

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Paul Stepnes, *et al*,

Civil Case No. 08-cv-5296 (ADM/JJK)

Plaintiffs,

v.

**DECLARATION OF ATTORNEY FOR
PLAINTIFFS, JILL CLARK, IN
SUPPORT OF MOTION TO
DISQUALIFY AND OTHER RELIEF:
**FILED UNDER SEAL CURRENT
ATTORNEY EYES ONLY**: AMENDED
JANUARY 26, 2010¹**

Peter Ritschel, *et al*,

Defendants.

I, Jill Clark, state under penalty of perjury that the following is true and accurate to the best of my knowledge and ability, and of my personal knowledge except where indicated.

1. The exhibits are as follows (for other exhibits cited in the Memorandum see prior-filed Declarations):

Exhibit 1 is the transcript of the December 18, 2009 proceedings.

Exhibits 2-8 are described in the content of the Declaration.

2. The converted emails that Ms. Walker admits to having reviewed, included numerous emails between Stepnes and the following attorneys:

a. **Priscilla Faris**: There is an email string dated March 28, 2008, in

which Paul Stepnes is sending his ideas for the contest to his attorney,

¹ For ease of reference, the Court and opposing counsel are being provided a version where the additions are **bolded**. Text that was already bolded is still bolded.

who was already representing him in litigation relating to one of his properties. Upon review, attorney-client privilege is claimed for this document. Stepnes was seeking advice from his current attorney. This email string is important because it contains specific information about what Stepnes was thinking, considering, and seeking legal advice on, *regarding activity that CBS is scrutinizing in this lawsuit*, namely, the timeframe just before Stepnes went public with the contest that launched in May 2008. It is clear from depositions already taken in this matter, that CBS is focusing on this timeframe, and on what Stepnes was thinking, doing, and seeking advice about (see discussions of Simonson emails, below). Further, when police executed a search warrant at Irving House on May 29, 2008, they seized some evidence that *when combined with the email in question, CBS could use to claim that Stepnes engaged in criminal conduct*. This CBS could fashion as a complete defense to the defamation claim. The emails from Attorney Faris are clearly marked with her law firm signature (see above). This belies Leita Walker's claim that she did not "recall" viewing emails from any attorneys other than Jill Clark. Not only did Leita Walker view this email string, she included one of these emails in the "key docs" file that she sent to the Levine Sullivan firm on June 26, 2009. Indeed, now that Plaintiff counsel has the electronic version of the "key

docs” file – it is known that Ms. Walker not only viewed those emails, but that she saved one of them on **June 26, 2009, at 9:07 a.m.** (Clark Decl. Exh. 2, see re line at left margin “Question”). That “key docs” file was, as admitted by Mr. Sullivan in the 9/24/09 hearing, and by both Mr. Borger and Mr. Sullivan at the 12/18/09 hearing, reviewed by CBS attorneys in this case. Further, it was referenced by CBS’ Memorandum filed 9/17/09, in its footnote, *and* discussed by Mr. Sullivan at the 9/24/09 hearing. These emails were reviewed, and re-reviewed, and re-reviewed.

- b. **Eve Borenstein:** there is an email string dated March 17-18, 2008, that manifests in approximately 6-7 “files” and in which Paul Stepnes is seeking legal representation from Attorney Borenstein. The emails are clearly marked at the bottom as a “law office” (see Exhs. 5a and 5b, to Officer Hanson deposition for the full signature). These emails are important, and Stepnes has been prejudiced by CBS attorney review of them because: they discuss content that is being actively litigated in this case, and which surrounds a “foundation” that the WCCO 7-15-08 broadcast discussed. CBS has gained an advantage from knowing this information because it will assist them in taking Stepnes’ deposition, it will assist them in preparing legal argument against Stepnes in this

case and related to the “foundation.” *No one notified Plaintiff counsel to inform her that these emails from a law firm had been viewed.*

c. **Paul Simonson:** There are numerous emails to and from Paul Simonson. Paul Stepnes has indicated that he believed that his emails with Paul Simonson were privileged. (Stepnes 9/10/09 Aff. ¶3c). The client’s subjective intent is relevant to the determination of privilege. These emails are important, because they are advice about the legality of the contest that Stepnes launched in May 2008. With those emails, CBS could argue that Stepnes *knew* that the contest was illegal and/or criminal. This, CBS could parlay into a complete defense to Stepnes’ defamation claim. Paul Stepnes never had the opportunity to claim the privilege for these emails. CBS claimed privilege for certain email(s), and following the September 24, 2009 hearing, that privilege was upheld. Stepnes was prevented from such a process. Leita Walker admitted that she recalled seeing emails from Simonson, and as shown by Clark Decl. Exh. 2,² she copied one of those emails to her “key docs” file on **June 23, 2009 at 2:57 p.m.** (see re line on left – “got your voicemail”), then went back to copy a second email on **June 26, 2009 at 8:56 a.m.** *It is unclear where she copied this email from on June 26 – if she was not at the MCAO.*

² This is a window capture of the meta-data from the “key docs” electronic disk received from CBS following the 12/18/09 hearing.

- d. Although Leita Walker does not admit to viewing other attorney emails, the amount of time she spent in the Forensic Report, the copies she made, the timing of her work (see discussion of metadata, below), and her other conduct, all suggest that she *did*, indeed, review other attorney documents.
- e. Of course, Plaintiffs have not been able to depose defense counsel, to learn who Leita Walker talked to, or the work patterns of other attorneys with which to draw circumstantial conclusions.

3. It should also be noted that in the deposition of Pete Girard, CBS attorney Sullivan mentioned a Simonson email in a manner that showed that CBS will use the email against Stepnes in this litigation. It is still an open issue whether Attorney Clark will therefore become a “necessary” witness at trial. Or, even if she does not actually testify on the witness stand, CBS would definitely benefit from being able to taint Attorney Clark in this case. Leita Walker’s “key docs” file also saved 2 emails about a dinner party that Attorney Clark had had at her house. Those emails, dated December 26, 2007 (with re line “Quatamala” saved by Walker on June 26, at 9:02 a.m.), and March 28, 2008 (with re line “our get together” also saved June 26, 9:02 a.m.), have nothing to do with this case, and would not have been produced in discovery. They were not requested, and they are not relevant. Further, in one of the emails Clark states, “I’m glad we did not talk ‘work’ and just had fun.” Plaintiffs believe that this harmless comment about a purely social event,

will be claimed by CBS to be evidence that Attorney Clark was somehow involved in the contest venture, and thereby attempt to taint her in the eyes of the jury.

Plaintiff counsel has spent numerous hours reviewing the over 50,000 pages of emails in the 3 large unconverted email files. They contain:

- a. **Emails to/from Attorney Ralph Mitchell**, who represented Stepnes in several litigation matters (a bankruptcy filing, and a foreclosure by action regarding the Irving House – the subject of the contest and this litigation). Further, the CBS defendants have demanded in discovery, that Stepnes identify all civil lawsuits that he was involved in, showing their interest in the bankruptcy action, and foreclosure by action case regarding Irving House. CBS even made a motion to compel those documents. The Court ordered production, and Stepnes complied by listing numerous items of litigation, as well as providing numerous documents. Further, CBS has subpoenaed documents from Americana Bank (which held the first mortgage on the Irving House), and around 2,000 pages were served on Plaintiff counsel. Clearly, CBS is interested in the litigation surrounding Irving House and Plaintiff's other properties and they are intent on making those matters a part of this case. The emails with Attorney Mitchell are clearly for the purpose of legal advice and the conducting of ongoing litigation. Further, more than one of those emails is strategic in nature – mapping out the upside and downside of

certain litigation maneuvers. Mitchell also provides legal advice to Stepnes, spanning many matters, which were strategic, and which relates directly to Irving House. Further, those emails contain information that CBS could use to try to make it look like Paul Stepnes had a bad reputation. CBS has made it clear that they intend to reduce damages by telling the jury that Stepnes had a bad reputation *before* he was defamed by the WCCO broadcast. These emails could be used for this purpose. (Again, Stepnes does not admit that that is a fact, merely that aggressive opposing counsel could try to make it look that way.).

- b. **Emails to/from Attorney Priscilla Faris.** Attorney Faris' firm represented Paul Stepnes in a piece of litigation involving a *different* property on Irving Avenue. Those emails discuss strategy, about matters that CBS is clearly interested in (see above). Further, they contain information that CBS could use to try to make it *look* like Paul Stepnes had a bad reputation before the July 2008 WCCO broadcast. These are in *addition* to the emails to/from Faris that are discussed above, and contained in the "key docs."
- c. **Emails to/from Attorney Jill Clark.** In the large email files, emails go back to the timeframe when Attorney Jill Clark represented Paul Stepnes in a prior case he had filed against Minneapolis Police. That litigation is obviously of interest to CBS. Indeed, Plaintiff counsel is of the opinion that CBS devised its "relevant timeframe" to be able to get that prior lawsuit somehow into

evidence in this case. The emails were clearly for the purpose of legal advice, and in conducting ongoing litigation. CBS (and the City) would gain an advantage from the information that they learned in the emails, to the extent that they would be able to learn the unguarded thoughts of Stepnes and his attorney, about that litigation. Further, those email(s) discussed settlement strategy, a strategy that could be used against Stepnes in settlement discussions in this case. Further, there were emails in which Stepnes sought the legal advice of Attorney Clark (but were not part of the 2005 litigation), which could benefit the defendants in this case. Topics included people and issues that are a part of this litigation.

5. I have spent numerous hours reviewing emails in the large (unconverted) Mbox files. I can confirm that these 3 large files were copied onto Leita Walker's laptop, and sent to the Levine Sullivan firm in Washington. After hours of review, I cannot see any difference between the (unconverted) Mbox files from the original Forensic Report, and those on the Walker laptop/copied to Levine Sullivan. Further, with all due respect, Plaintiffs now highly doubt Ms. Walker's declaration that she spent about 6 hours reviewing the Forensic Report. First, when one views the dates/times that the files and folders were saved, it shows numerous hours, on June 23, 26 and 29. (See Exhs. 2 - 7, further discussed below). If someone were merely copying, they would just save everything within a few minutes.

Second, it is clear from the metadata from her laptop version of the Forensic Report, that:

- She says she went to the Minneapolis City Attorney's Office (MCAO) on June 23, 2009, and we can tell from the electronic metadata from the "key docs" file that she reviewed the Forensic Report and copied numerous files to her "key docs." (See Exh. 2 to Clark Decl.).
- Ms. Walker stated she returned to the MCAO on June 26 to complete her review. And it is true, some of the files in her 'key docs' folder were saved on that date (Clark Exh. 2, Exh. 6-7) as were the files in Evidence Verification Reports (Exh. 3). However, many, many files and folders are shown as being last modified on June 29, 2009. These include folders: Converted Mbox Messages; Evidence Verification Reports; and Mbox (email) files (these are the unconverted emails). (Clark Decl. Exh. 4). Inside the "Mbox (email) files, the large unconverted email files are shown as "modified 6/26/09. (Clark Decl. Exh. 5). It is unclear when the files were saved, and if they were "modified." Plaintiffs have not been able to ask Ms. Walker this. Perhaps she copied the files onto her laptop, then copied them into a different part of her laptop on June 26, and/or June 29.
- But certainly it appears, that even after Leita Walker had emailed the "key docs" file to the Levine Sullivan firm, she went back to copy additional files/folders at the MCAO. Why would she go back for the unconverted emails

– if no one intended ever to look at or use them? **If she did not return to the MCAO on June 29, how could she save large folders on that date?**

In response to a subpoena to a Mr. Mihm in this case (a third party witness), CBS firm Levine Sullivan printed out thousands of pages of emails, bate-stamped them and delivered them to Plaintiff counsel. Plaintiffs find it difficult to believe that that would be done with those emails, and not with the unconverted email found in paper bear, momma bear, and baby bear. All we know is that *after* Stepnes alerted the Court about the numerous privileged emails in the large, unconverted files, CBS counsel have stated that they didn't look at it.

Now that Plaintiffs have the electronic disk of the Forensic Report from the CBS attorneys (from Walker's laptop), we can tell that by November, 2008, the date that Hanson met with Ritschel and according to him probably *looked* at those emails in November (Hanson dep. 21-22, 26-27), Hanson had already saved numerous "converted" emails. (*See, e.g.*, Clark Decl. Exh. 8; this exhibit shows emails saved by Hanson November 17, although there are numerous emails saved November 18 as well).

Hanson already admitted that he talked to Ritschel about content of emails between Stepnes and Clark that were "legal advice." Clark cannot tell whether Hanson was referring to the 2005 case, the post-arrest case(s) of Stepnes, or both. The "Jill Clark" folders do contain the emails between Clark and Stepnes after

Stepnes was arrested on May 28, 2008, and (obviously) before the laptops were seized on May 29, 2008. These emails are the beginnings of legal conversations regarding Stepnes, his potential lawsuit against Ritschel, etc. There are only a few. They are important in this context because the content could be used against both Stepnes, and if Clark is a witness, against Clark. *Not* because either of those 2 have done anything wrong, but creative, aggressive counsel could try to make it look that way. (This is *not* a reference to any type of crime-fraud exception – they would not fit that category at all, and Plaintiffs do not mean to imply that with the last sentence.)

Other than the copies ordered by the Court, CBS has never returned any data from the Hard-Drives.

Since filing motion papers on January 12, 2010, Plaintiff counsel has had an opportunity to peruse and spot-check the disk of pdf's that Faegre & Benson produced prior to the 12/18/09 hearing. (Clark Decl. ¶6).

The first, and most alarming thing about those pdf's, is that they were run through an email converter program. Leita Walker's Declaration stated at ¶6 that the "subfolder titles 'Mbox (email) Messages'... while readable, were not 'user-friendly' because the content was not formatted and included text akin to computer code." It certainly appears that someone on the CBS team instructed that the email data from that large Mbox (which was 'unconverted'

in the Hanson Forensic Report) should be formatted so that it would be easier to read. So someone (the service?) ran it through an email converter (similar to what Hanson did for the “converted” emails in the Forensic Report). Why would someone make these easier to read if they were not going to read them? Of course, Plaintiffs do not know when this conversion occurred. It could have occurred before September 1, 2009, when Stepnes “rang the bell.” (*Id.*).

Plaintiffs do not recall anyone from the CBS team informing me that the unconverted emails had been converted. That was important information that I would have wanted to have. And as counsel for Stepnes, I would have asked who did that, when, and why? (*Id.*).

When Plaintiffs compared the large files in Hanson’s Forensic Report, with the pdf’s on the disk provided by Faegre & Benson, it was learned that the process of *conversion* greatly reduced the number of pages. This is important, because it accounts for the differences in numbers of pages from the Hanson-version Forensic Report unconverted files (which Plaintiffs ported into Microsoft word documents totaling about 50,000 pages), and the pdf-based disk provided by Faegre & Benson. (*Id.*).

Note that at 12/18/09 Tr. at p. 28, ln. 10, Mr. Borger made the claim that Leita Walker “didn’t copy everything there.” At page 30 of the same transcript, Mr. Borger calls what Leita Walker copied a “9,000 pages sub-set.” (Line 20-

21). (*Id.*). From Plaintiffs' review, the only files that Ms. Walker did *not* copy from Hanson's Forensic Report, are the 2 "Jill Clark" files:

- Noted Inbox Messages (from Jill Clark); and
- Noted Sent messages (to Jill Clark)³

All other folders and files appear to be on her "CD Report" disk (produced to Plaintiffs just before Christmas 2009).

Note that from Clark Decl. Exh. 5, we can tell that Walker copied the *large* unconverted email files, containing the following kilobytes:

0001-0000.htm 65,296 KB

0002-0000.htm 5,946 KB

0003-0000.htm 114 KB

These are large, .htm files, and not *portions* of those files. The kilobyte size of the largest file on the Walker disk is about the same size as the largest file in the Hanson Forensic Report. The entire files appear to be on the Walker disk. Stated another way, it is now clear to Clark that the Court was accurate in its statements at page 31 of the 12/18/09 Tr.

³ Note that Plaintiffs' review shows that Ms. Walker did *not* copy the "Jill Clark" files. See Declaration of Thomas Evenstad.

These file sizes look to be the same file size as the “unconverted” email files that Plaintiffs call paper bear, momma bear, and baby bear. I have spot-checked the newly-converted-bate-stamped-provided-by-Faegre/Benson emails, and have located emails to/from the following Attorneys:

Jill Clark, Esq.

Ralph Mitchell, Esq.

Priscilla Faris, Esq.

The emails do not appear to be in the same order as in the Hanson files. But the emails seem to all be there. If the Court wants me to, I will provide the bates numbers for these. It was not my first instinct to do so, however, because it seemed that would send CBS counsel rushing to the disk to open, read and argue from them.

Clark’s 50,000 pages of Microsoft word docs, based on what I have reviewed, are contained in the pdf’s that Faegre provided, as bate-stamped. As stated, I have not been able to compare email to email (that is a daunting task), but my spot checking has shown results consistent with the files being the same.

7. Judge Porter has now issued an order for partial payment of attorney fees associated with the state action. Plaintiffs will provide a copy of

that order with their attorney fee affidavits and explain what has been compensated and what has not.

This concludes my Declaration of **15** pages.

January 26, 2010

s/jillclark

Jill Clark, Esq.