

No. 71050-8-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MARK PHILLIPS, KENNETH GORDON,
JANE DOE GORDON, and the marital community
composed thereof; DOUG LOWER AND MAUREEN LOWER,
husband and wife and the marital community composed thereof;
A DOT Corporation, a Washington corporation,

Appellants

vs.

ROBERT ARNOLD, a single man,
on behalf of BANANA CORPORATION,
a Washington corporation, assignee,

Respondent

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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Appeal From The Superior Court For King County
Hon. John Erlick

REPLY BRIEF OF APPELLANT

Mark Phillips
2801 1st Ave. #102
Seattle, WA 98121
Telephone: (206) 607-9415
Pro Se

Reed Yurchak, WSBA #37366
40 Lake Bellevue Dr. #100
Bellevue, WA 98005
Telephone: (425) 890-3883
Attorney for ADOT Corporation

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I. Restatement of the Case.

In restating the factual summary of the case, Respondent argues that even though there had been a finding of liability after summary judgment was granted against Appellant, “he was ultimately permitted to present evidence regarding his liability at trial without restriction.”¹ That is simply not true. The trial court stated it was “bound by the prior court’s finding of liability.”²

Equally misleading is the claim by Respondent that the “interlocutory judgment was rendered moot by the trial court’s unchallenged finding.”³ To the contrary, Appellant opposed the original motion from federal prison to the best of his limited resources,⁴ filed a motion for reconsideration under CR 60 prior to the trial for damages,⁵ and objected to the finding of liability at the start of trial. During the hearing on the CR 60 motion, the Court specifically instructed Appellant that his only opportunity for relief was to the appellate court.⁶ Respondent’s citation to *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 300-01 (1992) offers no support for his proposition that Appellant, who has attacked the partial summary judgment ruling at every opportunity,

¹ Respondent’s Brief at 1.

² RP 2-6-13, 8-10.

³ Respondent’s Brief at 1.

⁴ CP 86.

⁵ CP 198.

⁶ CP 204A.

somehow “waived” this argument. The Court in *Washburn* did not involve the facts or procedural history that must now be considered.

Respondent also attempts to mislead the court regarding “related transactions” in regards to Banana. In fact, there was no such prohibition in the Articles of Incorporation or bylaws; but the inverse was true. Section 4.7 of the Articles of Incorporation specifically allowed for such transactions; Respondent’s reliance on general prohibitions and broad statutory language does not overcome the specific contractual agreement found in the Articles of Incorporation.⁷ Additionally, Arnold specifically acknowledged that such transactions would be contemplated when he signed the Subscription Agreement, and he gave Phillips broad, unrestricted authority to manage Banana.⁸

One of the most disputed points at trial was what intellectual property had been licensed and at what point in time. As Respondent’s Brief make clear, Respondent still does not understand the intellectual property at issue in this case and because of this misunderstanding, misleads the court when he argues that “all” intellectual property had been

⁷ Ex. 57.

⁸ As will be emphasized, *infra*, the lack of testimony under oath from Arnold not only allowed Respondent to raise issues that should not have been raised, but also allowed Respondent’s agent to “testify” as to his “thoughts, statements and actions,” all to Appellant’s detriment.

transferred to Banana from the beginning.⁹ In support of this proposition, Respondent cites to agreements that do not support this position, and the testimony of Kenn Gordon, the bookkeeper of Banana, who had no responsibility nor understanding of the intellectual property owned by Phillips and Banana, to show that “all” intellectual property had been “transferred” to Banana. But as Phillips and his expert, Mandell, made clear at trial, Respondent conflates and confuses intellectual property that is licensed, that is owned, that involves music, encryption or text payment, and intellectual property that involves hardware versus software. As Phillips testified, the *business plan* for texting and payments was assigned at the time of the Subscription Agreement, but the mobile software for encryption *was not*.¹⁰ This initial assignment was similar to the assignment made by Phillips to MOD, who transferred the business plan and all associated intellectual property to MOD. In technical terms, Banana was assigned the rights to the intellectual property that involved the “field of use.”¹¹ However, Phillips had not transferred to Banana the encryption software, which code bases and functional code was very different from the business plan intellectual property. This was carefully

⁹ Respondent’s Brief at 6.

¹⁰ Respondent actually quotes the applicable sentence from the Assignment of June 19, 2006, but fails to understand the language: The transfer of the “*business plan* for Banana Corporation and all related ideas and intellectual property expressed or implied therein...” (emphasis added). Exs. 61, 203; CP 254, 255.

¹¹ RP 2-21-13, 11-12.

explained to Arnold prior to his execution of the Subscription Agreements, and explains the specific clauses in the Subscription Agreement that contemplates the licensing of “additional intellectual property.”¹² Under Respondent’s self-serving interpretation of the relevant agreements, such clauses make no practical sense. Nothing in the licensing of the Phillips’ intellectual property “overlapped” or was “illusory.” *See* extended discussion of the intellectual property during the testimony of Phillips, RP, 2-21-13, 41-46, 109-127, 164, 189; RP, 2-26-13, 72, 74, 86; and RP, 7-29-13, 6, 82, 169-170; and Mandell, RP, 2-25-13, 9-10, 34, 39, 43, 45.

Similarly, Gordon’s failure to understand the “purpose” of the Service Agreement between Banana and ADOT is irrelevant to the issues before this Court. His failure to “understand the purpose” does not negate the fact that Gordon was well aware that Banana employed the consulting services of Chris Gundy, Doug Lower, and others. Additionally, it was undisputed at trial that Banana used ADOT’s computers, offices, telephones, and infrastructure for three years from 2006 through 2009. Respondent apparently believes that Banana was provided no benefit for all of these services from ADOT, and Respondent’s witness van Drunen summarily concluded that the Service Agreements were “illusory.”¹³ van Drunen does not account for the services received from ADOT during his

¹² Ex. 208, RP 2-26-13, 53-54.

¹³ RP 2-19-13, 106.

testimony.¹⁴ To the contrary, the evidence shows that Arnold actually wrote checks to ADOT personally to pay for the “hosting services” that Banana used in its work.¹⁵ As Maureen Lower testified, Arnold kept a file for “ADOT” in his office to account for payments related to the “hosting services.”¹⁶ It is inconceivable that Arnold, a sophisticated investor, was unaware that the Services Agreement was not only required by Banana to perform even basic tasks, but also necessary to develop its computer codes and eventual products.¹⁷

It is true that Phillips did not have a written consulting agreement with Banana, just as he had no written consulting agreement with MOD or with ADOT. The only expert testimony at trial testified that this is a fairly “common” practice in the software industry and there were “sufficient business purposes” and “value added” to the companies to justify the agreements.¹⁸ Despite Respondent’s claim to the contrary, there was ample evidence that Phillips kept Arnold abreast of all developments at Banana, including all expenditures, even though Arnold had given Phillips broad powers to manage Banana. There was testimony not only from

¹⁴ RP 2-20-13, 30-33.

¹⁵ RP 2-20-13, 171-172,

¹⁶ *Id.*

¹⁷ Ironically Phillips has been assessed a tax penalty by the IRS of \$220,000; an amount due largely to the fact that Phillips failed to properly “value” ADOT in its transfer to MOD; the same ADOT that Respondent complained added no “value” to Banana.

¹⁸ RP, 2-25-13, 45, 46.

Phillips, but from Maureen Lower as well, that Phillips visited Arnold regularly and often provided Arnold with updates and documents.¹⁹ This is another instance of Respondent attempting to use the lack of testimony from Arnold to “prove” a point or raise an issue.²⁰ Respondent now claims that the “absence” of documentation somehow is “evidence.” To the contrary, the absence of documentation simply does not allow Respondent to prove that Appellant’s testimony is not true. Respondent’s own Opposition Brief supports Appellant’s testimony when it notes that Arnold, a sophisticated investor, “invested \$5.5 million, made in several six-figure tranches over a period of time: from June 2006 to May 2007.”²¹ Despite the clear inference from these actions, Respondent would have you believe that Arnold continued to write “six-figure” checks *without any disclosure from Phillips whatsoever*. The argument defies logic. To the contrary, the undisputed actions of Arnold, coupled with the testimony of Phillips and Maureen Lower, establish that disclosure was made to Arnold, which disclosure was sufficient that over the course of 11 months, he did not make a single request in writing or demand upon Phillips or Banana to provide additional documentation and information. More

¹⁹ RP, 2-22-13, RP 2-26-13, 46.

²⁰ Likewise the testimony of Cole Younger that Arnold was not kept advised or provided relevant documents is not credible, given Younger’s testimony that he was *unaware* of ADOT, although he also testified he was very familiar with the Subscription Agreements, which mention and describe ADOT numerous times.

²¹ Respondent’s Brief at 7, 8.

telling is the lack of documentary evidence from Respondent *demanding*, over this 11 month period, that Phillips provide him with an update or disclosure. It is only Arnold's minions who have taken umbrage with the actions of Phillips, people who were not present during any of the relevant meetings herein, had no first-hand knowledge of the illuminating events in this case, yet are allowed to opine about the "knowledge of Arnold" only because Arnold's testimony was never recorded. To wit, we don't know what Arnold's thoughts or actions were on this matter and never will. The undisputed testimony from Phillips and Maureen Lower coupled with the actions of Arnold himself effectively negate this claim by Respondent.

Similarly, Respondent's objection to the payments made to Doug Lower is defeated by common sense. Lower was a talented operations manager who had been involved in some of Phillips' prior enterprises and, more importantly, was familiar with some of the Phillips' intellectual property and employees. Respondent seeks to demean Lower by describing him merely as a "childhood friend" of Phillips. Lower had a decade of embedded engineering management and experience comparable to Phillips. As Mandell testified, Lower was involved in the "spreadsheet analysis" necessary when seeking to provide a proposal for stated work;

work that was tedious, demanding, yet important to the company.²² While Lowers' remuneration was somewhat unorthodox, it was not unheard of in the industry according to Mandell.²³

With respect to the salary paid Lower, if his salary is amortized over the entire time that he consulted with Banana over the four year period, he was only paid \$100,000 per year, certainly below the average for a senior director of operations with his level of experience.²⁴ Likewise, Respondent's argument regarding the loan made to Lower tries to "raise an issue" where there are no disputed facts. The knowledge of Maureen Lower regarding the loan made to Doug Lower by Banana is equally irrelevant. Maureen Lower was not the recipient of the loan, did not make the loan, and had no advisory or other position with Banana. More importantly, Arnold himself forgave the loan to Doug Lower; an action that now prevents him from claiming this "loss" against Phillips. Respondent cites to no compelling authority that would allow him to pursue a claim against a "secondary" debtor where he has already released all claims against the primary debtor, because there is no such authority.

²² RP 2-25-13, 26.

²³ RP, 2-25-13, 36-38.

²⁴ Statistics can be meaningless, as Respondent's calculation of \$1,000/hour payment to Lower proves. The calculation fails to include the life of the contractor agreement. Normally, lawyers are loathe to reduce income to an "hourly rate," given the huge fees earned by some in contingency cases, which rates dwarf the \$1,000/hour fee cited by Respondent.

Forgiveness of the debt of the principal, in the absence of an agreement also releases any secondary actor from liability. Respondent's "evidence" supporting the claim regarding the Lower remuneration involves suppositions and guesstimates by persons who have never started nor managed a software or tech company and have no first-hand knowledge of the standards within the industry. Those who do have such knowledge, Phillips and Mandell, have testified that such agreements may be necessary to "retain" key personnel; opinions that were unrebutted by admissible evidence at trial.^{25 26} Mandell testified that he has "invested in and investigated a number of software companies."²⁷

ADOT had a "drawable" promissory note or line of credit with Banana that was used in order to help ADOT's primary employee, Phillips, meet his tax liabilities. Phillips has testified that he had disclosed the promissory note to Arnold, which testimony is unrebutted. Respondent's advisers are simply upset, after the fact, of the use of the

²⁵ van Drunen's opinion on the appropriateness of Lower's remuneration are based not on experience as a founder or even a CFO of a tech company, but merely non-expert opinion based upon hearsay.

²⁶ The Estate of Arnold, via his advisers, has had control over the IP licensed to both MOD and Banana, unrestricted, since 2010, but have produced nothing. Perhaps Respondent and his advisers should consider hiring computer programmers familiar with the IP, and with relevant experience, although they may have to come up with novel means of remuneration in order to retain the personnel who could actually produce something besides a lawsuit.

²⁷ RP 2-25-13, 20.

loan to ADOT. The only expert opinion offered at trial showed this to be an acceptable practice.²⁸

The evidence at trial did not support that “Metawallet” was to be a separate company; rather, the evidence supported that this occurred due to clerical error. It was always intended to be just the “trademark” of Banana. There was unrebutted testimony from Phillips’ lawyer that he was in the process of bringing “Metawallet” under the umbrella of Banana. Given all of the unrebutted evidence on this point, even allowing, as the Court surmised, that Arnold had no “rights” in Metawallet, it is hard to imagine that the Court would not have concluded that Arnold did indeed have an interest in Metawallet given the wealth of evidence supporting this conclusion, had Arnold so moved. Respondent’s allegation to the contrary is based on pure speculation.²⁹

II. Arnold’s attendance at trial was mandated by the local rules for good reason.

Respondent contends that Arnold’s attendance is not mandated by King County Local Rule 4. Such an argument defies legislative history as well as a common sense interpretation of the rule. KCLR 4 states that “a party seeking affirmative relief or asserting an affirmative defense” must

²⁸ RP 2-25-13, 40-41.

²⁹ Phillips expert documented and testified that for purposes of his evaluation he considered Metawallet and Banana to be the same entity. Mako Report, Ex. 228; RP, 2-25-13, 18.

appear for trial. While Respondent argues that the use of the term “party” in the Local Rules is generic and may “address the person or his legal representative,” the language of the rule is specific, limiting the term “party” to those “seeking affirmative relief” or those “asserting an affirmative defense.” Only the actual party is entitled to seek relief or assert a defense.³⁰

More importantly, the “circumstances” of this case demonstrate a clear abuse of discretion by the Court in not ordering Arnold’s deposition. As the record makes clear, Arnold failed to appear at trial without any explanation from his counsel, or any motion to excuse his absence. Once Appellant objected to Arnold’s non-appearance, Respondent’s counsel, through Arnold’s accountant, represented to the court that Arnold was “too ill” to attend. No medical evidence was ever presented to the Court regarding Arnold’s disability; only the unsubstantiated testimony (double hearsay) of de Haan. The Court noted the importance of his testimony, stating it *must* be obtained.³¹ The Court initially granted defendant’s motion to depose Arnold, but then withheld its order with the right to revisit the issue during trial; no “Protective Order” was provided by the Court, but instead the Court took the matter under consideration.

³⁰ That the Civil Rules or RCW apply different standards does not prevent King County from structuring its own rules and standards.

³¹ RP 2-6-13, 11-15.

Perhaps, if the Court had required medical evidence regarding Arnold's health, it would have understood the necessity of preserving his testimony for the record, as it was central to the prosecution of the claims in the case and to Phillips' liability. Despite the necessity of the testimony, his claims were allowed to continue without it. Instead of admissible evidence, his agents and advisers were allowed to "intimate" that "Phillips made no such disclosures" or that "Arnold did not execute that Subscription Agreement." The prejudice to Appellant was dramatic. Arnold was able to assert claims against him despite never overcoming the unrebutted evidence that Phillips did disclose all necessary transactions to him, that Phillips continued to provide Arnold with all documentation, and that Arnold, a sophisticated investor, made no written demand to Phillips for any such information while writing significant checks over a period of 11 months.

But while the Court took Appellant's request for a deposition under advisement, it did not order the necessary steps in order to *preserve* Arnold's testimony for trial. The result is that Phillips' defense was greatly hampered, and Respondent was able to "prove" its case by innuendo and inference, rather than the testimony of Arnold. Arnold's testimony was crucial to the probity of several key issues:

- a. Testimony regarding his signature on the Subscription Agreements;
- b. His receipt of disclosures and documents regarding the management of Banana;
- c. Phillips' disclosures to him regarding expenditures of Banana;
- d. Phillips' disclosures to him regarding Metawallet;
- e. Arnold's understanding of the purpose for writing checks directly to ADOT and MOD on behalf of Banana;

In this case, Respondent has been able to prosecute this lawsuit without declaration, testimony, or any affirmative statement under oath against defendant. This is not the typical lawsuit, and certainly not the typical lawsuit in which the claims are based upon a derivative action. While Phillips was incarcerated and believed that he was ably represented by counsel, Respondent filed a partial motion for summary judgment, which motion was granted by the court despite the fact that the motion contained no expert testimony, and no testimony from the plaintiff.

III. The Court erred in granting Respondent's partial motion for summary judgment against Phillips and ADOT.

Respondent argues that the Mako Report was not properly "before the court" on Summary Judgment on the technical grounds that it did not

appear in declaration form.³² Appellant included a copy of the Mako Report with his declaration.³³ However, Phillips did inform the Court that Mandell had been retained by him as an expert and that the report contained his “expert opinions.” Appellant contends that, under the circumstances, he presented enough evidence to defeat the partial motion for summary judgment, given that the Court must view all facts and reasonable inferences in the light most favorable to the nonmoving party. *City of Lakewood v. Pierce County*, 144 Wash.2d 118, 125, 30 P.3d 446 (2001). If the court found that the Mako Report was not admissible or hearsay, at a minimum the Court was required to grant Appellant a continuance and the opportunity to cure the evidentiary defect, particularly given Phillips’ circumstances in this case. Phillips did request a continuance from the Court, the denial of which greatly prejudiced him and contradicts statutory and case law authority. *See, e.g.*, CR 56(f); *Guile v. Ballard Community Hosp.*, 70 Wn.App.18, 23, 851 P.2d 689 (1993);

³² The argument that ADOT had sufficient time to retain new counsel prior to the hearing defies the facts in the case and common sense. As explained in detail in the Opening Brief, Phillips was not timely notified of his counsel’s withdrawal, and so had only days to retain counsel *from prison*, a near impossible task, especially since Phillips could not call any individual who was not previously approved and contingent on the responding party accepting the call.

³³ Respondent’s claim that the Mako report evaluated only “Metawallet” is demonstrably false and misleading, and is a strange argument to make. The report itself evaluates the expenditures of “Banana,” and Mandell’s trial testimony made it clear he treated Metawallet and Banana as “the same.” RP 2-25-13, 5, 34-5. Respondent’s counsel admitted the same when questioning Mandell about his “investigation of Banana and MetaWallet.” RP 2-25-13, 4.

Lewis v. Bell, 45 Wn.App. 192, 196, 724 P.2d 425 (1986); *Cofer v. County of Pierce*, 8 Wn.App. 258, 262-63, 505 P.2d 476 (1973).

More telling are the moving papers submitted by Respondent, which contained no declaration from Arnold, nor other statement under oath from the person asserting the claim.³⁴ A party may move for summary judgment in one of two ways, by alleging his version of the facts and stating there are no genuine issues, or by pointing out that the opposing party cannot meet its burden. *Guile, supra*, 70 Wn.App. at 21. In this case, Respondent sought to set forth his “version” and used declarations to “establish” facts. “Moving party must not only identify those portions of the record, together with the affidavits, if any, which her or she believes demonstrate the absence of a genuine issue of material fact.” *Id.* at 22.

At issue in Arnold’s motion for summary judgment was the issue of disclosure; absent this affirmative showing, Arnold should not have been granted summary judgment. *White v. Kent Med. Ctr., Inc.*, 61 Wn.App. 163, 170, 810 P.2d 4 (1991); *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). But, Respondent’s partial motion for summary judgment was not supported with his declaration; to the contrary, the motion was supported by declarations of Smyth, his lawyer, and de Haan, his

³⁴ CP 58, 59, 60.

accountant. Neither were able to testify about facts from personal knowledge that would be relevant to the issues in the motion. Appellant contends that only Arnold could submit a declaration stating that he was never advised of the expenditures made by Phillips, or that Phillips failed to disclose all of the expenditures to Arnold. *Absent this affirmative showing by Arnold, Phillips was under no legal obligation to defend any of the expenditures.* It was not sufficient for Respondent to meet his burden of proof without admissible evidence that Phillips did not make such disclosures; a burden Respondent did not meet. A review of the record shows that Arnold did not produce any evidence of “breach of fiduciary duty;” he did not include a declaration stating that such expenditures were not disclosed to him; and he did not retain an expert who could opine as to the “breach of a duty” which would meet his initial burden of proof.³⁵ Instead, the Court seems to have merely accepted the filing of Arnold, which contained broad, conclusory allegations of corporate malfeasance, without requiring the evidence necessary to prove such allegations. It is not enough to simply submit the financial records of Banana supported by declarations from persons who were not involved in

³⁵ That Arnold has been involved in such protracted litigation and yet never provided a declaration, sworn testimony or other statement under oath is truly a mystery. His knowledge and testimony are *central* to the *claims he has made*; claims that cannot be “prosecuted” by his advisers because they had no personal knowledge of the conversations that are crucial to proving liability.

the transactions and have no personal knowledge to establish a “breach of a duty.” Respondent repeatedly tries to take advantage of the fact that Arnold gave no testimony under oath, instead claiming, without admissible evidence, that Phillips acted “without notifying the only disinterested shareholder, Mr. Arnold.”³⁶ The only admissible evidence before the Court is that Phillips did, indeed, notify the “disinterested shareholder” of his actions. Because Respondent did not meet his burden of proof in moving for partial summary judgment, and Appellant filed sufficient evidence to raise a triable issue of fact, the Court erred in granting partial summary judgment.

Likewise, ADOT offered sufficient evidence to the Court to warrant denial of the partial motion for summary judgment. As detailed in the Opening Brief, Phillips’ notification from his attorney that he was withdrawing from representing him and ADOT was received only weeks before the hearing on the motion for partial summary judgment. Phillips had made arrangements using the last of his assets to secure the representation, and was without ability to not only contact lawyers, but to retain them as well. While Phillips attempted to file documents on behalf of ADOT, he was unable to represent ADOT at the hearing or even submit documents on its behalf. As a result, partial summary judgment was

³⁶ Respondent’s Brief at 24.

entered against ADOT, even though it presented evidence to the Court that it had a viable defense to the claims of Arnold. Because the Court granted the partial motion for summary judgment based upon a technical violation, ADOT respectfully requests the opportunity to fully defend itself at trial.

IV. The Court improperly adopted the opinions of a lay witness in place of the only expert opinions at trial.

Respondent misconstrues the argument regarding the testimony of Guido van Drunen, admittedly a lay witness who did not review all of the pertinent records. First, Appellant did object to the testimony of van Drunen as anything other than as a lay witness, a description that van Drunen himself adopted.³⁷ The problem is that the Court adopted van Drunen's lay opinions and substituted them for the expert opinions presented at trial by the only recognized expert, Mandell. Respondent's argument that Appellant "waived" any objection to van Drunen's testimony is irrelevant and not supported by the facts. Appellant could not object to van Drunen's testimony as a lay witness, because no special qualification as a lay witness was necessary. The error lays in the Court substituting a lay witness' opinion for Mandell's expert opinion. An example of this improper substitution can be found in Finding of Fact 22. In trying to clarify the line that it was walking, the Court reasoned:

³⁷ RP 2-19-13, 55.

“However the Court believes that it can consider the contents of the reports, both through the testimony of Mr. van Drunen, as well as certain aspects of the report, to the extent that the information came from the business records of Banana, A-Dot, or MetaWallet.”³⁸

But such a line abuses the discretion allowed a Court. The KPMG report was not admissible, so any information contained therein must likewise be inadmissible. Any reports or business records referred to by the Court must be considered only to the extent they have been offered and admitted at trial. As Appellant’s counsel pointed out during cross-examination, van Drunen’s method of transferring information from his notes to his report was non-uniform and not sufficiently reliable to support a finding of fact.³⁹ This is particularly true for the “admissions” made by Phillips to van Drunen, admissions that have never been made by Phillips in any other setting or to any other person.⁴⁰ There was no admissible testimony at trial that would support the Court’s finding that:

“[N]one of the above disbursements, consulting fees, and loans from Banana to A-Dot and from A-Dot to Phillips and others were disclosed in advance or contemporaneously to or approved by Mr. Arnold.”⁴¹

³⁸ RP 2-20-13, 81-82.

³⁹ RP 2-20-13, 30-33.

⁴⁰ Similarly, Mandell testified that he questioned van Drunen about his statements that the payments to Lower were a “finder’s fee,” statements he could not defend to Mandell. RP 2-25-13, 31.

⁴¹ CP 1155.

That finding relied upon the opinion of van Drunen, along with the opinions of Younger and de Haan, whose testimony may have been credible, but was pure hearsay as to what may or may not have been disclosed to Arnold. This is another example of Respondent taking advantage of the absence of testimony by Arnold under oath. Instead of a specific statement from Arnold, the Court relied upon hearsay and the “pseudo-expert” opinion of a lay witness to make a finding of fact.

What troubles the Appellant is that the opinions of the only expert at trial, indeed, the only person other than Phillips who had any real world experience in a tech company, were dismissed by the Court and its opinions substituted for the expert. Respondent is equally confused on this issue, as he argues that:

“[T]he characterization, however, is immaterial because the court found substantial evidence to support its findings and conclusions that the payment was a related party transaction not ratified by Banana’s disinterested shareholders as required both by Banana’s Articles and bylaws and RCW 23B.08.700 to .730.”⁴²

But the Court was prevented from such a finding based upon the only expert testimony at trial. As the Banana Articles of Incorporation make clear and Mandell testified, no such prohibition applies and no finding can be based upon the factors outlined by the Court. To further

⁴² Respondent’s Brief at 36.

emphasize the failure of Respondent to understand Appellant's objection, he concludes, "***Moreover, van Drunen's testimony supports the finding (emphasis added).***"⁴³ Respondent unwittingly supports Appellant's argument; the Court too often adopted the lay opinion of van Drunen over the expert opinion of Mandell.

Respondent seeks to substitute his own opinions for those of the only expert at trial, Mandell, when he purports to interpret the Articles and bylaws of Banana. Such claims had been considered and dismissed by Mandell as he reviewed Phillips' actions in this case.⁴⁴ Those opinions, which were not rebutted by expert opinion in this case, must be adopted by the Court. Specifically, all Findings of Fact which concern a "breach of a duty" by Phillips rely on impermissible hearsay evidence and are contradicted by the expert testimony offered at trial. Findings of Fact 18, 19, 20, 21, 22, 23, 24 and 25 all rely in whole or in significant part on evidence that is contradicted by Mandell's testimony, and substitute lay, hearsay opinion for expert testimony.

V. The Court erred in calculating damages.

⁴³ *Id.* citing RP 2-19-13, 92.

⁴⁴ Respondent's bald assertion that Mandell was "highly biased" and was owed \$100,000 by Phillips does not impugn his testimony, as there was no possibility that Phillips would be able to recover any money in the lawsuit; financial self-interest is not a criticism you could level at Mandell for his testimony in this case.

Respondent has again misunderstood Appellant's argument regarding damages. The Court has failed to follow transactions from "cradle to grave" to determine which company was the source of funds which were allegedly misspent. The simple "set off" found in the judgment does not explain that the judgment, added to the expenditures even van Drunen admitted were justified,⁴⁵ far exceeded the money invested in Banana by Arnold. To accept the Court's damages amount, you would have to believe that Banana operated for four years, enjoying office space and computer access, hired engineers and travelled to Bolivia several times after hiring a consultant who helped it enter into a contract, yet had only nominal expenses. The Court erred in its calculation of damages.

VI. Phillips is entitled to a credit of \$2.5 million.

As detailed in the Opening Brief and supra, Phillips is entitled to a credit of \$2.5 million which constitutes the amount he was owed by Banana for licensing of the encryption intellectual property. The trial court and Respondent have confused the type and purpose of the intellectual property that was transferred in the original assignment, and that intellectual property that was needed to complete the NuevaTel

⁴⁵ RP 2-20-13, 34-36.

contract. Phillips must be given a credit for this amount in any adverse judgment.

VII. Phillips cannot be liable for attorney's fees based upon the promissory note.

Respondent's throw-away argument that Phillips should be liable for attorney's fees because the "note was found to be a basis for judgment against Phillips for breach of fiduciary duty" is not well taken and not supported by the case law cited by Respondent. The promissory note contemplates attorney's fees based upon "enforcement" of the note; not if the note is tangentially related to a finding of liability. Although Phillips had no liability nor benefit under the note, Respondent seeks to impose the attorney's fees clause against him. There is no basis in contract or law to require Phillips to pay Respondent's attorney's fees.

CONCLUSION

For the reasons set forth hereinabove, Appellant respectfully request the Court overturn the judgment of the trial court, including the grant of partial summary judgment.

DATED this 27th day of August, 2014.

By: *Mark Phillips*
MARK E. PHILLIPS, Pro Se
2801 1st Avenue, Ste 102
Seattle, Washington 98121
Mark.Phillips@gmail.com
Tel: (206) 607-941

By: *Reed Yurchak*
REED YURCHAK, WSBA 37366
40 Lake Bellevue Dr. #100
Bellevue, Washington 98005
Yurchaklaw@gmail.com
Tel: (425) 890-3883
Fax: (425) 654-1205
Attorney for ADOT Corporation

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