

27046-8

67046-8

No. 67046-8-1

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

JEFFREY MOORE,
Appellant,

v.

BLUE FROG MOBILE, INC., a Washington corporation, VICTOR
SIEGEL and JANE DOE SIEGEL, a married couple, BRETT MAXELL
and JANE DOE MAXWELL, a married couple, and MAHA IBRAHIM
and JOHN DOE IBRAHIM, a married couple,
Respondent.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 NOV 10 PM 4:01

BRIEF OF RESPONDENT SIEGEL

Kelby D. Fletcher (WSBA #5623)
STOKES LAWRENCE, P.S.
800 Fifth Avenue, Suite 4000
Seattle, Washington 98104-3099
(206) 626-6000

Attorneys for Victor Siegel

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ISSUES ON APPEAL..... 2

III. STATEMENT OF THE CASE..... 4

IV. ARGUMENT..... 13

 A. Should This Court Disturb The Trial Court’s Refusal To Grant Moore Relief Under CR 56(f)?.....13

 1. Standard of Review13

 2. The Trial Court Properly Denied A Continuance13

 B. Should The Trial Court’s Evidentiary Rulings Be Disturbed On Appeal Or, Alternatively Was There Harmless Error?17

 1. Standard of Review17

 2. The Baxter Declaration Is Irrelevant.....17

 3. Paragraph 6 of the Baxter Declaration Is Irrelevant And Hearsay.....18

 4. Paragraph Of The Baxter Declaration Is Hearsay And Speculation.....20

 5. Paragraph 10 Of the Baxter Declaration Recounts Hearsay20

 C. Because This Court Did Not Remand With Particular Instructions, Was It Appropriate For The Trial Court To Consider Siegel’s Motion For Summary Judgment?23

 1. The Law Of The Case Does Not Preclude Siegel’s Motion For Summary Judgment23

 2. When Necessary, The Appellate Court Will Provide Instructions To The Trial Court24

D. Was Moore’s Entitlement To The Balance Of Severance “Fairly Debatable” As A Matter Of Law, Thereby Relieving Siegel Of Liability Under RCW 49.52?	25
1. Strict Personal Liability Under RCW 49.52 Does Not Exist	25
2. Determination of <i>Bona Fide</i> Dispute Does Not Have To Hinge On State Of Mind.....	27
3. Monetary Damage is Not Necessary.....	30
4. Whether Moore Breached His Agreement With Blue Frog Was “Fairly Debatable”.....	31
5. Blue Frog’s Stipulation To Judgment Cannot Bind Siegel.....	32
V. CONCLUSION.....	33

TABLE OF AUTHORITIES

Washington Cases

<i>Brewer v. Copeland</i> , 86 Wn.2d 58, 542 P.2d 445 (1975).....	22
<i>Butler v. Joy</i> , 116 Wn. App. 291, 65 P.3d 671 (2003).....	13
<i>Coggle v. Snow</i> , 56 Wn. App. 499, 784 P.3d 554 (1990).....	16
<i>Colwell v. Holy Family Hosp.</i> , 104 Wn. App. 606, 15 P.3d 210 (2001).....	13
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	19
<i>Ellerman v. Centerpoint Prepress, Inc.</i> , 143 Wn.2d 514, 22 P.3d 795 (2001).....	28
<i>Folsom v. Burger King</i> , 135 Wn.2d 663, 958 P.2d 301 (1998).....	17
<i>Gross v. Sundig</i> , 139 Wn. App. 54, 161 P.3d 380 (2007).....	13
<i>In Re Marriage of Rockwell</i> , 157 Wn. App. 449, 238 P.3d 1184 (2010).....	23
<i>Jacob's Meadow Owners Ass'n v. Plateau 44 II LLC</i> , 139 Wn. App. 743, 162 P.2d 1153 (2007).....	30
<i>Kieburz & Assocs., Inc., v Rehn</i> , 68 Wn.2d 260, 842 P.2d 985 (1992).....	27
<i>Moore v. Blue Frog Mobile, Inc.</i> , 153 Wn. App. 1, 221 P.3d 913 (2009), <i>review denied</i> , 168 Wn.2d 1020 (2010).....	passim
<i>Morgan v. Kingen</i> , 166 Wn.2d 256, 210 P.3d 995 (2009).....	26
<i>Pederson v. Potter</i> , 103 Wn. App. 62, 11 P.3d 833 (2000).....	33
<i>Quest v. Utilities and Transportation Commission</i> , 140 Wn. App. 255, 166 P.3d 732 (2007).....	17

<i>Rosen v. Ascentry Techs., Inc.</i> , 143 Wn. App. 364, 177 P.3d 765 (2008).....	32
<i>Schilling v. Radio Holdings, Inc.</i> , 136 Wn.2d 152, 961 P.2d 371 (1998).....	26
<i>State v. Farr-Lenzini</i> , 93 Wn. App. 453, 970 P.2d 313 (1999).....	20
<i>White v. Kent Med. Ctr., Inc., P.S.</i> , 61 Wn. App. 163, 810 P.2d 4 (1991).....	24
<i>Zimmerman v. W8Less Prods., LLC</i> , 160 Wn. App. 678, 248 P.3d 601 (2011).....	27

Statutes

RCW 49.52.050(2).....	25
-----------------------	----

Additional Cases

<i>Isabelli v. Curtis 1000, Inc.</i> , 31 Ill. App. 3d 1030, 335 N.E.2d 538 (1975).....	31
<i>Leavitt Co. v. Plattos</i> , 27 Ill. App. 3d 598, 327 N.E.2d 356 (1975).....	30
<i>Wells v. Uvex Winter Optical</i> , 635 A.2d 1188, 27 A.L.R. 5th 807 (R.I. 1994).....	31

Court Rules

CR 56(f)	13
ER 402	21
ER 403	21
ER 602	20, 21
ER 701	21
ER 801(a).....	21
ER 801(d)(1).....	22
ER 801(d)(2).....	20
ER 801(d)(2)(ii)	22
ER 803(a)(3)	22

ER 804(b)(3).....	20
RPC 1.13.....	15
RPC 1.6(a).....	15

Additional Authorities

AMERICAN HERITAGE DICTIONARY, THIRD ED.	30
KARL TEGLAND, 5C WASH. PRACTICE: EVIDENCE § 801.35 (5th ed. 2007).....	22
KARL TEGLAND, 5C WASH. PRACTICE: EVIDENCE § 803.11 (5th ed. 2007).....	22
KARL TEGLAND, 5C WASH. PRACTICE: EVIDENCE § 803.4 (5th ed. 2007).....	22

I. INTRODUCTION

Jeff Moore brought this action against Victor Siegel and others in order to obtain the balance of severance compensation he claimed was owed as a result of his former employment with Blue Frog Mobile. Siegel was, for a time, the CEO of Blue Frog. Under RCW 49.52, Moore argued that he was entitled to double damages from Siegel, personally.

After substantial severance and other payments in excess of \$100,000 were paid to him, Moore voluntarily provided a declaration to a litigant with a claim against Blue Frog. Moore had connections with this litigant which were themselves suspect. Siegel believed that Moore breached a “broadly worded non-disparagement clause” in the severance contract requiring him to maintain a duty of loyalty to Blue Frog. Therefore further payments were not made to Moore.

Earlier, Moore obtained summary judgment against Siegel after conducting extensive discovery. That was reversed at 153 Wn. App. 1, 221 P.3d 913 (2009), *review denied*, 168 Wn.2d 1020 (2010) (*Moore I*). Moore did not conduct timely discovery after remand.

Siegel successfully moved for summary judgment in March, 2011 on the basis that it was ‘fairly debatable’ whether additional severance was owed because of Moore’s conduct. The ‘fairly debatable’ standard was

applied by this court in *Moore I* based on long-standing Washington precedent established under RCW 49.52.

After Siegel's motion for summary judgment was filed, Moore claimed he should have more time to respond in order to conduct discovery. In large part, the facts in Siegel's motion were obtained from discovery elicited by Moore before the summary judgment in *Moore I*. After remand, Moore had every opportunity to conduct timely discovery but chose not to do so. The trial court denied the motion to continue.

Siegel successfully moved to strike portions of a declaration submitted by Moore in opposition to the motion for summary judgment. The evidence, even if admissible, was irrelevant and not material to disposition of the motion.

This Court should affirm the summary judgment and award Siegel his costs in all proceedings in this matter.

II. ISSUES ON APPEAL

1. Moore conducted extensive discovery before *Moore I* was decided. He only sought discovery after Siegel filed his motion for summary judgment eight months after the mandate issued. The discovery Moore sought was related to issues raised by Siegel in the trial court and this Court in *Moore I*. Under these and other circumstances unfavorable

to Moore, should this Court disturb the trial court's refusal to grant Moore relief under CR 56(f)?

2. Holli Baxter signed a declaration for Moore on October 8, 2008. Her declaration contained inadmissible hearsay and speculation. Moore submitted this declaration in opposition to Siegel's motion for Summary Judgment. Siegel objected to portions of Baxter's declaration and the trial court sustained the objections. Should the trial court's evidentiary rulings be disturbed on appeal or, alternatively was there harmless error?

3. Siegel argued to this Court in *Moore I* that fact issues precluded summary judgment for Moore and that those issues warranted judgment in his favor. This Court in *Moore I* reversed and remanded but did not address Siegel's argument that he was entitled to judgment. Because this Court did not remand with particular instructions, was it appropriate for the trial court to consider Siegel's motion for summary judgment?

4. Moore voluntarily prepared and signed a substantive declaration in support of a party in litigation with his former employer, Blue Frog. This Court stated in *Moore I* there was a "broadly worded non-disparagement clause" in Moore's severance contract which in effect required Moore to maintain his duty of loyalty to Blue Frog. Because this

Court did not remand with particular instructions, was Moore's entitlement to the balance of severance "fairly debatable" as a matter of law, thereby relieving Siegel of liability under RCW 49.52?

III. STATEMENT OF THE CASE

Moore is a lawyer and the former Chief Operating Officer of Blue Frog Mobile. CP 512, 230, 231 (Moore Declaration of Oct. 24, 2008 and attachments). Moore left the firm in January, 2007. Siegel became CEO on April 30, 2007. CP 231, 636. There is no evidence that Siegel and Moore had any acquaintance before Siegel became CEO.

In 2005, Moore supposedly made a contract of behalf of Blue Frog with ITL. CP 101 at ¶ 6 (Gabriel Giordani Declaration, Siegel's successor as CEO). His counterpart on the ITL side was Yvette Melendez, a sister of Ian Eisenberg, a Blue Frog founder. *Id.* ITL was owned by Ms. Melendez and Joel Eisenberg, Ian Eisenberg's father. CP 512. Moore was also Ian Eisenberg's legal counsel and worked for various businesses in which Eisenberg had an interest. *Id.* Mr. Moore admitted in his declaration of August 8, 2007 that, "[o]ur original arrangement with ITL was done without benefit of a written agreement." CP 116 at ¶ 3.

The remaining executives of Blue Frog were not aware of the purported contract between Blue Frog and ITL until after Moore left Blue Frog in early 2007. CP 102 at ¶ 8. (Giordani Dec.) This was because,

“none of Blue Frog’s accounting books and records reflect any debt to ITL, nor do Blue Frog’s financial statements submitted to [its] bank and insurer reflect any debt to ITL, nor do Blue Frog’s tax returns reflect an accruing payable to ITL.” *Id.* They first learned of the contract in a January, 2007 letter from Ms. Melendez to Blue Frog, which stated that a large amount of money was due to ITL because its, “Controller discovered that a due to an oversight . . . no invoice has ever been sent” for the alleged services provided by ITL. CP 237 (Attachment to Moore Declaration). This letter was dated after Moore was terminated by Blue Frog’s board of directors on January 9, 2007. CP 231 at ¶ 4. By then, Ian Eisenberg and Blue Frog were in “extremely acrimonious” litigation which ultimately led to Eisenberg’s removal from the Blue Frog board of directors. CP 101-102 at ¶ 6.

After Siegel became CEO of Blue Frog, he expressed concern that ITL was an entity controlled by Ian Eisenberg and that “ITL’s claims were not disclosed to [Blue Frog] or asserted until after Ian’s termination and are arguably not based on market terms.” CP 740 (E-mail between Siegel and Yvette Melendez). Siegel continued, “ITL’s claims are part and parcel of a dispute between [Blue Frog] and its controlling stockholders” including Mr. Eisenberg. *Id.*

On April 17, 2007, Moore and Blue Frog entered into a written contract in which Blue Frog would make severance payments to Moore in the total amount of \$167,708.33, continue paying health insurance premiums, provide \$10,000 in legal fees, and accelerate of stock options. CP 100, 110-114. The contract also provided:

Non disparagement. Executive agrees, for himself ..., not to take, support, encourage, induce or voluntarily participate in any action ... **that would negatively comment on, disparage, or call into question the business operations, policies, or conduct of BFM [Blue Frog Mobile],** or any parent, subsidiaries, affiliates, officers or employees thereof, or ... to act in any way with respect to such business operations, policies or conduct that would damage BFM's reputation, business relationships, or present of future business

CP 113 (emphasis added). In essence, this provision obligated Moore to continue his duty of loyalty to Blue Frog.

In spite of his promise of continued loyalty, not four months later, on August 8, 2007, Moore voluntarily signed a declaration provided to him by counsel for ITL, which was then litigating a claim against Blue Frog. This claim was in an arbitration and was based on the contract Moore claimed to have negotiated in 2005. ITL sought more than \$600,000 in this claim. CP 102 at ¶7. The Moore declaration substantively supported ITL's claim against Blue Frog. CP 116-141. It

contained a detailed summary of an alleged course of dealing with ITL over many years along with extensive attachments.

ITL used Moore's August 8, 2009 declaration to support its summary judgment motion against Blue Frog. CP 101 at ¶ 6.

Blue Frog and ITL had discussed settlement before the declaration was filed, CP 233 at ¶ 7, CP 515. The most recent offer was for payment by Blue Frog of \$150,000 upon settlement and a balance of \$150,000 over six months. CP 189; CP 740 (July 30, 2007 e-mail from Siegel to Ms. Melendez at ITL). However, on August 24, 2007, after Moore provided his declaration to ITL, Blue Frog agreed to settle for a lump sum cash payment of \$300,000. CP 526-528. *And see Moore I* at 153 Wn. App. at 9, n.1. A confession of judgment was prepared and signed to that effect. CP 551-554.

After he learned of Moore's declaration in August, 2007, Siegel consulted with Blue Frog's General Counsel, Scott Milburn, Esq. and outside counsel, Keelin Curran, Esq., at the Stoel Rives law firm. After obtaining their advice, Mr. Siegel decided to terminate further severance payments to Moore. CP 79 (Deposition transcript of Giordani at 51:8-20; 52:7-21). Siegel's consultation with legal counsel was elicited in a CR 30(b)(6) deposition of Seigel's successor as CEO, Gabriel Giordani. The deposition was noted and conducted by Moore's counsel on June 18,

2008. CP 70. Counsel for Blue Frog asserted attorney-client privilege with respect to the substance of Siegel's conversation with counsel. CP 79 (Dep. transcript at 52: 7-14). Moore did not seek waiver nor did he seek judicial review of the assertion of privilege.

Moore claimed that both Siegel and Blue Frog were attempting to 'get dirt' on him in order to stop severance payments. The implication seems to be that the response to the declaration provided by Moore in support of ITL was the culmination of that effort and that it was inconsequential. Moore Brief at 23.

Siegel testified that he was aware in June, 2007 of comments made about him by Moore that were "less than complimentary." CP 587, ¶ 2 (Siegel declaration). He went on to testify that he "did not believe that the comments of Mr. Moore . . . were substantial enough to justify nonperformance by Blue Frog of its obligations under the severance agreement." *Id.* at CP 588, ¶ 4. Instead, Siegel "wanted to alert Mr. Moore to the obligation he had under ¶ 9 [non-disparagement provision] of the Separation Agreement." *Id.*

Siegel believed that Moore's conduct on behalf of ITL against Blue Frog violated the severance agreement: "I believe that Mr. Moore violated the non-disparagement provision of his Separation Agreement with Blue Frog when he volunteered to advance the interest of ITL to the

detriment of Blue Frog.” CP 142, 144 at ¶ 8. Because of that, he did not believe further severance payments were warranted. *Id.*

No attempt was made or threatened by Blue Frog to recoup the payments previously made to Moore under the severance contract. Further severance payments would have been made pursuant to the contract had it not been for this declaration.

Blue Frog paid Moore a total of \$104,737.90 in severance and an additional \$10,000 for attorneys’ fees by the time it stopped payments in August, 2007. CP 86 (Moore’s claim in *Moore I* for unpaid severance of \$62,973.43); CP 110 (severance contract, \$167,708.33 total to be paid); CP 111 (attorneys’ fees of \$10,000). In addition, stock options were accelerated and health insurance premiums were paid on Moore’s behalf by Blue Frog, as required by the April, 2007 severance agreement.

Moore filed this lawsuit against Siegel, Blue Frog, Brett Maxwell and Maha Ibrahim on September 28, 2007. Maxwell and Ibrahim were Blue Frog directors, both of whom were dismissed from the case in 2008. CP 3-8 (Complaint), CP 17-18, CP 576-578. Claims were brought against all individual defendants for violation of RCW 49.52 (willful withholding of wages) and for breach of contract. CP 3-8 at ¶¶ IV and V.

Siegel ceased any connection with Blue Frog in January, 2008. CP 142 at ¶ 2.

Moore moved for summary judgment in October, 2008. By then, Moore had conducted substantial discovery including production of over 5000 pages of documents by Blue Frog and ITL, CR 30(b)(6) depositions of Mr. Giordani, Ms. Melendez of ITL, and the lawyer for ITL in its arbitration with Blue Frog. CP 167-229.

A stipulated judgment was filed against defendant Blue Frog on November 3, 2008. CP 571-575. Previously, in September, 2008 Mr. Giordani, Siegel's successor as CEO wrote that Blue Frog "no longer exists." CP 562 (attachment to Moore declaration of October 24, 2008). Counsel for Blue Frog informed Moore's counsel on August 26, 2008 that "the company is closed down." CP 84 (attachment to declaration of counsel for Moore of October 3, 2008).

Siegel defended against Moore's motion for summary judgment on the basis that a *bona fide* dispute existed as to whether Moore breached the severance agreement by assisting ITL, thereby preventing personal liability from attaching under RCW 49.52. CP 579-586.

Judge Lum granted summary judgment to Moore against Siegel in the amount of \$125,946.86, twice the amount of the allegedly unpaid severance. Attorneys' fees and costs were also awarded. CP 641-644.

Siegel appealed. This Court reversed. 153 Wn. App. 1, 223 P.3d 913 (2009). The Supreme Court denied review. 168 Wn.2d 1020 (2010).

The Mandate was filed with the Superior Court on June 22, 2010. CP 649-659. The case was assigned to Judge Marianne Spearman.

Siegel filed a motion for summary judgment on February 22, 2011, with a hearing date of March 25, 2011. CP 660-687.

Moore moved for a continuance of the summary judgment motion pursuant to CR 56(f) on March 15, 2011. CP 697-706. In his motion, Moore claimed he needed to depose the lawyers with whom Siegel consulted.¹

That Siegel consulted with counsel with respect to Moore's severance was known to Moore well in advance of this Court's decision in **Moore I**. See 153 Wn. App. at 4. Indeed, this was a fact disclosed in Moore's CR 30(b)(6) deposition of Siegel's successor as CEO of Blue Frog in June, 2008. See p. 7, *supra*². Moore also claimed that he served new discovery on Siegel on the same day his response to the summary judgment was due. CP 709 (Declaration of Moore's counsel at ¶ 7). However, responses to that discovery were provided by Siegel on

¹ The *subpoena* for these lawyers were initially served on March 7, 2011 in a manner inconsistent with CR 45(b)(2). They were served in a proper form with a return of March 31, 2011, some six days after the date the motion for summary judgment was set for hearing. CP 707-709 at ¶¶ 3-5 (Declaration of Moore's counsel) and referenced attachments, CP 726-738.

² The Giordani CR 30(b)(6) deposition was filed by Moore with his motion for summary judgment in **Moore I**. Siegel incorporated that into his motion for summary judgment in March, 2011.

March 16, 2011, two days following its service. CP 794 at ¶ 2 (Declaration of Siegel's counsel).

Judge Spearman, denied the motion to continue. CP 799-801.

In opposition to Siegel's motion for summary judgment, Moore submitted the declaration of Holli Baxter dated October 2, 2008. CP 145-147. The declaration is found at Appendix A. Siegel moved to strike portions of her declaration. CP 762-771. Paragraph 6 of Baxter's declaration related a conversation she had with Moore which, in turn, related to a conversation Moore had with yet another person in Amsterdam.

In paragraph 7 of her declaration, Ms. Baxter disclosed that Blue Frog's general counsel asked her to do something. Baxter claimed that this occurred because the lawyer "knew" or "thought [Baxter] possessed" certain information. This paragraph also attributed a "purpose" to the instructions without any foundation. This paragraph also attributes a motive to the lawyer.

Siegel also objected to paragraph 10 of Ms. Baxter's declaration. There, she stated she had a conversation with Moore who asked to speak with the successor general counsel. She then stated what she claims this lawyer told her and attributed a specific intent to him.

Siegel's objections were based on hearsay and speculation about attributing motives to another person. CP 770-771. Judge Spearman granted Siegel's motion to strike. CP 823-825. Baxter's declaration is attached at Appendix 'A'. Summary judgment for Siegel was ordered on March 25, 2011. CP 833-835.

IV. ARGUMENT

A. **Should This Court Disturb The Trial Court's Refusal To Grant Moore Relief Under CR 56(f)?**

1. Standard of Review

Denial of a motion to continue under CR 56(f) is reviewed for abuse of discretion. *Gross v. Sundig*, 139 Wn. App. 54, 67, 161 P.3d 380 (2007). A court may deny a CR 56(f) motion for continuance when "(1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact." *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003); *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 615, 15 P.3d 210 (2001).

2. The Trial Court Properly Denied A Continuance

Moore moved to continue Siegel's motion for summary judgment through a motion made under CR 56(f). That rule states:

Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Moore's motion to continue had two bases: First, that he needed discovery regarding Siegel's consultation with legal counsel and second, that Moore had just propounded additional discovery to Siegel. These arguments failed because there was no good reason for the delay in conducting discovery and, moreover, Moore would have been barred from discovering the content of privileged conversations between Siegel and corporate counsel.

a. Moore Was Aware Of Siegel's Consultation With Legal Counsel Before *Moore I*

Here, Moore conducted substantial discovery prior to his motion for summary judgment leading to *Moore I*.

It was Moore's discovery efforts which disclosed that Siegel consulted with legal counsel. This occurred in June, 2008 during Moore's CR 30(b)(6) deposition of Siegel's successor as CEO of Blue Frog, almost three years before Siegel's motion for summary judgment. Siegel used that evidence in *Moore I* and this Court took note of it. 153 Wn. App. at 9. That deposition transcript is found at CP 70-82.

Moore had ample time to depose the attorneys with whom Siegel consulted in advance of his motion leading to *Moore I* and then after remand to the Superior Court.

b. Siegel Cannot Waive The Attorney Client Privilege
In Any Event

It must be noted here, as Siegel did below at CP 669 n.39, that the conversation between Siegel and counsel for Blue Frog was privileged and that the privilege belongs to the corporation. RPC 1.13. Moore has not presented any evidence of what he did in the thirty three months between discovery of this conversation and Siegel's motion either to obtain waiver of that privilege or to test assertion of it in court.

Counsel for the corporation would only have been able to testify as to the fact of communications with Siegel and not to their substance. RPC 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . ."); *see also* Comment 19 to that rule ("The phrase 'information relating to the representation' should be interpreted broadly.") As a former executive, Siegel had no authority to waive the privilege.

c. Siegel Responded To Moore's Discovery And Moore Has Not Claimed Prejudice

Moore's additional discovery was propounded to counsel for Siegel on March 14, the date on which his response to Siegel's Motion for Summary Judgment was due. Siegel provided responses on March 16.

Moore also asserts that Siegel did not respond to initial discovery requests from 2007 until March 8, 2011.³ Moore Brief at p. 26, n.8. These responses were provided in time for use in Moore's Response to Siegel's Motion for Summary Judgment which was filed on March 15. CP 688. Moore did not claim this prejudiced him in responding to Siegel's motion.

Coggle v. Snow, 56 Wn. App. 499, 784 P.3d 554 (1990) is relied upon by Moore as support for a CR 56(f) continuance. It provides little comfort for him. The party seeking relief under CR 56(f) in *Coggle* engaged new counsel one week after a summary judgment motion was filed; there had been "little discovery" and the Court of Appeals noted that it "cannot discern a tenable ground or reason for the trial court's decision [to deny a continuance]." *Id.* at 508. Given the facts here, it is a simple

³ Siegel's original counsel also appeared for other defendants, CP 9-16, and later withdrew. His current counsel appeared on the eve of the summary judgment motion in *Moore I*.

matter to discern why Judge Spearman denied the motion to continue: Moore had not established good reason for doing so.

The trial court did not abuse its discretion when it denied Moore's motion to continue.

B. Should The Trial Court's Evidentiary Rulings Be Disturbed On Appeal Or, Alternatively Was There Harmless Error?

1. Standard of Review

The trial court's rulings on evidentiary matters in a summary judgment are reviewed *de novo*. *Folsom v. Burger King*, 135 Wn.2d 663, 958 P.2d 301 (1998). "Error without prejudice is not grounds for reversal, and error is not prejudicial unless it affects the case outcome." *Quest v. Utilities and Transportation Commission*, 140 Wn. App. 255, 260, 166 P.3d 732 (2007).

2. The Baxter Declaration Is Irrelevant

The complete Holli Baxter declaration is found at Appendix 'A'. The conversations she relates in paragraphs 6 and 7 of her declaration occurred in April, 2007. Baxter Dec. at ¶ 5, CP 145-147. Siegel was not then officially serving as CEO and Blue Frog was about to sign or just had signed Moore's Severance contract. (Siegel did not sign the contract on behalf of Blue Frog).

Moore contends that the Baxter declaration assists in demonstrating that Siegel and Blue Frog were out to gather 'dirt' on

Moore. Moore Brief at 22. If either Siegel or Blue Frog were out to “find dirt” certainly the dirt would have been obtained before negotiating or signing a contract with Moore obligating the company to pay him over \$160,000 in severance compensation, attorneys’ fees of \$10,000 and health and other benefits. It is undisputed that Blue Frog performed under the contract until Moore’s August 8, 2007 declaration, paying over \$100,000 in severance together with attorneys’ fees and other benefits. Regardless of what Ms. Baxter reported, it has no use in this matter.⁴ Her declaration testimony about the alleged April, 2007 conversations is irrelevant. ER 402, 403 (irrelevant evidence is inadmissible; relevant evidence may be excluded if confusing, misleading or waste of time).

The trial court, in an order at CP 823-825, sustained Siegel’s objections on the bases of hearsay and speculation as to state of mind of another.

3. Paragraph 6 of the Baxter Declaration Is Irrelevant And Hearsay

Paragraph 6 of Baxter’s declaration deals with an irrelevant issue: Whether Moore disparaged Siegel personally before Moore’s August 8, 2007 declaration. The testimony in this paragraph recites a conversation

⁴ Moore asserts at pp. 23-24 of his brief that Siegel never wanted to make the severance contract with Moore in the first place. There is no factual basis for this.

Ms. Baxter had with Moore who, in turn, relates a conversation he had with yet another person. The apparent utility of this is to substantiate that Moore had not earlier disparaged Siegel despite Siegel's concerns about these statements.

While Siegel believed that Moore earlier made a disparaging statement, Siegel testified that he "did not believe that the comments of Mr. Moore . . . were substantial enough to justify nonperformance by Blue Frog of its obligation under the severance agreement." CP 588.

Regardless of relevance, Moore cites no authority for admissibility of the hearsay attributable to Moore in paragraph 6 of Baxter's declaration. Absent citation to authority, the appellate court will disregard the claim of error. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

The statement attributed by Ms. Baxter to Moore is clearly hearsay: "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). This is inadmissible. ER 802. In turn, the statement by Moore to Baxter concerning his conversation with Brian Johnson is also hearsay.

4. Paragraph 7 Of The Baxter Declaration Is Hearsay And Speculation

With respect to former Blue Frog General Counsel Rosenwald's conduct in paragraph 7 of Baxter's declaration, Moore claims this is an admission by a party, ER 801(d)(2), and a statement against interest, ER 804(b)(3). The latter rule requires that the declarant be "unavailable" and there is no foundation that Rosenwald, the former general counsel, was in any way "unavailable" as that term is defined at ER 804(a)(1)-(6).

Whether Rosenwald's alleged statement to Baxter is an admission by a party opponent requires one to assume that Baxter could determine Rosenwald's state of mind. The supposed directive to Baxter is predicated upon Baxter's ability to determine that Rosenwald would be "using the information she knew or thought I possessed." See Appendix 'A' at ¶ 7. There is no foundation for this assertion. It is speculative, ER 602, because of lack of personal knowledge and it also fails as an opinion of a lay witness under ER 701, *State v. Farr-Lenzini*, 93 Wn. App. 453, 462-63, 970 P.2d 313 (1999) (reversible error to allow police officer to testify that driver of car "was attempting to get away from me and knew I was back there and refusing to stop.")

5. Paragraph 10 Of the Baxter Declaration Recounts Hearsay

Paragraph 10 of Baxter's declaration recounts a phone call Baxter had with Moore in August, 2007. She then recites that conversation to

Scott Milburn, who was by then general counsel of Blue Frog, and provides Millburn's supposed response. Baxter also attributes an intent to Milburn regarding whether he would return Moore's call. Obviously, imputation of motive or intent is inadmissible as speculation. ER 602, ER 701 (witness may not testify absent personal knowledge, lay witness may testify as to opinion only in limited circumstances not present here). The statements by Moore and Millburn, whether oral or nonverbal, ER 801(a), are plainly hearsay.

Moore is attempting to demonstrate here as he did in the trial court that he was providing the August 8, 2007 declaration in support of ITL in order to avoid a deposition requested by Blue Frog. CP 591-592. His attempts to call Milburn are irrelevant. ER 402, ER 403. At best, Moore was seeking a verbal modification of his contract. The severance agreement at its paragraph 11 required modifications to be in writing and signed by both Blue Frog and Moore. CP 113.

Moore could have avoided any repercussions had he given testimony under oath in a deposition conducted by either Blue Frog or ITL. Instead, he chose to provide a declaration to ITL in support of its position, not to Blue Frog.

Moore claims that what Milburn did or did not do in response to information from Baxter about her conversation with Moore is a present

sense impression and admissible under ER 801(d)(1). This rule “was meant to include only statements made under circumstances ruling out reflection or premeditation.” KARL TEGLAND, 5C WASH. PRACTICE: EVIDENCE § 803.4 (5th ed. 2007). There is great latitude in deciding whether this exception applies in a given circumstance. *Brewer v. Copeland*, 86 Wn.2d 58, 73, 542 P.2d 445 (1975).

Neither should ER 801(d)(2)(ii) apply to Milburn’s statements to Baxter as urged by Moore. Moore believes that Milburn’s supposed conduct in not returning a phone call is admissible as a statement by silence. However, the alleged statement of Milburn is, in turn, dependent upon a statement attributed to Moore in the earlier conversation with Baxter and by her related to Milburn. An admission under Rule 801 “is simply a statement by a party that is in some way inconsistent with the party’s position at trial.” TEGLAND, *supra* at § 801.35. That inconsistency is not present.

Finally, Moore urges that ER 803(a)(3) (then existing mental, emotional or physical condition) applies. However, “[b]y its terms, the hearsay exception includes only statements describing the *declarant’s own* emotions or feelings.” TEGLAND, *supra*, at § 803.11 (emphasis in original). One searches in vain for an expression of emotion or feeling in paragraph 10 of Baxter’s declaration.

C. Because This Court Did Not Remand With Particular Instructions, Was It Appropriate For The Trial Court To Consider Siegel’s Motion For Summary Judgment?

1. The Law Of The Case Does Not Preclude Siegel’s Motion For Summary Judgment

In his briefing to this Court in *Moore I*, Siegel did urge reversal and judgment in his favor. However, the Court reversed and “did not reach the parties’ other contentions.” 153 Wn. App. at 10, n.3.

Nothing in this Court’s decision in *Moore I* prevented the trial court from again examining the factual record presented either by Moore or Siegel in the context of a summary judgment motion. As the Court observed in authority cited by Moore, *In Re Marriage of Rockwell*, 157 Wn. App. 449, 454, 238 P.3d 1184 (2010) (“Rockwell II”): “We did not intend to bind the trial court on remand to only the two alternatives argued by counsel. We intended that the trial court exercise its discretion on remand.” This decision in *Rockwell* was the second trip to an appellate court. The first decision reversed a characterization of a pension in a dissolution and remanded “for further proceedings.” *In Re Marriage of Rockwell*, 141 Wn. App. 235, 255, 170 P.3d 572 (2007). On remand, the trial court felt constrained by the appellate decision to choose between only alternatives posed by the parties. However, the appellate direction “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.” *Rockwell II*, 157 Wn. App. at 453.

2. When Necessary, The Appellate Court Will Provide Instructions To The Trial Court

When the appellate court wants to instruct the trial court to do something in particular after remand, it does so. *See, e.g., White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 810 P.2d 4 (1991). That decision reversed a summary judgment in favor of a defendant health care provider in a medical negligence case. The trial court permitted the health care provider to raise for the first time the issue of proximate causation in its reply to the response of the plaintiff in the defense motion for summary judgment. In a footnote, the appellate court instructed the trial court:

Because the issue may arise on remand, we note that the specialists' testimony upon which Defendants relied in the trial court to establish a lack of proximate cause is too ambiguous to support summary judgment on this issue. Both ENT specialists testified that White's tumor had been present for a number of months. This testimony appears to be sufficient to raise a question of fact as to whether an immediate referral would have obviated the need for the radical surgical procedure used here.

Id. at 169, n.2.

D. Was Moore's Entitlement To The Balance Of Severance "Fairly Debatable" As A Matter Of Law, Thereby Relieving Siegel Of Liability Under RCW 49.52?

1. Strict Personal Liability Under RCW 49.52 Does Not Exist

Moore's position is that recent Supreme Court decisions dictate that "payment of wages is mandatory." Brief of Appellant at 21.

If there is a clerical error or a *bona fide* dispute about whether a wage is owing, the statutory remedy establishing both personal liability and double damages pursuant to RCW 49.52 does not exist. *Moore I*, 153 Wn. App. at 8.

If Siegel is not liable under RCW 49.52, he has no liability to Moore under any other theory or claim. Moore's suggestion otherwise at p. 22 of his Brief is not well taken. In the decisions he cites, the employing entity was liable for unpaid wages under RCW 49.48.010, a statute which does not impose personal liability. In those decisions, the individuals sued under RCW 49.52 were not liable because 'willfulness' was not established.

The statute requires a specific intent in a specific circumstance: "Wilfully and with intent to deprive the employee of any part of his or her wages" RCW 49.52.050(2). If the employee makes an error, the requisite intent is missing. If there is a *bona fide* dispute, there may either be no intent or there may not be a wage involved at all, or both.

Both *Morgan v. Kingen*, 166 Wn.2d 256, 210 P.3d 995 (2009) and *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 961 P.2d 371 (1998) are relied upon by Moore throughout his brief. Both decisions dealt with situations where it was undisputed that a wage had been earned and was owed to the employee. In each case, the employing entity was in financial distress and could not pay the wage. What was at issue in those cases was whether the financial distress of the employing entities excused individual corporate officers and managers from personal liability in actions brought against them under RCW 49.52.

Both *Morgan* and *Schilling* rejected a defense for the individuals based upon the inability of the employing entity to pay the wage: “In the absence of a clearly demarcated test for financial inability to pay, we cannot conclude [defendant’s] failure to pay [plaintiff] was anything but willful under our cases.” *Schilling*, 136 Wn.2d at 164. The decision there observed that the individual defendants “made choices to pay other creditors before [workers].” *Id.* at n.5.

Here, Moore chose to put the balance of his severance at risk by volunteering to engage in activity that ran afoul of his post-employment duty of loyalty required by his severance agreement. Up to the time he did that, Blue Frog met its obligation under the severance agreement to pay

Moore. Thereafter, it was, at the very least “fairly debatable” whether further payments were owing.

2. Determination of Bona Fide Dispute Does Not Have To Hinge On State Of Mind

In a claim brought under RCW 49.52 the “fairly debatable” standard allows a fact finder to focus on either the state of mind of a defendant or on the conduct of the plaintiff. The former is pertinent if there is an issue, for example, as to whether an employment relationship was formed by the employer. *See, e.g., Zimmerman v. W8Less Prods., LLC*, 160 Wn. App. 678, 694-97, 248 P.3d 601 (2011). In the latter circumstances the issue may be whether the plaintiff performed under a contract admittedly formed. So it is here: Moore had continuing obligations of loyalty due to his contractual obligation after leaving Blue Frog’s employment. Moore’s conduct put into question whether he maintained that loyalty. *See, e.g., Kieburz & Assocs., Inc., v Rehn*, 68 Wn.2d 260, 265-66 n.2, 842 P.2d 985 (1992) (Employee’s duty of loyalty premised upon agency and/or fiduciary relationship during employment).

Under Moore’s severance agreement he was required to refrain from conduct contrary to the interests of Blue Frog regardless of whether Blue Frog was damaged.

Moore was not directly or indirectly to “support, encourage . . . or voluntarily participate in any activity that would negatively comment on, disparage or call into question the business operations, policies or conduct of [Blue Frog]” A separate portion of the same contract section, written in the disjunctive, obligated Moore not “to act in any way with respect to such business operation, policies or conduct that would damage [Blue Frog’s] reputation, business relationships or present or future business.”

Moore’s brief incorrectly ignores the dispositive nature of this contract language and his actions, arguing instead that factual disputes over Siegel’s state of mind preclude summary judgment.

Whether a *bona fide* dispute exists can require a determination of state of mind. *Moore I*, 153 Wn. App. at 8. Certainly one can envision a multitude of situations where the defense depends upon fact finding: Whether a raise was promised but not paid; whether a commission was earned or subject to set-off due to customer returns. There may also be a *bona fide* dispute over whether an individual is personally liable under RCW 49.52 despite his or her title. See *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 520-21, 22 P.3d 795 (2001).

Siegel did claim in *Moore I* that his state of mind was relevant to his defense of a *bona fide* dispute. That was in the context of a summary

judgment against him in which Moore claimed that what Siegel believed was the operative fact - directing further severance payments to stop. Siegel claimed that his reasonable belief whether the balance of severance was due was a fact question. In other words, even if Siegel was incorrect about whether Moore was in breach, the issue had to be defined in terms of what Moore did and whether Moore's conduct by itself made further entitlement to severance "fairly debatable."

In *Moore I* this Court held, "[i]t does not matter if Siegel's interpretation of the non-disparagement clause is erroneous. The question is whether Moore's entitlement to the payments was fairly debatable." 153 Wn. App. at 8. The focus by this court in *Moore I*, was on what Moore did, not what Siegel believed. Siegel could reasonably believe that Moore breached his severance contract and objectively, it could also be "fairly debatable" whether Moore did so. Either determination works in favor of dismissal of claims against Siegel. On Siegel's summary judgment motion, the trial court correctly focused on Moore's behavior when making its objective determination of whether a *bona fide* dispute existed. Thus, Moore's arguments about Siegel's state of mind are not only incorrect on the law but irrelevant to this appeal.

This Court, like the Court below, need only to look to Moore's declaration and attachments in support of the ITL contract litigation with

Blue Frog, CP 116-141, to determine that it indeed was “fairly debatable” under an objective standard whether what Moore did breach his contractual continuing duty of loyalty to Blue Frog.

3. Monetary Damage is Not Necessary

Moore also incorrectly asserts here that Blue Frog must demonstrate damage in order for Siegel to prevail. That disregards the plain language of his contractual obligation, p. 27, *supra*. The “Nondisparagement” provision of the contract does not require damage to Blue Frog.⁵ *See also, Jacob’s Meadow Owners Ass’n v. Plateau 44 II LLC*, 139 Wn. App. 743, 754, 162 P.2d 1153 (2007) (“It is true that, as a general rule, every breach of contract gives rise to a cause of action, even when the aggrieved party has not suffered any damage.”)

The non-Washington decisions cited by Moore in his brief at p. 18 n.7 deal with the showing an employer must make in order to enforce a post-employment restraint such as a non-competition agreement. *Leavitt Co. v. Plattos*, 27 Ill. App. 3d 598, 327 N.E.2d 356 (1975) (Employer had no legally protectable interest in a post-employment restraint; allegation of irreparable harm to employer disregarded); *Isabelli v. Curtis 1000, Inc.*,

⁵ The caption for this section, “Nondisparagement” is a misnomer. The contract provision which follows is far broader than mere disparagement: “[t]o speak of in a slighting way; belittle. To reduce in esteem or rank.” AMERICAN HERITAGE DICTIONARY, THIRD ED. *See, also, Moore I* at ¶ 14 “broadly worded nondisparagement clause”

31 Ill. App. 3d 1030, 335 N.E.2d 538 (1975) (Former employee sought declaratory judgment that post-employment restraint was invalid; court agreed that only if employer could establish irreparable injury would the provision be enforced and Employer required to pay wrongfully withheld pension contributions owed to employee). *Wells v. Uvex Winter Optical*, 635 A.2d 1188, 27 A.L.R. 5th 807 (R.I. 1994), dealt with reversal of a judgment in favor of former employee who sued claiming that the employer breached its promise to provide positive references. There was no mention of ‘irreparable damage.’⁶

4. Whether Moore Breached His Agreement With Blue Frog Was “Fairly Debatable”

Whether something is ‘fairly debatable’ is an objective standard in the context of this case. This objective standard arises from the *bona fide* dispute exception to liability and, is long-standing under Washington decisions. See *Moore I* at ¶ 12. The focus is on what Moore did and whether that negated his entitlement to the balance of his severance payments. “Absent disputed facts, the legal effect of a contract is a question of law” *Rosen v. Ascentry Techs., Inc.*, 143 Wn. App. 364, 369, 177 P.3d 765 (2008) (internal quotations omitted). Here, the

⁶ It is undisputed that the terms of the Blue Frog/ITL settlement changed within days of Moore’s declaration. What once had been down payment with additional payments over time became a lump sum payment by Blue Frog to ITL. See pp. 7-8, *supra* and *Moore I*, 153 Wn. App. at 5.

operative facts are not in dispute. Moore does not deny that he voluntarily supplied the declaration; its contents are objectively verifiable as was his obligation to Blue Frog.

Contrary to Moore's insistence otherwise, Moore Brief at p. 7, the date when Blue Frog executives first learned of the ITL contract has no bearing on Moore's continuing duty of loyalty to the company. It is the substance of the declaration that Moore chose to provide to Blue Frog's adversary, ITL, that is so telling. It provides a road map with 21 pages of attached documents for ITL to prove its case.

How can it be other than "fairly debatable" that Moore's declaration violated his obligation "not to take, support, encourage, induce or voluntarily participate in any action or attempted action that would negatively comment on, disparage, or call into question the business operations, policies, or conduct of [Blue Frog]"?

Certainly, Moore's declaration amounts to an adverse comment on Blue Frog by supporting the very position of a party in litigation against it.

5. Blue Frog's Stipulation To Judgment Cannot Bind Siegel

Moore claims that the stipulated judgment against Blue Frog should have *res judicata* effect against Siegel. He relies on *Pederson v. Potter*, 103 Wn. App. 62, 11 P.3d 833 (2000). Brief at 17-18.

Application of *res judicata* requires identity between an earlier judgment and a later action as to: (1) persons and parties in each action; (2) causes of action; (3) subject matter and 4) the quality of person for or against whom the claim is made. *Pederson, supra*, at 103 Wn. App. at 67. In *Pederson*, purchasers of a business defaulted on a payment to the seller. A confession of judgment was obtained in settlement. The purchasers then defaulted on the settlement and claimed misrepresentation by the sellers in their purchase of the business. The Court determined that the confession of judgment allowed application of *res judicata* against the later assertion of the misrepresentation claim because it should have been litigated in the earlier matter.

Here, there is a notable absence of identity of parties. Siegel was no longer connected with Blue Frog when it stipulated to the judgment. And, by then, Blue Frog was out of business. Blue Frog's action in November 2008, almost a year after Siegel left the company, has no binding legal effect upon him.

V. CONCLUSION

The trial court rulings regarding evidence and denial of a continuance should be affirmed.

Siegel's motion for summary judgment should also be affirmed.

Moore chose to put into jeopardy the balance of his severance payments when he volunteered to supply key evidence to a party in litigation with his former employer. It was more than 'fairly debatable' whether by doing so Moore violated his contractual continuing duty of loyalty to his former employer: It was obvious that he did so.

Dated this 10th day of November, 2011.

STOKES LAWRENCE, P.S.

By: 

Kelby D. Fletcher (WSBA No. 5623)

Attorneys for Respondent Victor Siegel

800 Fifth Avenue, Suite 4000

Seattle, WA 98104

(206) 626-6000

654046.doc

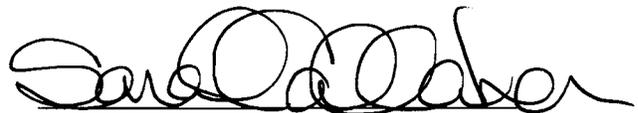
DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the 10th day of November, 2011, I caused a true and correct copy of the foregoing document, "Brief of Respondent Siegel," to be delivered by messenger to the following counsel of record:

Counsel for Jeffrey Moore:

Gregory M. Miller (WSBA #14459)
John R. McDowall (WSBA #25128)
Carney Badley Spellman, P.S.
701 5th Avenue, Suite 3600
Seattle, WA 98104

Dated this 10th day of November, 2011, at Seattle, Washington.

A handwritten signature in black ink, appearing to read "Sarah Callahan". The signature is fluid and cursive, with a horizontal line drawn underneath it.

Sarah Callahan, Practice Assistant to
Kelby Fletcher

Appendix A

1 **FILED**
KING COUNTY, WASHINGTON

The Honorable Dean S. Lum

2 SEA SUPERIOR COURT CLERK
OCT 27 2008

3 SEA SUPERIOR COURT CLERK
OCT 27 2008
4 **FILED**
KING COUNTY, WASHINGTON

5
6
7 IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

8 JEFFREY MOORE,

9 Plaintiff,

NO. 07-2-31654-0 SEA

10 vs.

DECLARATION OF HOLLI BAXTER

11 BLUE FROG MOBILE, INC., a
12 Washington corporation; VICTOR SIEGEL
and JANE DOE SIEGEL, a married couple,
13 BRETT MAXWELL and JANE DOE
MAXWELL, a married couple,
14 Defendants.

15 I, Holli Baxter, declare as follows:

16 1. I worked at Blue Frog Media, AKA Blue Frog Mobile ("BFM") from March
17 2006 through January 2008.

18 2. From the time I was hired until January 9, 2007, I was an executive assistant to
19 Jeffrey Moore, a co-founder and former Chief Operating Officer of BFM.

20 3. As Jeff Moore's assistant I was responsible for assisting him in taking care of
21 many personal matters, which would enable him to focus his attention on BFM matters. This

DECLARATION OF HOLLI BAXTER - 1

CARNEY
BADLEY
SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

MOO025 0002 ji158107.01CC 9/26/08

ORIGINAL
Page 1/45

1 was common knowledge among management and standard practice with all of the founders of
2 the company. In this role I was privy to his personal information, including checking and
3 credit numbers, username and passwords for various accounts, DOB, and his Social Security
4 Number. I kept this information under his Microsoft Outlook Contact Vcard.

5 4. In January 2007 Jeff Moore was terminated by Blue Frog Mobile, and I then
6 became the executive assistant to Victor Siegel, CEO and President of BFM.

7 5. In late April 2007, Jeff Moore called BFM to speak with Victor Siegel. I
8 answered the phone and took the call for Victor, as he was not available. I informed Jeff that
9 Victor was not able to speak and asked if he wanted me to take a message for Victor.

10 6. Jeff informed me he was calling in reference to mBlox, and he stated he had
11 met with Brian Johnson of mBlox while in Amsterdam, and that mBlox had complained that
12 Victor did not show up to a scheduled meeting. Jeff did not say anything negative about
13 Victor or BFM. I did not speak again with Jeff until August 2007.

14 7. At about this same period of time, and before Alison Billings left BFM,
15 Lonnie Rosenwald, General Counsel for BFM, directed me to try and access Jeff's personal
16 electronic accounts that I knew of, , AOL Instant Messaging ("AIM") account, using the
17 information she knew or thought I possessed. The purpose was to see if Jeff had any AIM
18 conversations or email with anyone in which he may have disparaged BFM. I was directed to
19 do this without Jeff's knowledge.

20 8. In response, I deleted all Jeff's personal information I possessed and acted as if
21 I had actually done what Lonnie Rosenwald directed me to do.

DECLARATION OF HOLLI BAXTER - 2

MOO025 0002 jil58107.01CC 9/26/08

**CARNEY
BADLEY
SPELLMAN**

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

9. I was then tasked with going through all email of Jeff, Ian Eisenberg and Ron Erickson, the three co-founders of BFM. BFM kept these records.

10. On or about August 8, 2007, Jeff called BFM and asked for Scott Milburn, then General Counsel of BFM (Scott had succeeded Lonnie in this role). I told him that I would get Scott. I then went to Scott and indicated that I had Jeff on the phone and that Jeff wanted to speak with him. Scott told me to tell Jeff that he was not in and had left the office. I took Jeff's number and gave it to Scott. To my knowledge, Scott did not call Jeff back, and it appeared he did not intend to.

11. Brett Maxwell was a Board member of Blue Frog Media. In December 2007 he and Gary Kremen came to the office of BFM to meet with the executive staff of the BFM, Victor Siegel, Gabriel Giordani, Susan Persh and Scott Milburn. Brett directed me to take an inventory of assets of the company at that time.

I SWEAR UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 2 day of ~~September~~ ^{October}, 2008, at Seattle, Washington.


Holli Baxter

DECLARATION OF HOLLI BAXTER - 3

**CARNEY
BADLEY
SPELLMAN**

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
701 FIFTH AVENUE, #3600
SEATTLE, WA 98104-7010
FAX (206) 467-8215
TEL (206) 622-8020

M00025 0002 ji158107.01CC 9/26/08