely **and reasonably** believed that Moore materially breached the severance agreement, thereby relieving Blue Frog of its severance payment obligation. FN2 While this belief may have been erroneous, reasonable minds **could find** that it created a bona fide dispute over Moore's entitlement to the payments and thereby, defeat a willfulness finding and preclude Siegel's personal liability for double damages under RCW 49.52.070. **Because there is a genuine issue of material fact as to whether a bona fide dispute existed**, we reverse the trial court's summary judgment order and its award of attorney fees and costs. FN3.

FN3. **Since this conclusion is dispositive**, we do not reach the parties' other contentions. . . .

*Moore I*, 153 Wn. App. at 9-10 (footnote 2 omitted) (emphasis added).

Notably, one of the “parties’ other contentions” was Siegel’s impassioned plea for entry of summary judgment in his favor. But because the holding that “there is a genuine issue of material fact as to

whether a bona fide dispute existed” was “dispositive,” the Court had no reason to formally address Siegel’s request for judgment in his favor because it was mooted by the holding. The only way for the trial court to address Siegel’s request for summary judgment in his favor was for it to fail to follow and, thus, effectively overrule the Court of Appeals decision in *Moore I*. That is an error of law and reversible error. RAP 12.2; *Marriage of Rockwell*, 157 Wn. App. 449, 454, 238 P.3d 1184 (2010); *Yurtis v. Phipps*, 143 Wn. App. 680, 690-91, 181 P.3d 849 (2008).

The appellate rule provides that

After the mandate has issued, the trial court may, however, hear and decide post judgment motions otherwise authorized by statute or court rule *so long as those motions do not challenge issues already decided by the appellate court.*

RAP 12.2, quoted in *Yurtis v. Phipps*, 143 Wn. App. at 691 (emphasis by the court). Here the motion decided by the trial court violated RAP 12.2. It challenged the issue already decided in *Moore I*: a material issue of fact exists as to the reasonableness of Siegel’s belief and to the existence of a “bona fide dispute,” precluding summary judgment -- for *any party*.<sup>4</sup>

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<sup>4</sup> Moreover, this Court pointed out in *Marriage of Rockwell* that it uses specific language when remanding a case to the trial court for it to exercise discretion, language that is tellingly absent from the decision in *Moore I*:

. . . the language “we remand for ‘further proceedings’” signals this court’s expectation that the trial court will exercise its discretion to decide any issue necessary to resolve the case. [citations omitted]

*Marriage of Rockwell*, 157 Wn. App. at 454.

Granting summary judgment to Siegel on remand therefore was contrary to the decision in *Moore I* and an error of law which requires reversal. It also was a substantial injustice because of the unnecessary delay and additional expense it imposed.

**C. This Court Held in *Moore I* that the Decision to Withhold Moore's Severance Wages Presented the Classic Factual Issue That Requires Trial.**

Again, when this Court reversed summary judgment for Appellant Moore, it stated that the issue of the propriety of Siegel's withholding Moore's severance wages is a fact issue to be decided by a trier of fact, plain and simple. *See Moore I*, 153 Wn. App. at 9-10. In other words, summary judgment was not appropriate for *either* party.

The reasonableness of a decision regarding whether to comply with a certain duty or obligation is the quintessential factual issue that is generally not susceptible to summary judgment. The duty at issue here that was owed by defendants Siegel and Blue Frog to Moore was a mandatory statutory duty. Under RCW 49.52.050 and RCW 49.52.070, the payment of wages is mandatory. *Morgan v. Kingen*, 166 Wn.2d, 526, 210 P.3d 995 (2009); *Schilling v. Radio Holdings*, 136 Wn.2d 152, 961 P.2d 371 (1998). In *Schilling*, 136 Wn.2d at 163, the Supreme Court upheld a ruling in favor of the employee on summary judgment, noting the strong public policy enunciated by the Legislature in creating the statutory scheme that has both civil and criminal penalties as well as exemplary

damages for a failure to pay wages owed employees, and that the statute is given a liberal construction to achieve its purpose of protecting employees and recovery of their withheld wages. *Id.*

This Court could not and did not reverse *Schilling* or *Morgan* in *Moore I*, but merely noted that the issues raised in this case created factual issues that were not susceptible to summary judgment. Thus, not only did the trial court misconstrue *Moore I*, it ignored the Supreme Court in *Morgan* and *Schilling*. The summary judgment must be reversed.

**D. “State of Mind” is an Issue of Fact that is Not Susceptible to Summary Judgment, as Siegel Argued to this Court in *Moore I*, Making Summary Judgment Improper. Moreover, the Evidence Taken In Favor of Moore Shows Siegel’s State of Mind Was Not Reasonable.**

As Siegel previously argued to this Court in *Moore I*,<sup>5</sup> the determination of a person’s state of mind is not susceptible to summary judgment.<sup>6</sup> In particular, Siegel argued that, in the context of the wage statute, the key issue of whether the employer “willfully withheld money owed” is a question of fact that cannot be determined on summary judgment. However, Siegel went on to conflate his fact-based defense to the willfulness requirement -- that there was a bona fide dispute over the

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<sup>5</sup> See App. A, Siegel’s Opening Brief in *Moore I*, No. 62716-3-I (filed Feb. 17, 2009), pp. 11-12, argument subheading 2: “State of mind is not susceptible to summary judgment.”

<sup>6</sup> *Turngren v. King County*, 33 Wn. App. 78, 649 P.2d 153 (1982) (citing *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960)); *Percival v. Bruun*, 28 Wn. App. 291, 622 P.2d 413 (1981).

wage claim -- with a total defense against any application of RCW 49.52.

See App. A., Siegel's Opening Brief in *Moore I*, pp. 11-13.

Siegel seemingly argued that, if there is a *possibility* of a bona fide dispute which could potentially be established based on the one-sided assertions of the employer, dismissal of the employee's claim was required. This argument conveniently forgot the principle that, when he was the non-moving party, the court had to accept Siegel's evidence in his favor *and* deem it credible; but, as the moving party, Siegel was no longer entitled to have the evidence seen in his favor. Rather, the trier of fact can accept Moore's evidence and not Siegel's and thereby reject Siegel's assertion that Siegel's belief Moore had breached the Severance Agreement to Blue Frog's damage was reasonable.

On remand, however, Siegel tried to have it both ways. The issue Siegel presented on his summary judgment motion was whether his decision to withhold Moore's severance wages was reasonable as a matter of law under the mandatory wage statutes: *i.e., was his state of mind reasonable*, given all of the facts and also claimed lack of need to show damages under the subject Separation Agreement? CP 660-87, 772-82; RP 3-4. He thus argued that the trial court had to conclude, as a matter of law, that Siegel had a reasonable belief that Moore had breached the agreement and that his state of mind could be determined on summary judgment -- precisely what Siegel had argued to this Court in *Moore I*.

This Court rejected Siegel's argument and held summary judgment was not proper on the issue of whether there was a bona fide dispute *Moore I*, remanding for trial. It was error for the trial court to grant summary judgment on this now-settled issue on remand.

Given *de novo* review, Moore details his position below to show that granting summary judgment to Siegel was error. Moore argued that, based on all the evidence before the trial court taken in Moore's favor, a jury could find Siegel's decision to withhold wages was *not* reasonable, making summary judgment improper. *See* CP 688-96; 707-56; RP 6-14.

- Blue Frog dismissed its counterclaim for damages against Moore and stipulated to a judgment in favor of Moore.
- The non-disparagement clause in question that Siegel relied upon required evidence of damages.
- Siegel knew that Blue Frog's obligation to ITL was an existing obligation several months before the Moore Declaration.
- Siegel knew that he had already offered to pay \$300,000 to ITL at least 10 days prior to Moore's Declaration.
- Blue Frog was actively "looking for dirt" on Moore to get out of the Severance Agreement it had made only when forced to.
- Moore had a substantial and continuing financial interest in Blue Frog's success beyond the severance payments.

**1. Blue Frog Stipulated to a Judgment and Also to the Fact that Jeff Moore did Not Damage the Company.**

Blue Frog stipulated to a Judgment that it owed Moore his severance wages. This should have had *res judicata* effect. *See Pederson*

v. *Potter*, 100 Wn. App. 62, 11 P.3d 833 (2000). Since there was no viable counterclaim against Moore, it follows that there was no basis to withhold Moore's wages.

Siegel and Blue Frog had agreed to a Term Sheet with ITL to settle Blue Frog's contract debt to ITL for \$300,000 in March 2007 – five months before Moore's ITL Declaration. *See* CP 514-49, Exs. I-K to Moore Dec., *esp.* CP 516, confirmation email. Siegel re-confirmed this settlement amount on July 30, 2007, ***ten days before Moore's ITL Declaration***, when he wrote an e-mail to Yvette Melendez of ITL offering \$300,000 to settle the dispute. CP 189. ***Neither Blue Frog nor Siegel produced this critical, dispositive e-mail in discovery in this case.***

In fact, Siegel misread the contract's non-disparagement provision, which clearly requires a showing of damage to Blue Frog's business. CP 113, ¶9. He also misread the law regarding severance wages.<sup>7</sup>

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<sup>7</sup> In cases involving severance agreements and violations of restrictive covenants, courts have consistently held that **in order to withhold severance, an employer must prove that his business would be irreparably damaged by violation of a restrictive covenant.** *See Wells v. Uvex Winter Optical*, 635 A.2d 1188 (1994), (*Leavitt Co. v. Plattos*, 327 N.E.2d 356 (Ill. App. 1975); *Isabelli v. Curtis 1000, Inc.*, 31 Ill. App. 3d 1030, 1038, 335 N.E.2d 538 (Ill. App. 1975); *see also St. John Medical Center v. State ex. Rel. Dept. of Social and Health Services*, 110 Wn. App. 51, 64, 38 P.3d 383 (2002) (To prevail on a breach of contract claim a party must demonstrate both a material breach of that contract and also resulting damage).

There is no claim of such irreparable damage by Blue Frog in this case. This means that, as a matter of law, Blue Frog could not prevail on Siegel's assertion the Severance Agreement was breached, which Siegel's claimed conferences with counsel should have (and may have) advised him. If there could not even be a theoretically cognizable claim for breach of the Severance Agreement, then any "reliance" on that theory to stop the severance payments could not be reasonable. Stopping the payments could only be a  
(Footnote continues on next page.)

Siegel's intentional, free-will decision to withhold wages was a knee jerk-reaction at best that did not have a reasonable basis in the Severance Agreement or facts, and which the Company later conceded was wrong.

**2. Siegel and Blue Frog Clearly Knew About the ITL Contract Eight Months Before Wrongfully Withholding Moore's Severance Wages.**

Siegel claims he and Blue Frog did not know about the ITL contract at issue. But his predecessor, Al Ramirez, knew about the ITL obligation in January, 2007, and did not object to it. *See* CP 236-39, Exs. A and B to Moore Dec. Siegel's successor, Giordani, conceded in his deposition that Blue Frog knew of the ITL obligation in January 2007. CP 74. Other documents, *which Blue Frog also did not produce in discovery in this case*, also confirm what Siegel swore to and what Mr. Ramirez conceded: in fact, Blue Frog knew of the ITL-Blue Frog contract in September 2005. *See* CP 459-73, Ex. G to Moore Dec. In particular, in September 2005 the company CEO, Ron Erickson, and the company Treasurer, David Theobald, were both made aware of the ITL contract. CP 460, Aug. 10, 2005 email. In the face of such evidence, Siegel's decision to withhold Moore's wages was unreasonable.

On the other hand, if Siegel truly knew nothing about the ITL

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matter of caprice. Since Siegel refuses to disclose the details of his conferences with counsel and has resisted discovery thereof, the presumption must be that, if disclosed, those conferences would hurt Siegel's case and help Moore.

contract, and deemed it suspect, this could yield two possible conclusions from a trier of fact – both of which would preclude summary judgment for Siegel. First, if he had no knowledge about it, and/or thought it was suspect, he had no basis to withhold Moore’s severance wages. Alternatively, if indeed it was a bogus obligation, then why did Siegel offer to pay ITL anything, let alone the \$300,000 he had already agreed to before any Declaration from Mr. Moore? Either way, this demonstrates that reasonable minds could differ as to whether Siegel’s actions were reasonable given the facts before him.

**3. The Evidence Shows that Blue Frog Was Out to “Find Dirt” on Plaintiff Moore.**

The Holli Baxter Declaration documents Blue Frog’s general counsel Lonnie Rosenwald’s instructions to Baxter in late April to search Moore’s e-mails to see if he had made any statements that were disparaging to Blue Frog. CP 146, ¶¶4-7. In other words, the company had been out to “find dirt” on Moore for some time prior to the second withholding of his severance wages. In the face of such evidence, coupled with the admitted lack of damages and the fact Blue Frog had already agreed to pay \$300,000 in settlement to ITL, it cannot be said that Siegel acted reasonably in withholding Moore’s severance wages.

**E. The Law of the Case Doctrine Should Not be Applied When it Contradicts Established Law.**

The law of the case doctrine is discretionary and may be avoided

by the appellate court where the prior decision is clearly erroneous and would work a manifest injustice to one party. *See Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.2d 844 (2005) (citing RAP 2.5(c)(2)). **First**, the trial court's decision contradicts existing law. The Supreme Court held in both *Morgan* and *Schilling* that payment of wages is mandatory under RCW 49.52.050 and RCW 49.52.070. It held in both cases the volitional act of withholding wages is a violation of these statutes: "willfulness" is found where the "employer's refusal to pay [is] volitional.... Willful means 'merely that the person knows what he is doing, intends to do what he is doing, and is a free agent.'" *Morgan*, 166 Wn.2d at 534. Only a clerical error or bona fide dispute the wages are owed can excuse non-payment. **Second**, RAP 2.5(c)(2) may excuse an appellate court from following a prior appellate decision, not trial courts. *Cf.* RAP 12.2.

Siegel's spin on what he incorrectly asserted as the so-called "law of the case" by a misreading of *Moore I* cannot overcome either the Supreme Court's opinions in *Morgan* and *Schilling*, nor the plain language of *Moore I* itself. Rather, *Moore I* must be construed consistent with the controlling Supreme Court decisions. And more to the point, the decision's clear, express language must simply be applied in a straightforward way rather than disregarded: where a question of material fact exists, summary judgment is precluded and the matter must be tried.

**F. The Trial Court Erred in Dismissing Moore’s Claims Because the Cases Cited by Plaintiff for the So-Called “Fairly Debatable” Standard All Awarded Single Damages.**

Siegel cited three cases to the trial court in support of his argument that summary judgment was appropriate, *Cannon v. City of Moses Lake*, 35 Wn. App. 120, 663 P.2d 865 (1983), *Moran v. Stowell*, 45 Wn. App. 70, 724 P.2d 396 (1986), and *Duncan v. Alaska Federal Credit Union*, 148 Wn. App. 52, 199 P.3d 991 (2008). But in each of those cases, the court actually awarded single damages and did not dismiss the plaintiff’s claims. At a minimum, the trial court should have done the same, *i.e.*, allowed Moore’s claim for single damages without regard to his additional claims for double damages and attorney fees under RCW 49.52.070 to proceed.

**G. The Trial Court Improperly Excluded the Declaration of Holli Baxter.**

The trial court improperly excluded certain probative evidence from Siegel’s assistant at Blue Frog, Holli Baxter. CP 823-25. This was clear error. Baxter explained a set of circumstance she observed and also explained certain actions she was directed to take in her job to “find dirt” on Jeff Moore. CP 145-46. Her testimony if credited also rebuts the false claim that Moore disparaged Blue Frog to Baxter herself. *See* CP 103, Giordani Dec., ¶ 12. Such testimony was clearly admissible because it goes right to the heart of the issue of disparagement raised by Blue Frog and Siegel in this case. *See Momah v. Bharti*, 144 Wn. App. 731, 750-51,

182 P.3d 455 (2008).

For instance, Siegel sent Moore an e-mail in May 2007 indicating he was upset at Moore for talking to a Blue Frog vendor, that Moore should not contact his assistant (Holli Baxter) or talk to Blue Frog business partners, and that his patience was “very low.” CP 871, Moore 2011 Dec. ¶¶3-4. Baxter’s declaration testimony helps explain these circumstances. Moore was concerned about Siegel’s no-show to a meeting with Brian Johnson of mBlox in spring 2007 because he still owned 500,000 shares in Blue Frog (with 150,000 in stock options) and wanted to see the company succeed, in part by keeping a vendor happy. *Id.* He called Siegel to tell him this, *id.*, which Baxter corroborates. CP 146. This testimony was offered to show there is evidence that Moore did not disparage Siegel or Blue Frog, as originally claimed by Blue Frog via the Giordani Dec., ¶ 12, CP 103 (on which Siegel relies), yet the Court erroneously decided to exclude Baxter’s declaration.

Most important, the conversation between Moore and Brian Johnson, as testified to first-hand by Johnson (CP 639) apparently caused Siegel’s patience with Moore to be “very low,” as indicated by Johnson’s description of Siegel’s reaction and Siegel’s email. Blue Frog started searching Jeff Moore’s old e-mails to find disparaging comments or information, a circumstance Baxter confirms in her declaration. Siegel had a motive to act against Moore, minimally to undo the Severance

Agreement he had never wanted to make in the first place, and Baxter's declaration shows actions consistent with that motive while also providing the background and explanation to prove that Moore said nothing disparaging – a key issue in this case, which Moore is entitled to rebut.

The statements by former Blue Frog general counsel Lonnie Rosenwald of the company's intent to search Moore's files for disparaging statements are party admissions and statements against interest. *See* ER 801(d)(2) and ER 804(b)(3). They also demonstrate a plan and motive, admissible under ER 803(a)(3); *see also Pannell v. Food Services of America*, 61 Wn. App. 418, 810 P.2d 952 (1991) (statements by a party's managers to another person in the company are admissible).

What Scott Milburn appeared ready to do or not do after being informed that Moore called to talk to him about his ITL Declaration is admissible under ER 803(a)(1) as a present sense impression. It is also admissible under ER 801(d)(2)(ii), which permits a statement of which the party has manifested an adoption or belief in its truth. *See State v. McCaughey*, 14 Wn. App. 326, 541 P.2d 998 (1975) (nod of the head was admissible); *State v. Israel*, 113 Wn. App. 243, 54 P.3d 1218 (2002) (silence was admissible). It is also admissible to show the context in which Moore gave the ITL Declaration, the primary basis for Siegel's defense in this case, under ER 803(a)(3).

In sum, all this evidence, viewed most favorably to Moore on summary judgment, demonstrates malice toward and deliberate intent to “find dirt” on Jeff Moore. As such, it is clearly probative of Siegel’s state of mind towards Moore and of the reasonableness of his claimed belief severance wages were no longer due. Its exclusion was error. Moreover, given the erroneous consideration of summary judgment in the first place, these pre-trial evidentiary rulings should also be vacated for the remand, subject to any objections that may arise in the context of the evidence at trial, which is the best place to determine evidentiary issues. *See Minehart v. Morningstar Boys Ranch, Inc.*, 156 Wn. App. 457, 467-68, 232 P.3d 591, *rev. den.*, 169 Wn.2d 1029 (2010) (denying discretionary review of pre-trial ruling on admissibility of similar act evidence in part because proper review of admissibility was made after trial, discussing how pre-trial evidentiary rulings are tentative because the ultimate question of admissibility will depend on the full context at trial).

**H. The Trial Court Erred in Denying Moore’s CR 56(f) Continuance Motion.**

One of Siegel’s main defenses is the “business judgment rule,” here that he relied on the company’s attorney’s advice. Moore had to determine the bona fides of this defense on remand. Siegel had moved out of state and, only after filing his own motion for summary judgment, did Siegel belatedly give his responses to Moore’s interrogatories and requests

for production which were originally served in early 2008.<sup>8</sup> Those responses did not resolve those fact questions. After the summary judgment filing and still before receiving any responses from Siegel to the 2008 discovery requests, Moore sent subpoenas to the attorneys and sought a CR 56(f) continuance to obtain such information. CP 707-42.

Denial of this motion was error. *See Garret v. City of San Francisco*, 818 F.2d 1515, 1518-19 (9<sup>th</sup> Cir. 1987); *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990) (reversing trial court's denial of continuance to obtain discovery before summary judgment). The Ninth Circuit reversed the denial of discovery of facts essential to the party's opposition as moot following the trial court's grant of summary judgment for its failure to exercise discretion, the same situation that exists here. *See* RP p. 21. Such evidence, when Siegel himself failed to produce documents relevant to it, is necessary to explore and rebut the "business judgment rule" defense claimed by Siegel and which, because of the unusually disjointed "progress" of this case, reasonably was not obtained earlier by Moore. It was prejudicial error to dismiss the case before Moore could obtain this evidence, which independently requires reversal.

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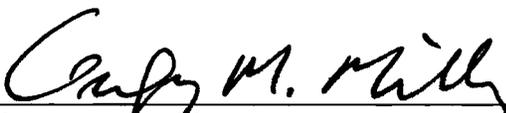
<sup>8</sup> Moore originally served the requests in February, 2008. CP 707, ¶2. Moore got an order compelling answers within one month in June, 2008 when Siegel failed to respond, including \$500 in sanctions, CP 20. The *Moore I* mandate issued June 18, 2010. CP 649. Siegel filed his summary judgment motion on remand on February 22, 2011. CP 660. But Siegel's answers to the still-outstanding 2008 initial discovery requests were not provided until March 8, 2011 (CP 707), after he had filed his summary judgment motion. Siegel's verification of them was not notarized until March 10, 2011. CP 723.

## V. CONCLUSION

This Court did not write a new standard for summary judgment motions, nor did it hold “state of mind” normally is susceptible to summary judgment when it decided *Moore I*. Rather, the unanimous panel concluded that factual issues precluded summary judgment for plaintiff Moore and remanded for trial. For the same reason, the panel also concluded summary judgment for defendant Siegel was improper. Because the trial court misconstrued this Court’s holding in *Moore I* that there are disputed material issues on whether there was a bona fide dispute the wages had to be paid, the summary judgment must be reversed, the associated rulings on evidence and discovery vacated, and the matter remanded (again) for trial.

DATED this 25<sup>th</sup> day of September, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By:   
\_\_\_\_\_  
Gregory M. Miller, WSBA No. 14459  
John R. McDowall, WSBA No. 25128  
Counsel for Appellant Jeffrey Moore

# APPENDIX A

NO. 62716-3-I

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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



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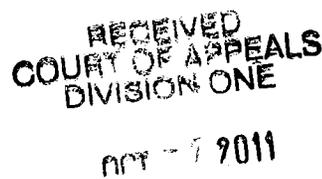
Jeffrey Moore,

*Respondent,*

vs.

Victor Siegel and Jane Doe Siegel,

*Appellants.*



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BRIEF OF APPELLANTS

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BY: Kelby D. Fletcher, WSBA #5623  
*Attorneys for Appellant*  
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felony defense. 18 USC 3006A(d)(1). In capital cases, the rate is \$125/hr.  
18 USC 3599(g)(1).

**4. It was not appropriate for the trial court to award fees at the rate of \$135/hour for work performed by a paralegal performing clerical tasks.**

Plaintiff claimed entitlement to recover fees at the rate of \$135 hour for 25.8 hours of work performed by a paralegal or \$3,483.50. Siegel objected to this claim. CP 753-754. The objection was based on *Morgan v. Kingen, supra*: That the work claimed was clerical in nature.

Here, as with law students, we do not know, because no evidence is in the record, "the reasonable community standards," if any there are, for the amount charged for paralegals.

## VI. CONCLUSION

Summary judgment was inappropriate in this case. Siegel demonstrated sufficient evidence existed for the trial court, and this court, to state, as a matter of law, that a *bona fide* dispute existed, thereby relieving Siegel of liability.

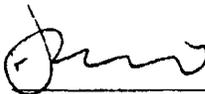
Whether a fact finder would determine that a breach of Moore's contract existed is not the operative fact. Rather, whether Sigel reasonably believed that there was a breach is what is signal in this case. Moore's own evidence disclosed that Siegel terminated further payments under Moore's separation contract only after consulting with inside and outside legal counsel. By then, Moore had been paid his legal fees attributable to the contract, almost \$105,000 out of a potential obligation of \$167,000 for severance, and health insurance benefits. Siegel and Blue Frog acted in

good faith until presented with objectively verifiable evidence that Moore acted contrary to the Separation Agreement. After that evidence surfaced, Siegel was justified in halting further payments.

This Court should reverse the Order granting summary judgment and order dismissal of claims against Siegel. *Impehoven v. Department of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992).

DATED this 17<sup>th</sup> day of February, 2009.

PETERSON YOUNG PUTRA

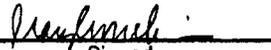


Kelby D. Fletcher, WSBA No. 5623  
Of Attorneys for Plaintiff(s)

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.

2/17/09  
Date

  
Signed

of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.”).

**2. State of mind is not susceptible to summary judgment.**

In the specific context of RCW 49.52, “[t]he question of whether the employer willfully withheld money owed, however, is a question of fact ....” *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 660, 717 P.2d 1371 (1986), citing with approval this court’s decision in *Ebling v. Gove’s Cove, Inc.*, 34 Wn.App. 495, 501, 663 P.2d 132 (1983). This is clearly in accord with generally accepted authority that states of mind, such as “willfulness,” require factual determination. “The issue of the defendant’s intent at the time of the plaintiff’s discharge is clearly a factual question.” *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 899 (3d Cir. 1987) (en banc) cert. dismissed, 483 U.S. 1052 (1987) quoted with approval by Division I in *Sellsted v. Washington Mutual*, 69 Wn.App. 852, 863, 851 P.2d 716 (1993).

By granting summary judgment against Siegel, the trial court determined that he acted “willfully” in order to deprive Moore of his wages in the form of severance pay. Siegel defended on the basis that a *bona fide* dispute precluded application of RCW 49.52 and, therefore, personal liability against Siegel.

As this Court has observed, “[s]ummary judgment is inappropriate if the record shows any reasonable hypothesis which entitles the non-moving party to relief.” *Selberg v. United Pacific Ins. Co.*, 45 Wn. App. 469, 726 P.2d 468 (Div. I 1986) (citations omitted). Further, “[a] genuine

issue of credibility should not be resolved at summary judgment.” *Silves v. King*, 93 Wn.App. 873, 880, 970 P.2d 790 (Div. I 1999).

Siegel presented objective evidence upon which he based his belief that Moore breached the contract: Moore’s declaration in support of an adversary of Blue Frog in an arbitration, ITL. CP 136-139. In addition, Siegel knew then, as the current CEO of Blue Frog knows now, that Moore’s assistance to ITL was suspect. CP 120-123 (Giordani declaration). A sister of a Blue Frog founder, Yvette Melendez, was a principal with ITL and the founder was in contentious litigation with Blue Frog at the time Moore gratuitously supplied his declaration. In addition, the supposed contract was agreed to by Moore, on behalf of Blue Frog, and Melendez, on behalf of ITL, in March, 2005, but not disclosed to any other Blue Frog executive until after Moore left Blue Frog on January 9, 2007.

**3. The existence of a *bona fide* dispute between a former employer and the former employee defeats personal liability and penalties under RCW 49.52.050 and .070.**

Here, personal liability was imposed upon defendant Siegel, a corporate officer, under RCW 49.52.050 and .070 for wages “willfully withheld” under a severance contract with another corporate officer, plaintiff Moore. The requisite intent “[w]ilfully and with intent to deprive the employee of any part of his wages” as set out at RCW 49.52.050(2) does not exist and, therefore, neither does liability under that statute, if there is a *bona fide* dispute between the employer and the employee regarding the existence of an obligation to pay the compensation.

*Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 161-62, 961 P.2d 371

(1998). In turn, a *bona fide* dispute exists if the employer “reasonably believed” that the compensation was not owing. These are questions of fact. See, *Lillig v. Becton-Dickinson, supra*.

4. **The reasonable belief of Siegel that Moore breached the severance contract by materially aiding an opposing party in litigation with the employing entity created a sufficient basis for a *bona fide* dispute.**

The contract obligated the payment by Blue Frog of severance to Moore in the total amount of \$167,708.33. A condition of the contract was that Moore could not participate voluntarily “in any action” that would “negatively comment on...[or] disparage...the...business operations...or conduct ...” of Blue Frog. CP 130 at 133 (Separation Agreement).

By August, 2007, Blue Frog paid Moore \$104,734.90 under the severance agreement and attorneys’ fees of \$10,000, health insurance and stock options. When Siegel learned that Moore voluntarily signed a declaration in support of ITL in its claim in arbitration against Blue Frog, Siegel stopped further payments, but only after consulting with inside and outside corporate counsel.

Siegel reasonably believed that Moore breached the contract because of Moore’s negative comment about Blue Frog or his disparagement of Blue Frog. Siegel Dec. at ¶ 8, CP 191. Siegel did not take the position that Moore could not testify truthfully in a hearing. Memo of Siegel in Opp. to Summary Judgment at CP 600, n. 2. Instead,

# APPENDIX B

NO. 62716-3-1

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON



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

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Jeffrey Moore,

*Respondent,*

vs.

Victor Siegel and Jane Doe Siegel,

*Appellants.*

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REPLY BRIEF OF APPELLANTS

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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 10<sup>th</sup> 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

Jaylinel  
Signed