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No. 67215-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STEVEN LODIS and DEBORAH LODIS, a marital community,
Appellants/Cross-Respondents,

v.

CORBIS HOLDINGS, INC., a Washington corporation,
CORBIS CORPORATION, a Nevada corporation,
and GARY SHENK, an individual,

Respondents/Cross-Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE BRUCE HELLER

REPLY BRIEF OF CROSS-APPELLANTS

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RULES AND REGULATIONS

CR 67. 4-5

I. REPLY ARGUMENT

This court should direct entry of judgment as a matter of law for Corbis on its claim that appellant Steven Lodis breached his fiduciary duty to Corbis by retaining a bonus he concedes was an erroneous overpayment. Lodis concedes the dispositive facts of this claim – that he owed a fiduciary duty to Corbis and that he retained corporate funds to which he is not entitled. The trial court erred by not granting Corbis judgment as a matter of law on its claim for breach of fiduciary duty.

Should this court remand for a third trial,¹ it should direct the trial court to admit evidence of prior complaints of harassment and retaliation against Lodis that resulted in a reprimand from Corbis' CEO. This evidence directly refutes Lodis' allegations that Corbis terminated Lodis with the requisite discriminatory or retaliatory intent, and is directly relevant to Corbis' argument that it acted reasonably and in response to new but strikingly similar complaints against Lodis. The trial court erred in excluding this evidence.

¹ Lodis' age discrimination claim and Corbis' counterclaims for breach of fiduciary duty, unjust enrichment, and fraud were tried to a jury before King County Superior Court Judge Bruce Heller from February 24 to March 18, 2010. The trial court granted Corbis a second trial on its breach of fiduciary duty claims after the jury found that Lodis had breached his fiduciary duty to Corbis, but refused to award any damages for the breach. (CP 9415-19)

A. Corbis Is Entitled To Judgment As A Matter Of Law On Its Breach Of Fiduciary Duty Claim Because Lodis Did Not Return A Bonus That He Concedes He Did Not Earn And That Was Paid In Error.

Lodis concedes that he was mistakenly paid an unearned \$35,000 bonus and a \$1,050 contribution to his 401(k), and that he never returned this money despite owing a fiduciary duty to Corbis as a corporate officer. (Reply Br. at 39) Lodis' reliance on the "business judgment rule" as presented to the jury in Instruction No. 7 (CP 10519) to retain these funds – because other Corbis employees believed the bonus payment was correct when it was made, because he did not solicit the payment, and because he "attempted" to deposit but never actually tendered a partial satisfaction of the claim into the court registry (Reply Br. at 33-40) – fails as a matter of law. This court should direct entry of judgment for Corbis because Lodis breached his fiduciary duty to Corbis by receiving and retaining corporate funds he never earned.

Lodis concedes, as he did below, that he owed a fiduciary duty to Corbis as its highest ranking Human Resources Officer. (Reply Br. at 35; 3/15 AM RP 63; II RP 623-24, 636; CP 9450-51, 9483; *see also* CP 2443, 9880-89) Lodis admits that he was not entitled to a \$35,000 bonus payment and a \$1,050 401(k) contribution, and that he has never returned these funds. (Reply Br. at 39; II RP 607, 636-37) These

concessions are dispositive of Corbis' fiduciary duty claim and entitle Corbis to judgment as a matter of law. *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 508, 728 P.2d 597 (1986), *rev. denied* 107 Wn.2d 1022 (1987) (corporate officers "are not permitted to retain any personal profit").

Relying on jury Instruction No. 7, a modified version of the business judgment rule, Lodis argues that that the jury could have found that he acted in good faith reliance on other Corbis employees who mistakenly believed that the bonus was proper at the time it was paid. (Reply Br. at 35-37; CP 10519) As the instruction reflects, the business judgment rule prevents courts from substituting their judgment for that of corporate officers and directors who act in good faith, with due care, and "in a manner the officer believes to be in the best interests of the corporation." (CP 10519) *See In re: Spokane Concrete Products, Inc.*, 126 Wn.2d 269, 279, 892 P.2d 98 (1995). However, the business judgment rule does not shield from liability a corporate officer or director who acts in bad faith. Lodis' argument that the business judgment rule allowed him to act directly contrary to his corporation's interests when he no longer believed that his actions were reasonable undermines the purpose of the rule and gives fiduciaries carte blanche to engage in fraud and corruption.

As a result, whether Lodis or other Corbis employees initially believed Lodis' receipt of an extra \$35,000 was authorized when it was paid has no bearing on whether Lodis breached his fiduciary duty by not returning these funds when he knew for a fact that the overpayment was wrong. Likewise, whether Lodis solicited the bonus payment, or as he asserts, whether he "inquired as to whether it should be a different amount" (Reply Br. at 34), is ultimately irrelevant. Lodis denied receiving the duplicate payment, requiring extensive discovery at significant cost. (CP 10002-03, 10064; II RP 467) Only when trial loomed did Lodis finally admit he was not entitled to the extra money. (See CP 3291) Regardless whether Lodis acted in good faith in *accepting* the funds "when Corbis mistakenly paid Lodis a duplicate bonus" (Reply Br. at 35), Lodis violated his fiduciary duty by refusing to *return* a bonus he knew he had not earned.

Lodis also argues that the jury was entitled to excuse his breach of fiduciary duty because he "attempted" to deposit \$35,000 into the court registry, but it is undisputed that he never made an effective tender. (Reply Br. at 39) Lodis "requested" permission to deposit funds into the court registry in a CR 67 motion he attached to his summary judgment motion. (CP 1019-20; Resp. Br. at 14) Corbis filed a response stating that it did not object to a deposit of funds into the court registry. (CP 1140-41)

But Lodis never deposited the funds or pressed the trial court for an order under CR 67. *See* CR 67 (“The party making the deposit *shall serve the order permitting deposit* on the clerk of the court.”) (emphasis added) Absent an effective tender, Lodis’ half-hearted “attempt” to make a payment is ineffective as a matter of law. *See Vergonis v. Vaseleou*, 105 Wash. 441, 444, 178 P. 463 (1919) (“The tender after action was brought was insufficient because not made to the respondent nor any one representing the respondent” and “the money tendered was not brought into court . . .”)

Lodis’ tender argument also fails because he never “sought to repay” the *full* amount of the overpayment, as he now contends. (Reply Br. at 39) Corbis had no obligation to accept Lodis’ \$35,000 “tender” that did not include reimbursing Corbis for its \$1,050 overpayment to Lodis’ 401(k) fund or for the substantial interest that accrued while Lodis contested his unauthorized retention of unearned funds for more than three years. (II RP 468-69) *See Field Lumber Co. v. Petty*, 9 Wn. App. 378, 380, 512 P.2d 764 (1973) (“a debtor cannot unilaterally tender a lesser sum than that which it is agreed is due and owing . . .”). Lodis’ belated attempt to obtain an accord and satisfaction by making a partial payment provides no defense to his breach of fiduciary duty as a corporate officer who wrongfully retains the property of his principal.

This court should grant Corbis judgment as a matter of law on its breach of fiduciary duty claim. It is undisputed that Lodis had a fiduciary duty to Corbis and that Lodis continues to retain corporate funds to which he is not entitled.

B. In The Event Of A Remand, This Court Should Allow Corbis To Introduce Evidence Of Prior Complaints Of Harassment And Retaliation Against Lodis.

This court need not address the trial court's error in excluding relevant evidence relating to Corbis' good faith in terminating Lodis if the court affirms the judgment dismissing Lodis' claims for retaliation and age discrimination. However, in the unlikely event of a remand, this court should direct the trial court to allow the jury to consider Corbis' CEO's knowledge that a female subordinate had previously accused Lodis of retaliatory and harassing behavior.

Although the jury obviously believed that Corbis terminated Lodis for a valid and not for a discriminatory reason, the trial court prevented Corbis from explaining that it acted reasonably and with cause by excluding evidence that Corbis' CEO believed that Lodis engaged in a pattern of harassing and retaliatory conduct against his female subordinates. (CP 6560) The trial court barred Corbis from introducing evidence that Lodis' female subordinate (Krista Hale) had accused Lodis of harassment and retaliation. This evidence was highly relevant to CEO

Gary Shenk's good faith reasons for terminating Lodis. (Response Br. at 27-29, 48-49) In the event of a remand, this court should direct the trial court to admit this evidence.

Corbis investigated Hale's allegations and in April of 2007 former Corbis CEO Steve Davis warned Lodis that his conduct was unbecoming of a Vice President and that any retaliatory conduct toward Hale would lead to termination. (CP 2443, 3679; Ex. 306) Shortly after this warning, Lodis terminated Hale. (CP 2443, 3653-57; 3/11 RP 19, 93-94) In response to her termination, Hale hired counsel and sent a demand letter to Corbis. (CP 2442-43; 3/16 PM RP 160-61) In October 2007, Shenk, having just taken over as CEO, agreed to pay a substantial sum to settle Hale's claim. (CP 2443)

In March 2008, Shenk was again confronted with allegations of retaliation against Lodis by another of Lodis' subordinates, Kirsten Lawlor, who had taken over Hale's position. (CP 2444-45, 2462-64; Ex. 326; 3/16 PM RP 49; 3/17 AM RP 99-100) After reading Lawlor's allegations against Lodis, Shenk was immediately concerned about their similarities to Hale's complaint. (CP 2445, 2468; Ex. 317; 3/17 AM RP 102-03) Shenk ultimately terminated Lodis, based in part, on the repeated allegations of harassment and retaliation against Lodis. (CP 2443-45, 2468; Ex. 317; 3/17 AM RP 102-03)

The trial court abused its discretion in excluding evidence of Hale's allegations of retaliation and harassment by Lodis. Hale's allegations were necessary context for understanding whether, upon receiving Lawlor's new allegations, Shenk's concerns regarding Lodis' behavior were reasonable. Regardless whether Hale's allegations were "inflammatory" or "unsubstantiated" hearsay as Lodis argues (Reply Br. at 42), the trial court should have allowed Shenk to explain his concern to the jury. See *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 79, 98 P.3d 1222 (2004) (supervisor's declaration was admissible in employee's discrimination suit because it was not offered to prove underlying events but "was offered to show [the supervisor]'s motivation for the decision to reprimand and eventually terminate" the employee); *Hedenburg v. Aramark Am. Food Services, Inc.*, 476 F. Supp. 2d 1199, 1204 n.3 (W.D. Wash. 2007) (same).

Lodis' concerns regarding the potential unfair prejudice and hearsay can be fully addressed with an appropriate limiting instruction. In the unlikely event of a remand, Corbis and Shenk should be allowed to introduce *all* evidence regarding Shenk's legitimate, non-discriminatory, and non-retaliatory reasons for terminating Lodis, including the fact that Shenk was aware that Lodis, as the highest ranking Human Resources

Officer at Corbis, had been previously accused of retaliatory and unbecoming conduct.

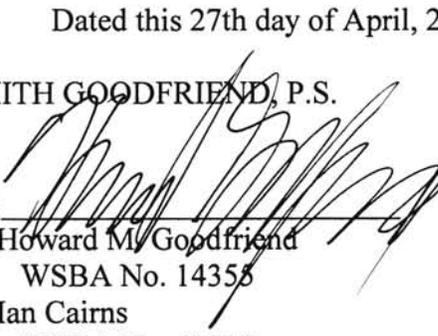
II. CONCLUSION

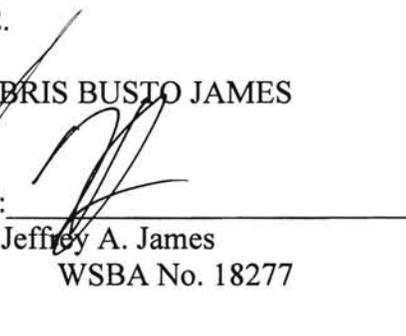
This court should enter judgment for Corbis on its breach of fiduciary duty claim and otherwise affirm the judgment below. However, should this court remand for a third trial, it should instruct the trial court that Corbis is entitled to introduce all evidence regarding its CEO's knowledge of allegations against Lodis by his subordinates.

Dated this 27th day of April, 2012.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 27, 2012, I arranged for service of the foregoing Reply Brief of Cross-Appellants, to the court and to counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 27th day of April, 2012.



Victoria K. Isaksen