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No. 96800-4

[Court of Appeals No. 76613-9-]

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

DAVID L. BUTLER and ELIZABETH BUTLER, and their marital
community, and THE ROBERT LARSON AUTOMOTIVE GROUP,
INC., a Washington corporation, d/b/a LARSON TOYOTA,

Respondents,

v.

ADA MOTORS, INC., d/b/a BURIEN TOYOTA, a Washington
Corporation,

Petitioner.

CORRECTED PETITION FOR REVIEW

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
ken@appeal-law.com
shelby@appeal-law.com
Attorneys for Petitioner

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INTRODUCTION

This Petition offers the Court an opportunity to address serious injustices arising under its decisions in ***Burnet v. Spokane Ambulance***, 131 Wn.2d 484, 933 P.2d 1036 (1997) and ***Jones v. City of Seattle***, 179 Wn.2d 322, 314 P.3d 380 (2013). Specifically, applying ***Burnet*** to excluding witnesses first identified during trial under a ***Jones*** harmless-error analysis shifts both the burden and *even the sanction* to the injured party, Respondent Burien Toyota.

In a prior trial, a jury found that Burien Toyota's client list is a trade secret and that Appellants David Butler and Larson Toyota misappropriated it. After a remand for retrial of unjust enrichment damages, a second jury found that Butler and Larson willfully and maliciously misappropriated the trade secret and awarded damages.

The Court of Appeals reversed the jury's verdict and remanded for a *third* trial. ***ADA Motors, Inc. v. Butler***, No. 76613-9-1 (Dec. 31, 2018) ("***ADA II***"). It contradicted its own prior decision in the same case, No. 70047-2-1 (Aug. 18, 2014) ("***ADA I***") and other precedents. This published opinion, including its advisory opinions on jury instructions, damages, and attorney fees, threatens to undermine the Uniform Trade Secrets Act (UTSA) and discourages efforts to protect trade secrets. This Court should grant review.

ISSUES PRESENTED FOR REVIEW

1. Is this Court's 5-4 *Jones* decision requiring trial courts to conduct a *Burnet* analysis on the record when a party suddenly discloses unidentified witnesses during trial both incorrect and harmful, obligating this Court to correct its decision?
2. Did the Court of Appeals err in failing to find that excluding four witnesses first identified during trial is harmless error in relation to the jury's willful and malicious misappropriation finding?
3. Does the Court of Appeals' advisory opinion on instructing the jury under the UTSA regarding "sales attributable to the use of a trade secret" conflict with other appellate decisions and even the appellate court's own prior decision in this case?
4. Does the Court of Appeals' advisory opinion on instructing the jury under the UTSA regarding "malicious" misappropriation conflict with other appellate decisions?
5. Does the Court of Appeals' advisory opinion on the loadstar fee award undermine the UTSA's purpose to encourage plaintiffs to bring USTA claims and conflict with a great deal of appellate precedent?

FACTS RELEVANT TO PETITION FOR REVIEW

- A. The first jury determined that Butler misappropriated Burien Toyota's trade secrets, but found no damages due to an instructional error.**

David Butler began working at Burien Toyota after he retired from a long career as a Nordstrom salesman. *ADA I* at 2.¹ He brought a list of his Nordstrom customers with him to Burien Toyota and gave it to Sobel & Associates, a third-party direct marketer for the sales people. *Id.* Burien Toyota allowed Butler to select customers from its database for participation in Sobel's direct-marketing program. *Id.*

After eight years, Butler left Burien Toyota and began working for Larson Toyota ("Larson"). *Id.* He took a list of customers with him: the "Sobel list." *Id.* At Larson, Butler contacted everyone on the Sobel list. *Id.* Burien Toyota sued Butler and Larson under various theories, but the case went to (the first) trial solely on trade secrets. *Id.*

By special verdict, the first jury found that the Sobel list was Burien Toyota's "trade secret" and that Larson and Butler misappropriated it. *Id.* at 2-3. But it awarded \$0 in damages without reaching willful and deliberate misappropriation. *Id.* at 3. Burien Toyota appealed, raising an instructional error on damages. *Id.*

¹ The facts stated here are largely taken from the appellate decisions in *ADA I* and *II*, which are attached to this Petition as App. A & B.

B. ADA I reversed, holding that Burien Toyota must establish sales, while Butler and Larson must prove any portion of the sales not attributable to the trade secret.

In “a trade secrets claim alleging unjust enrichment, the plaintiff has the initial burden of establishing the defendant’s sales, and then the burden shifts to the defendant to establish any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits.” *ADA I* at 4 & n. 8 (citing *Petters v. Williamson & Assoc., Inc.*, 151 Wn. App. 154, 165, 210 P.3d 1048 (2009) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 45, *com. f* (“RTUC § 45, *com. f*”) at 516-17 (1995)). This “places on the party in possession of the relevant information – the defendant – the burden of demonstrating which portion, if any, of the revenue obtained through the transfer of a trade secret was not, in fact, attributable to the transfer.” *Id.*

But the first trial court shifted the initial burden of proof to Burien Toyota, requiring it to show “damages from sales attributable to the use of a trade secret.” *Id.* Reversing and remanding for a second trial, the *ADA I* court held that “plaintiff’s initial burden in proving unjust enrichment for trade secret misappropriation is to prove only ‘sales.’” *Id.* at 7.

C. **On remand, the trial court excluded four of Larson’s late-disclosed witnesses, and the jury found willful and malicious misappropriation and damages.**

On remand, Burien Toyota produced a list of 412 matches between its database and an updated Larson sales list. **ADA II** at 3. Burien Toyota sought over \$1.7 million in past damages, and the same in future damages, for total damages over \$3.5 million. *Id.*

Pretrial, Larson listed 55 potential lay witnesses, reserved “the right” to call anyone Burien Toyota listed, and even listed the “412 individuals” on the match list. BR 22-23 (citing CP 1158-59). Larson never narrowed its list. *Id.* (citing CP 1487, 1536-37; RP 985-86).

But at trial, Larson argued that only five customers purchased cars at both dealerships. BA 18. Larson claimed that it had contacted four witnesses on the match list – Banfill, Brambila, Dunne, and Galang. BA 18-19. On the seventh day of trial, Larson said it would call Banfill. BR 23 (citing RP 1071-72). The court sustained Burien Toyota’s objection, noting its prior ruling that Larson could not call witnesses it failed to disclose. *Id.* at 23-24. Unfortunately, it did not conduct a **Burnet** analysis on the record.

The jury returned a verdict for Burien Toyota, finding Butler and Larson’s misappropriations willful and malicious, and awarding \$12,496.12 as “attributable to the use of a trade secret.” **ADA II** at 4

(citing CP 2384). Applying the UTSA (RCW 19.108.030) the trial court doubled the jury's award. *Id.* Applying RCW 19.108.040, it also awarded fees of \$610,071.90 to Burien Toyota. *Id.* at 16.

D. On appeal, Burien Toyota conceded that the trial court erred in failing to conduct a *Burnet* analysis on the record when it excluded four witnesses first disclosed during trial, while preserving its arguments that *Jones* is incorrect and harmful and that any error was harmless.

On appeal, Burien Toyota conceded that the trial court's failure to make *Burnet* findings on the record "is reversible error as to the damages award under *Jones*." BR 22; *ADA II* at 5. Burien Toyota argued harmless error, both generally, and specifically as to the willful and malicious misappropriation finding. *ADA II* at 5. But the appellate court shifted the burden to Burien Toyota to establish harmless error, rather than placing the burden on Larson to show prejudice arising from the error it raised. *Id.* at 5-6. That inverted analysis arises from incorrect and harmful holdings in *Jones*, discussed *infra*. Burien Toyota preserved its right to raise this issue. BR 27-28. Only this Court can correct *Jones*.

E. The appellate court reversed itself *sub silentio*, stating that plaintiffs now must prove sales attributable to a misappropriation, rather than just sales.

Offering an unnecessary advisory opinion on remand, the *ADA II* court opined that the UTSA jury instruction must require

Burien Toyota to prove “sales attributable to the trade secret.” **ADA II** at 7-9. As further discussed *infra*, this is directly contrary to **Petters**, RTUC § 45, *com. f*, and even its own decision in **ADA I**.

F. **The appellate court shifted the burden to Burien Toyota to provide a perfect instruction on “malicious,” ignoring that Larson’s proposed instruction was redundant and legally incorrect.**

In a second advisory opinion, the court opined the “malicious” instruction (Inst. 9) must include “ill will or improper motive.” **ADA II** at 10-15. The appellate court failed to acknowledge that Larson did not proffer a correct instruction. *Id.*; see BR 16-19. It also failed to recognize that Inst. 8 (on “willful” – which the appellate court found correct) and Inst. 9 (“without just cause or excuse”) together permitted Larson to argue its theory of the case. See BR 19-21.

REASONS THIS COURT SHOULD ACCEPT REVIEW

A. **This Court’s 5-4 *Jones* decision requiring trial courts to conduct a *Burnet* analysis on the record when a party suddenly discloses unidentified witnesses during trial is both incorrect and harmful, obligating this Court to correct its holding. (RAP 13.4(b)(4))**

This Court’s 5-4 decision in ***Jones*** is both incorrect and harmful. See, e.g., ***In re Stranger Creek & Trib.***, 77 Wn.2d 649, 466 P.2d 508 (1970) (overruling two longstanding precedents as incorrect and harmful, while holding that *stare decisis* is not absolute); BR 27-28. Requiring trial courts to conduct a ***Burnet***

analysis on the record when a defendant first discloses witnesses *during trial* results in great confusion and usually, great injustice. This Court should grant review to correct this situation.

While **Jones** affirmed the jury's verdict 9-0, the Court split on whether **Burnet** applies during trial. Compare **Jones**, 179 Wn.2d at 340-41 (court abused its discretion in failing to make some **Burnet** findings) (Gordon McCloud, J., writing for four Justices and a *pro tem* Judge – Justice Wiggins recused) with *id.* at 372 (no abuse of discretion in “requiring a party who discloses witnesses after the beginning of trial to show good cause why the witnesses should be allowed to testify”) (González J., writing for four Justices). The Concurrence puts the burden where it belongs: on the violator.

The injustice here is patent. Burien Toyota successfully proved a trade secret and its misappropriation in the first trial. It appealed an instructional error requiring Burien Toyota to prove not just sales – as **Pettors**, the RTUC § 45, *com. f*, and **ADA I** require – but “damages from sales attributable to the use of a trade secret.” Burien Toyota succeeded, and on remand also proved that Butler and Larson's misappropriation was willful and malicious, receiving damages and fees. Two trials, one appeal, three victories.

Yet solely due to the so-called **Burnet** error arising from Larson's unconscionable trial tactics blatantly violating court rules, Burien Toyota now faces a *third* trial – this time under a very similar jury instruction to the one that **ADA I** found prejudicial error. As the **Jones** Concurrence correctly recognized, there is little doubt that Larson's violations should result in sanctions *against Larson*; but here, the Court of Appeals has managed to sanction *Burien Toyota* for them. This topsy-turvy "justice" is incorrect and harmful.

Many courts have struggled with **Burnet** over the last two decades.² But **Jones** is just five years old; it has already been distinguished three times (two of which are published opinions); and it has been "followed" only 15 times.³ Of those 15 decisions, only five are precedential published opinions. Two of those are dependency cases, discussed *infra*. The other three are **Farah v. Hertz Transp., Inc.**, 196 Wn. App. 171, 383 P.3d 552 (2016); **Farrow v. Alfa Laval, Inc.**, 179 Wn. App. 652, 319 P.3d 861 (2014); and this Court's **Keck v. Collins**, 184 Wn.2d 358, 357 P.3d 1080 (2015).

² LEXIS lists 256 citing decisions, with 19 decisions "distinguishing" it, and 65 decisions "following" it.

³ Again, these are LEXIS numbers covering the 61 times **Jones** is "cited."

In *Farah*, the trial court excluded a trial exhibit on improper grounds. In *dicta*, the *Farah* court raised *Burnet* and *Jones sua sponte*, reaching the dubious conclusion that excluding one trial exhibit was a “severe sanction” triggering *Burnet*. 196 Wn. App. at 183. The self-evident error in this analysis was confirmed when the appellate court found harmless error, where the exhibit was merely cumulative. Reason dictates that excluding one cumulative trial exhibit cannot be a “severe sanction” under *Burnet*.

In *Farrow*, the appellate court again raised *Burnet* and *Jones sua sponte* in *dicta*, confirming a concession that a ruling excluding evidence could not be an alternative ground to affirm because no *Burnet* analysis was done. 179 Wn. App. at 664 n.8. This “springing” *sua sponte Burnet* analysis, while not truly significant in *Farrow*, could be devastating for parties caught unawares.

In *Keck*, this Court held that *Burnet* applies to striking an expert declaration on summary judgment. While many trial lawyers and judges were apparently surprised by this holding, it followed relatively easily from *Blair v. TA-Seattle E. No. 176*, 171 Wn.2d 342, 347-48, 254 P.3d 797 (2011) (applying *Burnet* to a court striking an expert witness, and *then* granting summary judgment).

But **Keck** failed to perform the harmless error analysis required in **Jones**. This further undermined uniformity in the law.

The **Jones** harmless error analysis is a source of confusion. As in **Keck**, the appellate court simply omitted any harmless-error analysis in **Porter v. Kirkendoll**, 5 Wn. App. 2d 686, 421 P.3d 1036 (2018). And in **Dependency of M.P.**, the court stated that it could not determine whether the exclusion of testimony was harmless, yet it reversed the judgment due to the absence of **Burnet** findings. 185 Wn. App. 108, 118, 340 P.3d 908 (2014).

Cases like these expose flaws in the **Jones** harmless-error regime. Normally, the party whose evidence was excluded would be required to make an offer of proof to preserve the error. And a party claiming a **Burnet** error should also have to object *in the trial court* to the absence of **Burnet** findings. But **Burnet** makes the exclusion a *per se* abuse of discretion, and **Jones** looks only at *harmless error*, so the **Dependency of M.P.** court failed to even notice that the winning party had failed to preserve any error.

Compare this with **Dependency of Lee**, 200 Wn. App. 414, 404 P.3d 575 (2017). There, the trial court refused to hear from an expert first disclosed on the ninth day of trial during the first (fact-finding) phase of the trial, but agreed to hear from her during the

second (dispositional) phase. 200 Wn. App. at 430-31. The party whose expert was excluded made an offer of proof. *Id.* at 431. The appellate court found a ***Burnet*** error and declined to hold it harmless, where the trial court discounted the expert's phase-two testimony based on its phase-one findings. *Id.* at 433.

Two dependencies, two reversals, totally opposite reasoning. The unpublished decisions betray even greater disarray, but neither time nor space permit full discussion here. Applying ***Burnet during trial*** places an enormous burden on trial judges, while relieving the very parties who commit pretrial disclosure violations from their duty to preserve the error – and *rewarding* them with a new trial instead of sanctioning them. This Court should grant review.

B. The Court of Appeals erroneously failed to hold that excluding four witnesses first identified during trial was harmless error as to the jury's willful and malicious misappropriation finding. (RAP 13.4(b)(2) & (4))

Even assuming that ***Jones*** is correct and harmless, it requires a correct harmless-error analysis. 179 Wn.2d at 338. Here, the appellate court failed to look at whether Butler and Larson could establish prejudice, instead requiring *Burien Toyota* to show harmless error. Again, justice is turned on its head.

Burien Toyota conceded error in failing to make *Burnet* findings solely as to damages.⁴ But nothing about the four absent witnesses' testimony could possibly have affected the jury's verdict that *the misappropriation* was willful and deliberate. See, e.g., RCW 19.108.030 ("If willful and malicious misappropriation exists, the court may award exemplary damages"); RCW 19.108.040 ("If . . . willful and malicious misappropriation exists, the court may award reasonable attorney's fees"). The excluded witnesses knew nothing about the misappropriation: Butler and Larson took the Sobel List without their knowledge long before they bought their cars.

Burien Toyota's only trial theory on willful and malicious misappropriation was that *Butler and Larson knew they were stealing Burien Toyota's trade secrets* because *Larson protects its own customer list as a trade secret*. The jury agreed. Yet the appellate court created a new theory: that the way Butler and Larson *used* the trade secrets is somehow relevant and that the excluded witnesses *might* have something to say about *that*, so their exclusion was not harmless! Injustice reigns.

⁴ Larson inferred that the jury's verdict awarded damages for sales to the four excluded witnesses, where the total damages closely approximate four times Burien Toyota's per-sale damages request.

Reversing the jury's verdict that Butler and Larson willfully and maliciously misappropriated Burien Toyota's trade secret conflicts with any known harmless-error analysis, including that in **Jones** itself. This Court should grant review to correct this conflicting, erroneous, and unjust published opinion.

C. The Court of Appeals' advisory opinion on instructing the jury under the UTSA regarding "sales attributable to the use of a trade secret" conflicts with other appellate decisions and even the appellate court's own prior decision in this case. (RAP 13.4(b)(2))

Although not required to do so, the Court of Appeals offered an advisory opinion on how to instruct the jury under the UTSA regarding "sales attributable to the use of the trade secret." **ADA II** at 7-9. This advice conflicts with other decisions and even **ADA I**. This Court should grant review.

As explained *supra*, **Pettters**, the RTUC § 45, *com. f.*, and **ADA I**, required Burien Toyota "to prove only 'sales.'" **ADA I** at 7. But **ADA II** contradicted this authority, and its own prior opinion, requiring Burien Toyota to prove "sales attributable to the misappropriation." **ADA II** at 9. **Pettters**, 151 Wn. App. at 164-65, asks this question:

[O]nce these things [a trade secret and its misappropriation] are established, how is the burden of proving the proper amount of restitutionary unjust enrichment damages allocated as between the plaintiff and defendant?

Pettters answers with RTUC § 45, *com. f (id.)*:

The plaintiff has the burden of establishing the defendant's sales; the defendant has the burden of establishing any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits. [Emphasis added.]

Consistent with **Petters**, RTUC § 45, *com. f*, and WPI 351.01, the trial court gave Inst. 7 (CP 2198, in relevant part):

Burien Toyota claims that as a result of the misappropriation of the trade secret, Mr. Butler and/or Larson Toyota have been unjustly enriched.

On the claim of unjust enrichment resulting from the misappropriated trade secret, Burien Toyota has the burden of proving the following proposition:

That, as a result of the misappropriation of the trade secret, Mr. Butler and/or Larson Toyota received money or benefits that in justice and fairness belong to Burien Toyota. Plaintiff has the initial burden of proving defendants' sales. The burden then shifts to Mr. Butler and/or Larson Toyota to establish any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits. [Emphases ours.]

This instruction says three times that Burien Toyota has the burden to prove that “as a result of the misappropriation of the trade secret,” Larson was unjustly enriched. Indeed, the trial court simply joined provisions from Larson’s own proposed Inst. 6, and **Petters**’ adopted RTUC § 45, *com. f*, in creating Inst. 7. See CP 1600. And the Special Verdict Form expressly required the jury to find *only* “profits on sales attributable to the use of the trade secret.” CP 2222.

The Court of Appeals erred in requiring the instructions on remand to say – for a fifth time – that Burien Toyota had to prove sales attributable to the use of its trade secret. This grossly overemphasizes the defense theory, placing a practically insurmountable burden on the plaintiffs. The Court should grant review and reverse this incorrect advisory opinion to prevent yet a third appeal and fourth trial.

D. The Court of Appeals' advisory opinion on instructing the jury under the UTSA regarding "malicious" misappropriation conflicts with other appellate decisions. (RAP 13.4(b)(2))

The Court of Appeals rendered another unnecessary and incorrect advisory opinion on instructing the jury under the UTSA, this one regarding "malicious" misappropriation. Its decision conflicts with other appellate decisions. This Court should grant review.

A trial court is under no obligation to give misleading instructions or instructions not supported by authority. **McCluskey v. Handorff-Sherman**, 68 Wn. App. 96, 110, 841 P.2d 1300 (1992) (citation omitted). Rather, the language of instructions is left to the trial court's discretion. **McCluskey**, 68 Wn. App. at 110 (citation omitted). The appellate court invades that discretion.

Larson proposed an improper instruction (CP 1602):

“Malicious” is defined as being characterized by, or involving, malice; having, or done with, wicked, evil or mischievous intentions or motives; wrongful and done intentionally without just cause or excuse as a result of ill will. [Emphasis ours.]

Saying that “malicious” involves malice is circular and unhelpful. Importing religious concepts like “evil,” or misleading words like “wicked,” “mischievous,” or “ill will” is confusing and unnecessary. Saying that a *misappropriation* is “wrongful” is redundant. See, e.g., RCW 19.108.010(2)(a) (“Misappropriation” means: “Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means”). Saying that “malicious” is “done intentionally” – where willful is already defined as intentional – is similarly redundant.

That leaves “without just cause or excuse” – which is the trial court’s Inst. 9. CP 2200. Indeed, that instruction is consistent with *Petters*, 151 Wn. App. at 173 (“BLACK’S LAW DICTIONARY 977 (8th ed. 2004) defines ‘malicious’ as ‘1. Substantially certain to cause injury. 2. Without just cause or excuse’”). Larson sought no “substantially certain” language. The appellate court otherwise has accepted that “malicious” means without just cause or excuse. Yet now it says it must *also* mean “as the result of ill will or improper motive.” **ADA II** at 15. That is a conflict.

ADA II also conflicts with **Harris v. Burnett's** holding that reversible "error is not present unless the preferable instruction has been submitted." 12 Wn. App. 833, 843, 532 P.2d 1165 (1975). **ADA II** dismisses **Harris** in a footnote, saying that Larson including "as a result of ill will" in an otherwise incorrect instruction "is sufficient to meet the **Harris** burden." That obviously conflicts with **Harris**.

E. The Court of Appeals' advisory opinion on the loadstar fee award undermines the UTSA and conflicts with a great deal of appellate precedent. (RAP 13.4(b)(1), (2) & (4))

The Court of Appeals' final advisory opinion is on the loadstar fee award. **ADA II** at 15-16. Its holding undermines the UTSA and its intent to encourage USTA claims in conflict with a great deal of appellate precedent. This Court should grant review.

This Court, and the Court of Appeals, have held that they will "not reverse the amount [of a UTSA fee award] unless the trial court clearly abused its discretion." **Thola v. Henschell**, 140 Wn. App. 70, 89, 164 P.3d 524 (2007) (citing **Boeing Co. v. Sierracin Corp.**, 108 Wn.2d 38, 61-62, 738 P.2d 665 (1987); **Ed Nowogroski Ins., Inc. v. Rucker**, 88 Wn. App. 350, 360, 944 P.2d 1093 (1997), *aff'd*, 137 Wn.2d 427 (1999)). In **Sierracin** – a case from over 30 years ago – this Court affirmed a UTSA fee award of over \$350,000, in addition to over \$1.3 million in exemplary damages. 108 Wn.2d at 44, 66.

That case did not involve two trials and two appeals. The trial court's fee award here was not an abuse of its broad discretion.

Yet the appellate court implied that the fee award was too high under its decision in **Berryman v. Metcalf**, 177 Wn. App. 664, 312 P.3d 745 (2013). **ADA II** at 15-16. **Berryman** says that courts must examine "billing judgment" in light of the *amount in controversy* and that courts "will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small." **Berryman**, 177 Wn. App. at 657, 660 (quoting **Mahler v. Szucs**, 135 Wn.2d 398, 433, 957 P.2d 632 (1998); **Scott Fetzer Co. v. Weeks**, 122 Wn.2d 141, 156, 859 P.2d 210 (1993)). But here, *the amount in controversy was over \$3.5 million*, making a roughly \$610,000 fee award – for two trials and a prior appeal – eminently reasonable: the requested fees are only 17% of the amount at stake.

The appellate decision suggests that hindsight is dispositive of UTSA fee awards. **ADA II** at 15-16 (for "proportionality analysis, the amount in controversy necessarily requires consideration of the actual amount recovered on a claim") (citing **Travis v. Wash. Horse Breeders Ass'n, Inc.**, 111 Wn.2d 396, 409-10, 759 P.2d 418 (1988); **Singleton v. Frost**, 108 Wn.2d 723, 731, 742 P.2d 1224 (1987)). Yet **Travis** says that "the amount of the award is not in itself decisive."

111 Wn.2d at 410. And many courts hold that a disparity between the recovery and the fees is not dispositive.⁵

This decision deprives Burien Toyota – and other victims of willful and malicious trade secret misappropriations – of their right to a jury trial. If the fees are already too high, any fees for a third trial might be found too much. The injustice is patent.

CONCLUSION

The appellate decision strikes at the heart of the UTSA. This Court should grant review.

RESPECTFULLY SUBMITTED this 20th day of February 2019.


MASTERS LAW GROUP, P.L.L.C.

Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
ken@appeal-law.com
shelby@appeal-law.com
Attorneys for Petitioners

⁵ See, e.g., **Brand v. Dep't of Labor & Indus.**, 139 Wn.2d 659, 663-64, 989 P.2d 1111 (1999) (approving \$25,000 fee on ~\$3,000 recovery in light of the fee statute's underlying purpose); **Fiore v. PPG Indus., Inc.**, 169 Wn. App. 325, 332, 279 P.3d 972, 977 (2012) (affirming ~\$450,000 fee award, where jury awarded ~\$12,000); **Mayer v. City of Seattle**, 102 Wn. App. 66, 83, 10 P.3d 408 (2000) ("the trial court may award an amount in attorney fees that is disproportionate to the underlying judgment, provided that the court follows the lodestar method").

APPENDIX A

ADA Motors, Inc. v. Butler, No. 70047-2-1
(Aug. 18, 2014) (*ADA I*)

2014 AUG 18 AM 11:40

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

ADA MOTORS, INC., dba BURIEN)
TOYOTA, a Washington corporation,)
Appellant/Cross Respondent,)

v.)

DAVID L. BUTLER and ELIZABETH)
BUTLER, and their marital community,)
and THE ROBERT LARSON)
AUTOMOTIVE GROUP, INC. a)
Washington corporation, dba LARSON)
TOYOTA,)
Respondents/Cross Appellants.)

No. 70047-2-1

UNPUBLISHED OPINION

FILED: August 18, 2014

VERELLEN, A.C.J. — A plaintiff alleging misappropriation of trade secrets and claiming unjust enrichment bears the initial burden of establishing the defendant's sales.¹ Then the burden shifts to the defendant to establish any portion of sales not attributable to the trade secret and any expenses to be deducted in determining net profits.² Here, the jury instruction that Burien Toyota had the initial burden to prove “damages from sales” rather than “sales” misstated the law and presumptively prejudiced Burien Toyota.

¹ Petters v. Williamson & Assocs., Inc., 151 Wn. App. 154, 165, 210 P.3d 1048 (2009) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 45 cmt. f., at 516-17 (1995)).

² Id.

Therefore, we remand for a new trial on the issues of damages and unjust enrichment. If the jury determines that the misappropriation of the trade secret was wilful and malicious, Burien Toyota may seek an award of attorney fees and costs both for proceedings in the trial court and for this appeal. Butler and Larson Toyota's issues on cross appeal do not warrant any relief.

FACTS

David Butler began working at Burien Toyota after he retired from a long career as a Nordstrom salesman. He alleges that he brought a list of his Nordstrom customers with him to Burien Toyota and gave it to Sobel & Associates, a third party that contracted with Burien Toyota to provide direct marketing materials to customers on behalf of its sales people. Burien Toyota alleges it also allowed Butler to select customers from its database for participation in Sobel's direct marketing program.

After eight years, Butler left Burien Toyota and began working for Larson Toyota. He took a list of customers with him. The parties refer to this as the "Sobel list," but disagree whether the list included only Butler's Nordstrom customers or extended to customers and contacts developed while Butler worked for Burien Toyota. Burien Toyota alleges that once at Larsen Toyota, Butler contacted all of the customers on the Sobel list. Burien Toyota sued Butler and Larson Toyota for breach of contract; accounting; unjust enrichment; breach of the duty of loyalty; violation of the uniform trade secrets act; tortious interference with business expectancies; injunctive relief, and attorney fees.

The case eventually went to trial on only the trade secrets claim. By special verdict form, the jury found that the Sobel list was a "trade secret" belonging to Burien

Toyota and that both Larson Toyota and Butler misappropriated that trade secret. But the jury expressly concluded that Burien Toyota was not financially harmed.

Burien Toyota appeals. Butler and Larson Toyota (collectively, Butler) cross appeal.

DISCUSSION

Jury Instructions on Unjust Enrichment on a Trade Secrets Claim

Burien Toyota argues that the trial court's instructions to the jury regarding the burden of proof for unjust enrichment misstated Burien Toyota's burden of proof. We agree.

"Jury instructions are reviewed de novo for errors of law."³ Instructions are sufficient "when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law."⁴ "If any of these elements are absent, the instruction is erroneous."⁵ Prejudice is presumed if the instruction contains a clear misstatement of law, but prejudice must be demonstrated if the instruction is merely misleading.⁶ An instruction is misleading if it permits both an interpretation that is, arguably, a correct statement of the law and an interpretation that is an incorrect statement of the law.⁷

³ Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 860, 281 P.3d 289 (2012).

⁴ Id. (quoting Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)).

⁵ Id.

⁶ Id.

⁷ Id. at 876.

In Petters v. Williamson & Associates, Inc., we adopted the *Restatement (Third) of Unfair Competition* § 45 comment f and held that in a trade secrets claim alleging unjust enrichment, the plaintiff has the initial burden of establishing the defendant's sales, and then the burden shifts to the defendant to establish any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits.⁸ This approach "places on the party in possession of the relevant information—the defendant—the burden of demonstrating which portion, if any, of the revenue obtained through the transfer of a trade secret was not, in fact, attributable to the transfer."⁹

Here, the trial court gave Instruction 8, an elements instruction that also included the burden of proof for damages and unjust enrichment:

TRADE SECRETS-BURDEN OF PROOF

On the claim of misappropriated trade secrets, Burien Toyota has the burden of proving each of the following propositions:

(1) That Burien Toyota had a trade secret;

(2) That Mr. Butler and/or Larson Toyota misappropriated Burien Toyota's trade secret; and

(3)(a) That Mr. Butler and/or Larson Toyota[']s misappropriation was a proximate cause of damages to Burien Toyota (Actual Damages);

and/or

(3)(b) That, as a result of the misappropriation, Mr. Butler and/or Larson Toyota received money or benefits that in justice and fairness belong to Burien Toyota (Unjust Enrichment). Under (3)(b) (Unjust Enrichment), **plaintiff has the initial burden of proving damages from sales** attributable to the use of a trade secret. The burden then shifts [to]

⁸ 151 Wn. App. 154, 165, 210 P.3d 1048 (2009) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 45 cmt. f., at 516-17 (1995)).

⁹ Id.

Mr. Butler and/or Larson Toyota to establish any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits.

If you find from your consideration of all the evidence that proposition (1), (2) and either (3)(a) or (3)(b) have been proved, then your verdict should be for Burien Toyota. On the other hand, if you find that propositions (1) nor (2) nor alternatives (3)(a) or (3)(b) have not been proved, your verdict should be for Mr. Butler and Larson Toyota.^[10]

The court also gave Instruction 18 articulating the requirements to prove damages:

TRADE SECRETS-DAMAGES

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for Burien Toyota on its claim, you must determine Burien Toyota's damages. The Plaintiff, Burien Toyota, has the **burden of proving damages. Damages means the amount of money that will reasonably and fairly compensate Burien Toyota for any injury you find was proximately caused by Mr. Butler and/or Larson Toyota.** Plaintiff may recover actual damages in the form of past and future lost profits as well as related expenses and may recover restitution for unjust enrichment, but the law does not permit the plaintiff to recover twice for the same damages. Thus, you may include as damages both plaintiff's lost profits as actual damages and defendants' gain as unjust enrichment only if and to the extent that they do not overlap in any way.^[11]

Burien Toyota specifically objected to the inclusion of the phrase "damages from sales" rather than "sales" in Instruction 8, claiming that it improperly shifted the burden of proof from the defendants back to Burien Toyota. Burien Toyota also objected to Instruction 18 on the same basis.

Despite the trial court's efforts to apply Petters and the *Restatement*, inclusion of the language "damages from sales" rather than just "sales" in Instruction 8 was an incorrect statement of the law. Petters holds that the plaintiff's initial burden is to prove

¹⁰ Clerk's Papers at 555 (emphasis added).

¹¹ Id. at 565 (emphasis added).

only "sales," not "damages from sales," before the burden shifts to the defendant. Instruction 18 compounds the impact of the misstatement in Instruction 8 by expressly stating that Burien Toyota has the burden to prove "damages" defined as something more than just sales.¹² Therefore, insertion of the word "damages" into Instruction 8 misstates the law by requiring Burien Toyota to prove something beyond sales. The instruction was not merely misleading. Because the error was a misstatement of the law, prejudice is presumed.

Butler's arguments to the contrary are not persuasive. First, he contends that the jury instructions at issue here should be reviewed for an abuse of discretion. While the precise wording of an instruction is within the trial court's discretion, a claimed error of law in a jury instruction is reviewed de novo.¹³

Second, Butler argues that insertion of the language "damages from" may be unartful, but when the instructions are considered as a whole, they adequately track both Petters and Washington Pattern Instruction (WPI) 351.01.¹⁴ But the deviation from

¹² The concluding sentences of the second paragraph of Instruction 18 address the concept that a plaintiff can recover both actual damages (lost profits and related expenses) as well as restitution for unjust enrichment (defendants' gains) so long as the actual damages and restitution do not overlap. But that does not resolve the dilemma resulting from defining the plaintiff's initial burden of proof for unjust enrichment in terms of "damages from sales" in Instruction 8, especially as impacted by Instruction 18's broad definition of the plaintiff's burden of proof for damages.

¹³ Housel v. James, 141 Wn. App. 748, 758, 172 P.3d 712 (2007).

¹⁴ The WPI suggests the following instruction:

On the claim of misappropriated trade secrets, (name of plaintiff) has the burden of proving each of the following propositions:

- (1) That (name of plaintiff) had a trade secret;
- (2) That (name of defendant) misappropriated (name of plaintiff's) trade secret; and

Petters and the WPI alters the fundamental meaning of the initial burden of proof of the plaintiff.

Third, Butler contends that the burden to prove sales is the same as the burden to prove damages from sales. This is not accurate, especially in view of the definition of damages included the Instruction 18.

Fourth, Butler argues that Petters can be read to hold that the burden to prove unjust enrichment is the same as the burden to prove an "actual loss," i.e., damages. But this ignores the core holding of Petters, which expressly adopts comment f of the *Restatement*. The plaintiff's initial burden in proving unjust enrichment for trade secret misappropriation is to prove only "sales." The burden to prove actual damages is different. Instruction 8 misstated the law.

Fifth, at oral argument, Butler asserted that the trial court inserted "damages from sales" rather than "sales" in order to incorporate Burien Toyota's burden to prove that

[(3) That (name of defendant's) misappropriation was a proximate cause of damages to (name of plaintiff)];

[(3) That, as a result of the misappropriation, (name of defendant) received money or benefits that in justice and fairness belong to (name of plaintiff)].

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 351.01, at 449-50 (2012).

Under the "Unjust enrichment" heading in the comment on WPI 351.01, it states that "[u]nder this unjust enrichment alternative, the Court of Appeals has held that, once the plaintiff proves sales attributable to the use of a trade secret, the burden shifts to the defendant to establish 'any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits.'" *Id.* at 451-52 (quoting Petters, 151 Wn. App. at 165).

the misappropriation of a trade secret proximately caused the sales at issue. Nothing in the record reveals such an intent. And a “damages from sales” instruction remains inconsistent with the burden shift outlined in Petters and the *Restatement*. It is also inconsistent with the underlying policy of requiring the defendant to establish any portion of the sales not attributable to misappropriation of the trade secret because the defendant possesses such information.¹⁵

Finally, Butler argues that even if Instruction 8 is erroneous, any error is harmless because Burien Toyota failed to prove any sales.¹⁶ Because the misstatement of law in Instruction 8 is presumed prejudicial, the harmless argument fails.

Cross Appeal

Butler’s arguments on cross appeal are not compelling. First, Butler argues that the trial court erred in denying his motion for summary judgment on the trade secrets claim. But if a trial court denies summary judgment based on the presence of material, disputed facts, the summary judgment motion will not be reviewed on appeal after a trial on the merits.¹⁷ Here, the trial court denied Butler’s summary judgment motion because there were issues of fact as to whether there was a trade secret and whether it was misappropriated. Therefore, we do not review the summary judgment motion.

¹⁵ See Petters, 151 Wn. App. at 165 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 45 cmt. f., at 516-17 (1995)).

¹⁶ Burien Toyota vigorously argues it presented credible evidence of Larson Toyota’s sales by comparing lists of car sales provided by Larson Toyota to its own customer database. Butler challenges the evidence of sales relied upon by Burien Toyota. But in the absence of a more comprehensive record, Butler cannot support its argument that the evidence of sales was inadequate to go to the jury.

¹⁷ Weiss v. Lonquist, 173 Wn. App. 344, 354, 293 P.3d 1264, review denied, 178 Wn.2d 1025 (2013).

Second, Butler argues that the trial court erred in denying his motion for a directed verdict on the trade secrets claim. But Butler has not met his burden to provide a record of the evidence presented at trial.¹⁸

Third, Butler argues that the trial court abused its discretion in denying his motion in limine to exclude as irrelevant certain documents and employee handbook provisions he signed. Granting or denying a pretrial motion to exclude evidence is a matter within the trial court's discretion.¹⁹ Butler contends there was inadequate consideration to make those documents binding and that the documents related only to federal privacy laws. But the trial court decided the jury should weigh testimony that the documents reflected Burien Toyota's efforts to protect its trade secrets as well as satisfy federal privacy laws. Butler contends that only designated federal agencies have the authority to enforce the federal privacy laws and that those laws do not allow Burien Toyota to rely on the documents at issue for a trade secrets claim. But he cites no persuasive authority that the documents could not serve such a dual purpose.²⁰

Finally, Butler challenges the trial court's rejection of several of his proposed jury instructions. He argues that the trial court should have given his two proposed burden of proof instructions rather than combining both into Instruction 17. He contends that the combined instruction unduly emphasized his burden of proof by mentioning it in both paragraphs of the instruction, while only mentioning Burien Toyota's burden of proof in

¹⁸ The belated offer at oral argument to supplement the record comes too late.

¹⁹ Douglas v. Freeman, 117 Wn.2d 242, 255, 814 P.2d 1160 (1991).

²⁰ The only authority he cites for this proposition is an unpublished opinion from a United States District Court in Illinois.

the first paragraph.²¹ But with only minor differences, Butler's two proposed instructions mirror the language of Instruction 17. Because the precise wording of a jury instruction is within the broad discretion of the trial court, Butler does not establish any basis for relief.²²

Butler also argues that the trial court erred in failing to give his proposed instruction that Burien Toyota had no right to privately enforce federal customer privacy laws, a theory he contends is supported by the evidence presented at trial. But he has not provided an adequate record of the evidence that was presented at trial and does not establish that Burien Toyota ever asserted any right to privately enforce federal privacy laws. Butler fails to demonstrate any basis for relief based upon the jury instructions.

²¹ Instruction 17 stated:

Except for defendants' equitable estoppel and "unclean hands" affirmative defenses, when it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question that the proposition on which that party has the burden of proof is more probably true than not true.

The defendants have the burden of proving their equitable estoppel and "unclean hands" affirmative defenses by a different standard of proof, by clear, cogent and convincing evidence. Proof by clear, cogent and convincing evidence means that the element must be proved by evidence the carriers [sic] greater weight and is more convincing than a preponderance of evidence. Clear, cogent and convincing evidence exists when occurrence of the element has been shown by the evidence to be highly probable. However, it does not mean that the element must be proved by evidence that is convincing beyond a reasonable doubt.

Clerk's Papers at 564.

²² House, 141 Wn. App. at 758.

Attorney Fees on Appeal

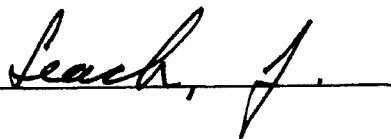
Both Burien Toyota and Butler request attorney fees and costs on appeal. Butler did not prevail on appeal, and we deny his request. Whether Burien Toyota is entitled to fees depends on whether Butler's misappropriation of the trade secret was wilful and malicious.²³ The jury did not reach that question on the special verdict form.

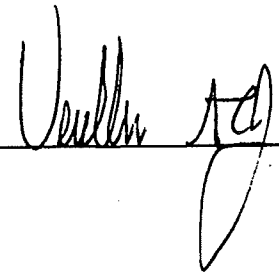
On remand, if the jury finds that Butler's misappropriation of the trade secret was wilful and malicious, then the trial court may address Burien Toyota's request for attorney fees and costs, including any fees incurred on this appeal.

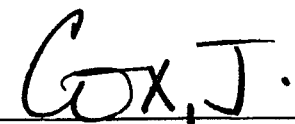
CONCLUSION

We reverse and remand for a trial on the issue of damages and unjust enrichment resulting from Butler's misappropriation of Burien Toyota's trade secret. If the jury determines that Butler's misappropriation was wilful and malicious, then the trial court may consider an award of attorney fees both for proceedings in the trial court and in this appeal.

WE CONCUR:







²³ RCW 19.108.040 provides that "[i]f a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or wilful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party."

APPENDIX B

ADA Motors, Inc. v. Butler, No. 76613-9-1
(Dec. 31, 2018) (***ADA II***)

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

ADA MOTORS, INC., dba BURIEN
TOYOTA, a Washington corporation,

Respondent,

v.

DAVID L. BUTLER and ELIZABETH
BUTLER, and THE ROBERT LARSON
AUTOMOTIVE GROUP, INC., a
Washington corporation, dba
LARSON TOYOTA,

Appellants.

No. 76613-9-1
consolidated with
No. 76614-7-1

PUBLISHED OPINION

FILED: December 31, 2018

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2018 DEC 31 AM 8:48

VERELLEN, J. — Before a trial court excludes witnesses for a party's failure to list them in a joint statement of evidence, the court must consider the factors identified in Burnet v. Spokane Ambulance.¹ Because the trial court excluded four witnesses without considering the Burnet factors and because the error was not harmless, this matter must be remanded for a new trial.

Although we need not address the additional issues raised on appeal, we take this opportunity to clarify that, as to damages, the plaintiff's initial burden of

¹ 131 Wn.2d 484, 933 P.2d 1036 (1997).

proof in an unjust enrichment claim under the Uniform Trade Secrets Act (UTSA)² is to establish sales attributable to the use of a trade secret. Then the burden shifts to the defendant to prove that any of those sales are not attributable to the use of a trade secret. And for the "willful and malicious" jury instructions, "willful" is adequately defined as "voluntary or intentional" and "malicious" is best defined to include "as a result of ill will or improper motive." Finally, if damages are recovered on remand and the jury determines the conduct was willful and malicious, resulting in an award of attorney fees, the trial court must expressly address any disproportionality between the amount of the fee award and the amount in issue.

FACTS

Prior to February 2003, Butler sold shoes at Nordstrom and developed a list of his customers and contacts. In February 2003, Butler left Nordstrom and began selling cars at Burien Toyota. Burien Toyota connected Butler with a marketing firm to help him maintain his customer list.

In March 2011, Butler left Burien Toyota and began selling cars at Larson Toyota (Larson). Butler took a 2009 version of the customer list with him. Butler contacted the customers to announce he was working at Larson. On April 4, 2011, Burien Toyota sent a cease and desist letter to Butler and Larson, alleging the customer list was Burien Toyota's trade secret. Larson flagged the customers on the list as "dead clients" and ceased all efforts to contact them.

² Ch. 19.108 RCW.

On April 25, 2011, Burien Toyota sued Larson, alleging breach of contract, unjust enrichment, breach of the duty of loyalty, violation of the UTSA, and tortious interference with business relationships. The court dismissed all but the UTSA claim, which proceeded to trial. During discovery, Larson produced a list of its vehicle sales since Butler started working at Larson Toyota, regardless of the salesperson involved. Burien Toyota produced a list of 200 matches between its customer database and Larson's sales list. In the first trial, the jury found the customer list was Burien Toyota's trade secret and that Larson misappropriated it, but the jury found the misappropriation did not financially harm Burien Toyota. Burien Toyota appealed. This court remanded the case for a new trial on unjust enrichment damages due to a jury instruction error.³

On remand for the second trial, the trial court reopened discovery. Burien Toyota produced a list of 412 matches between its database and the updated Larson sales list. Burien Toyota claimed \$4,305.66 in unjust enrichment damages per customer, totaling \$1,773,934.96. Burien Toyota also claimed an equal amount of damages for future unjust enrichment. Larson presented evidence that of the 412 matches identified by Burien Toyota, only five individuals actually purchased cars at both dealerships. Larson attempted to call the five individuals to testify, but the court excluded four of them because Larson had not properly listed them as potential witnesses. At the end of the second trial, the jury found

³ ADA Motors, Inc. v. Butler, No. 70047-2-1 (Wash. Ct. App. Aug. 18, 2014) (unpublished), <http://www.courts.wa.gov/opinions/pdf/700472.pdf>.

Larson was unjustly enriched and \$12,496.12 of Larson's profits on sales were "attributable to the use of a trade secret."⁴ The jury also found Larson's misappropriation of the customer list was willful and malicious.

Larson moved for a new trial under CR 59 based on the court's exclusion of the four witnesses. The court denied the motion. Because the jury found willful and malicious conduct by Larson, the court doubled the jury award and awarded attorney fees as allowed by the UTSA. Larson appeals.

ANALYSIS

Witness Exclusion

We review a trial court's denial of a motion for a new trial for abuse of discretion.⁵ A trial court abuses its discretion if its decision is based on untenable grounds or untenable reasons.⁶

Larson moved for a new trial under CR 59(a)(1) and (8), which provide that a court may grant a new trial due to:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

....

(8) Error in law occurring at the trial and objected to at the time by the party making the application.

⁴ Clerk's Papers (CP) at 2384.

⁵ Brundridge v. Flour Fed. Svcs., Inc., 164 Wn.2d 432, 454, 191 P.3d 879 (2008).

⁶ Teter v. Deck, 174 Wn.2d 207, 215, 274 P.3d 336 (2012).

Larson argued the exclusion of the four witnesses he failed to identify in his joint statement was error. He submitted declarations from the witnesses indicating they would have testified that they bought cars from Larson for reasons unrelated to the misappropriation and that they were not contacted or solicited prior to purchasing cars. We conclude a new trial is warranted.

Prior to imposing a severe discovery sanction such as excluding witnesses, the court must explicitly consider the factors from Burnet of whether a lesser sanction would probably suffice, whether the violation at issue was willful or deliberate, and whether the violation substantially prejudiced the opponent's ability to prepare for trial.⁷ A Burnet error is harmless where erroneously excluded evidence is irrelevant and/or "merely cumulative."⁸

Here, Burien Toyota acknowledges that the lack of Burnet findings "is reversible error as to the damages award."⁹ To the extent Burien Toyota suggests the Burnet error is generally harmless, there is no showing that the testimony of the four witnesses will be irrelevant or cumulative to the testimony given at trial. Burien Toyota's argument that the Burnet error is specifically harmless as to the jury determination that the misappropriation was willful and malicious also fails. Burien Toyota argues that the four witnesses' testimony is irrelevant to whether

⁷ Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 688, 132 P.3d 115 (2006).

⁸ Jones v. City of Seattle, 179 Wn.2d 322, 360, 314 P.3d 380 (2013) (witnesses testified to "virtually every specific activity cited by the excluded witnesses"; the court held the erroneously excluded testimony "that was not irrelevant was instead cumulative and its exclusion was therefore harmless")

⁹ Resp't's Br. at 22.

the misappropriation is willful and malicious, so there is no need for the jury to revisit that question on remand. But the testimony of the four excluded witnesses will address Larson's use of the misappropriated trade secret. Of course, Larson does not anticipate that their four proffered witnesses will be the source of any adverse evidence of malicious conduct, but we don't know the details of their testimony. The four witnesses may provide information material to whether the use of the trade secret was malicious.

Burien Toyota also argues that in the most recent trial, the only arguments it made about willful and malicious behavior related to how the trade secret was misappropriated, not how the trade secret was used. But Burien Toyota provides no authority that willful and malicious behavior, for purposes of trade secrets, encompasses only misappropriation and not how a trade secret was used. The question whether Larson's conduct was willful and malicious must be addressed by the jury on remand.

Therefore, we accept Burien Toyota's concession as to the damages verdict and conclude the court's failure to consider the Burnet factors was not harmless. We remand for a new trial concerning unjust enrichment damages and whether the misappropriation was willful and malicious.

We need not address additional issues raised on appeal, but we take this opportunity to provide some guidance for the third trial in this dispute.¹⁰

¹⁰ See State v. Fricks, 91 Wn.2d 391, 392, 588 P.2d 1328 (1979) ("We find two of the errors to be prejudicial, each requiring a remand for a new trial. We reach the remaining issues for the guidance of the trial court on remand."); Taylor

Jury Instructions¹¹

Larson argues jury instruction 7 misstated Burien Toyota's burden of proof. In the prior appeal, we concluded that, consistent with Petters v. Williamson & Associates, Inc.,¹² a proper damages instruction describing the plaintiff's burden in an unjust enrichment trade secret misappropriation case should not include the phrase "damages from sales." But the damages instruction given in the second trial also eliminated the phrase "attributable to the use of a trade secret." We clarify that the inclusion of the phrase "attributable to the use of a trade secret" is a more complete and precise statement of the law.

In Petters, this court adopted the Restatement (Third) of Unfair Competition approach to proving damages in cases involving misappropriation of a trade secret:

The traditional form of restitutionary relief in an action for the appropriation of a trade secret is an accounting of the defendant's profits on sales attributable to the use of the trade secret. . . . The

v. Intuitive Surgical, Inc., 187 Wn.2d 743, 753, 389 P.3d 517 (2017) ("Although we need not reach Taylor's additional claims, we reach them to provide guidance for the trial court should these issues arise on retrial.").

¹¹ We review jury instructions de novo. Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 860, 281 P.2d 289 (2012). An instruction is erroneous if it is misleading, does not allow counsel to argue their theory of the case, or when read as a whole does not properly inform the trier of fact of the applicable law. Id. (quoting Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)); Joyce v. Dep't of Corr., 155 Wn.2d 306, 323, 119 P.3d 825 (2005)). "An erroneous instruction is reversible error only if it prejudices a party. Prejudice is presumed if the instruction contains a clear misstatement of law; prejudice must be demonstrated if the instruction is merely misleading." Anfinson, 174 Wn.2d at 860.

¹² 151 Wn. App. 154, 210 P.3d 1048 (2009).

plaintiff has the burden of establishing the defendant's sales; the defendant has the burden of establishing any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits.^[13]

This approach "requires the defendant to explain why any particular portion of the money that it received as a result of the misappropriating transaction should *not* be considered an 'actual loss' suffered by the plaintiff."¹⁴ The Petters court also acknowledged "it is the burden of the party seeking relief under the Uniform Trade Secrets Act to demonstrate that such a secret has actually been misappropriated in order to have a right to any damage award."¹⁵

Before the second trial, Larson proposed the following instruction:

On the claim of misappropriated trade secrets, Burien Toyota has the burden of proving each of the following propositions:

That, as a result of the misappropriation of Burien's customer information, Mr. Butler and/or Larson Toyota received money or benefits that in justice belong to Burien Toyota. *The burden is on Burien Toyota to prove sales attributable to the use of a trade secret.* If Burien Toyota proves sales attributable to the use of a trade secret, the burden shifts to Mr. Butler and/or Larson Toyota to establish any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits.^[16]

The court declined to give this proposed instruction and opted instead to give jury instruction 7:

¹³ Id. at 165 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 45 cmt. f., at 516-17 (1995)).

¹⁴ Id.

¹⁵ Id. at 164.

¹⁶ CP at 1600 (emphasis added).

Burien Toyota claims that as a result of the misappropriation of the trade secret, Mr. Butler and/or Larson Toyota have been unjustly enriched. On the claim of unjust enrichment resulting from the misappropriated trade secret, Burien Toyota has the burden of proving the following proposition:

That, as a result of the misappropriation of the trade secret, Mr. Butler and/or Larson Toyota received money or benefits that in justice and fairness belong to Burien Toyota. *Plaintiff has the initial burden of proving defendants' sales.* The burden then shifts to Mr. Butler and/or Larson Toyota to establish any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits.

If you find from your consideration of all of the evidence that the proposition has been proved, then your verdict should be for Burien Toyota. On the other hand, if you find that the proposition has not been proved, your verdict should be for Mr. Butler and Larson Toyota.^[17]

Without the phrase "sales attributable to the trade secret," jury instruction 7 can be read to allow the plaintiff to satisfy its burden with gross sales data, whether or not attributable to the trade secret. Although Burien Toyota argues the existing instructions adequately allowed Larson to argue its legal theories, the trial court should not give an instruction that contains the potential for confusion or uncertainty.

Therefore, on remand, the damages instruction should include the provision: "The plaintiff has the initial burden of proving sales attributable to the trade secret. Then the burden shifts to the defendant to establish any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits."

¹⁷ CP at 2198 (emphasis added).

Larson also challenges jury instructions 8 and 9 defining “willful” and “malicious.” Under the UTSA, if “willful and malicious misappropriation exists, the court may award reasonable attorney’s fees to the prevailing party.”¹⁸ But the UTSA does not define “willful,” “malicious,” or “willful and malicious.”¹⁹ The sufficiency of jury instructions defining “willful and malicious” within the context of the UTSA is an issue of first impression before this court.

Jury instruction 8 defined “willful” as “voluntary or intentional, but not necessarily malicious.”²⁰ Jury instruction 9 defined “malicious” as “without just cause or excuse.”²¹ Larson contends that, read together, these instructions allow a jury to find willful and malicious misappropriation without finding the “critical” element of maliciousness, “ill will or improper motive.”²² Larson makes no other objection to jury instruction 8 regarding the definition of “willful.” In this setting, “willful” is adequately defined as “voluntary or intentional.”

Regarding maliciousness under the UTSA, Larson proposed a detailed definition:

“Malicious” is defined as being characterized by, or involving, malice; having, or done with, wicked, evil or mischievous intentions or

¹⁸ RCW 19.108.040.

¹⁹ See RCW 19.108.010.

²⁰ CP at 2199.

²¹ CP at 2200.

²² “Larson’s proposed instructions defining ‘willful’ and ‘malicious’ . . . reflected the common meaning understanding of these terms and included the critical ill will or improper motive element ‘malicious.’” Appellant’s Br. at 37-38.

motives; wrongful and done intentionally without just cause or excuse or as a result of ill will.^[23]

Burien Toyota's position is that Petters controls on the issue of defining "malicious" under the UTSA for the purposes of jury instructions. But Petters did not address the proper form of a jury instruction under the UTSA when it endorsed the phrase "without just cause or excuse" to define "malicious."²⁴

In Boeing v. Sierracin Corp., our Supreme Court analyzed the sufficiency of evidence supporting the trial court's finding of willful and malicious misappropriation.²⁵ After a contractual relationship between Boeing and Sierracin fell through, Sierracin continued to use Boeing proprietary data to manufacture and sell airplane windows in the spare parts market. A Boeing official warned Sierracin that any such use outside manufacturing parts for sale by Boeing was misappropriation, but Sierracin continued to use various Boeing specifications and tried to obtain its own FAA-authorization using the data. The trial court's finding

²³ CP at 1602. As a threshold matter, Burien Toyota relies on Harris v. Burnett, 12 Wn. App. 833, 843, 532 P.2d 1165 (1975), and argues Butler inadequately objected to jury instruction 9 and waived this issue. Under Harris "When an instruction to be given by the trial court is a correct statement of the law but is objected to as too broad or as insufficiently specific under the evidence, the objecting party must propose a proper instruction on the subject. Reversible error is not present unless the preferable instruction has been submitted and has been refused." Harris, 12 Wn. App. at 843. Butler's proposed instruction containing the preferable language "as a result of ill will" is sufficient to meet the Harris burden.

²⁴ Petters, 151 Wn. App. at 173.

²⁵ 108 Wn.2d 38, 738 P.2d 665 (1987). The narrower issue presented in this appeal, the sufficiency of jury instructions regarding the meaning of "willful and malicious," was not at issue in Boeing.

that Sierracin willfully and maliciously misappropriated trade secrets was affirmed on appeal:

The record indicates that Sierracin *knew its actions to be of dubious legality*, and engaged in a massive effort to disguise its copying of Boeing's drawings. *The trial court did not believe that Sierracin ever entertained any honest doubt as to the legality of its conduct, but took a calculated risk and lost. . . .* The trial court's decision that Sierracin's actions were willful and malicious is not erroneous and the award of punitive damages is affirmed.^[26]

The Petters court, like the Supreme Court in Boeing, analyzed the sufficiency of evidence supporting the trial court's finding of willful and malicious misappropriation. Petters, a design engineer specializing in underwater engineering, worked with Williamson to design and market a unique deep sea drill. After a falling out regarding Peters' compensation, the contractual relationship between Petters and Williamson ended. Petters then alleged Williamson misappropriated trade secrets owned in part by Petters. The trial court's finding that Williamson willfully and maliciously misappropriated trade secrets was affirmed on appeal:

Williamson advances the argument that, notwithstanding that it "willfully" licensed the BMS technology to NGK, it cannot be found to have acted "maliciously" because it did not actually intend to harm Petters by licensing the technology. Williamson protests that, indeed, because it always intended to pay Petters his royalty share of the transaction's proceeds, it only wanted to help Petters by licensing the technology.

This position both misstates the basis for the trial court's ruling and unjustifiably narrows the scope of that which may constitute "malicious" misappropriation. The conduct that the trial court found to

²⁶ Id. at 62 (emphasis added).

be malicious was Williamson's refusal to provide Petters with any information regarding the BMS-II transaction, let alone obtain authorization to disclose the BMS technology. Black's Law Dictionary 977 (8th ed.2004) defines "malicious" as: "1. Substantially certain to cause injury. 2. Without just cause or excuse." The only excuse that Williamson had for its conduct was its unusual interpretation of the injunction. That interpretation was erroneous and, hence, did not provide just cause for Williamson's behavior. None of the foreign cases cited by Williamson cast serious doubt on this purely factual determination.^[27]

This reasoning does not equate with using "without just cause or excuse" as the sole basis for a jury instruction defining "malicious" for purposes of the UTSA. Rather, it stands for the principle that the scope of what constitutes malicious misappropriation may not be unjustifiably narrowed.

Although there is significant variation in how other UTSA jurisdictions construe the same "malicious" provision, there is a legitimate concern that "without just cause or excuse" does not adequately convey the level of malice required.

For example, in Real-Time Laboratories, Inc. v. Predator Systems, Inc., the District Court of Appeal of Florida, Fourth District, declined to hold that a finding of "willful and malicious" requires only that trade secrets were taken with "knowing or reckless disregard."²⁸ Instead, the Florida court looked to two explanations of UTSA maliciousness found in other jurisdictions. First, the court used the rationale from a Seventh Circuit case that "willful and malicious" "surely must include an intentional misrepresentation as well as a misappropriation resulting from the

²⁷ Petters, 151 Wn. App. at 172-73 (emphasis added).

²⁸ 757 So.2d 634, 637-38, 25 Fla. L. Weekly D1250 (2000).

conscious disregard of the rights of another."²⁹ Second, the court highlighted our Supreme Court's decision in Boeing with its emphasis on "dubious legality" and lack of "any honest doubt as to the legality of its conduct."³⁰

In Bond v. Polycycle, Inc., the Court of Special Appeals of Maryland found that "actual malice was present" where the defendant exercised obvious "ill will" toward the plaintiff in his willful misappropriation.³¹ The Maryland court used two definitions of "malicious." First, "the intentional doing of a wrongful act without legal justification or excuse. . . . done knowingly and deliberately, for an improper motive and without legal justification."³² Second, having a purpose "to deliberately cause harm or injure."³³ Several other jurisdictions have applied similar definitions of "malicious" under the UTSA.³⁴

²⁹ Id. at 637 (emphasis added) (quoting Mangren Research & Dev. Corp. v. Nat'l Chem. Co., Inc., 87 F.3d 937, 946 (7th Cir. 1996)).

³⁰ Id. (quoting Boeing, 108 Wn.2d at 62).

³¹ 127 Md. App. 365, 382, 732 A.2d 970 (1999).

³² Id. (quoting Elliot v. Kupferman, 58 Md. App. 510, 526, 473 A.2d 960 (1984)).

³³ Id.

³⁴ See, e.g., Learning Curve Toys, Inc. v. PlayWood Toys, Inc., 342 F.3d 714, 730 (7th Cir. 2003) ("[T]he phrase 'willful and malicious misappropriation' . . . includes 'an intentional misappropriation as well as a misappropriation resulting from the conscious disregard of the rights of another.'" (quoting Mangren Research, 87 F.3d at 946); Haught v. Louis Berkman, LLC, 417 F. Supp. 2d 777, 784 (N.D. West Virginia 2006) ("Malice is 'characterized by, or involving, malice; having, or done with, evil or mischievous intentions or motives; wrongful and done intentionally without just cause or excuse or as a result of ill will.'" (quoting State v. Burgess, 205 W. Va. 87, 516 S.E.2d 491, 493 (1999)); MicroStrategy, Inc. v. Business Objects, S.A., 331 F. Supp. 2d 396, 430 (E.D. Va. 2004) ("[M]alice requires a finding that the action was taken with 'ill will, malevolence, grudge,

We conclude that, consistent with the Petters rationale, an intent to injure need not be shown to prove maliciousness under the UTSA. But “malicious” connotes a level of ill will or improper motive not captured by “without just cause or excuse.” Therefore, the UTSA maliciousness instruction on remand would be more complete and meaningful if expressed to include “as a result of ill will or improper motive.”

Attorney Fees

Larson raises numerous challenges to the amount and computation of attorney fees awarded. Because any award of attorney fees will be dependent on the outcome of the new trial on remand, we decline to address each of the arguments raised. But a key consideration is the proportionality of the award of fees to the amount in controversy.³⁵ A lodestar calculation that grossly exceeds the amount in controversy should suggest a downward adjustment, but a court “will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small.”³⁶ The court must give consideration to the billing judgment exercised, or not exercised, in view of the amount in controversy.³⁷ For purposes of proportionality analysis, the amount in controversy

spite, wicked intention or a conscious disregard of the rights of another.”) (quoting Peacock Buick, Inc. v. Durkin, 221 Va. 1133, 1137, 277 S.E.2d 225 (1981)).

³⁵ Berryman v. Metcalf, 177 Wn. App. 664, 660, 312 P.3d 745 (2013).

³⁶ Id. at 657 (quoting Mahler v. Szucs, 135 Wn.2d 398, 433, 957 P.2d 632 (1998)).

³⁷ Id. at 661 (quoting Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 156, 859 P.2d 1210 (1993)).

necessarily requires consideration of the actual amount recovered on a claim.³⁸ A court considering requested fees nearly 50 times as large as the amount recovered must necessarily address the billing judgment giving rise to the fee request.³⁹

Fees on Appeal

Burien Toyota also seeks fees on appeal under RAP 18.1 and RCW 19.108.040. RAP 18.1(a) allows fees when “applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before . . . the Court of Appeals.” Under RCW 19.108.040, if “wilful and malicious misappropriation exists, the court may award reasonable attorney’s fees to the prevailing party.” Consistent with RAP 18.1(i), we defer to the trial court to include reasonable fees associated with this appeal as part of any award of trial court fees on remand.⁴⁰

³⁸ See Travis v. Wash. Horse Breeders Ass’n, Inc., 111 Wn.2d 396, 409-10, 759 P.2d 418 (1988) (For fees under the Consumer Protection Act, ch. 19.86 RCW, “the amount in controversy is merely listed as a factor to be considered. The size of the attorney fees in relation to the *amount of the award* is not in itself decisive.”) (emphasis added); Singleton v. Frost, 108 Wn.2d 723, 731, 742 P.2d 1224 (1987) (instructing trial court to “take into account the amount involved and to set the award of fees with the *total sum recovered in mind*”) (emphasis added).

³⁹ The jury awarded \$12,496.12 in damages. The court awarded \$610,071.90 in attorney fees.

⁴⁰ See also Felipe v. Dep’t of Labor & Indus., 195 Wn. App. 908, 920, 381 P.3d 205 (2016) (“When an appellate court remands a case for retrial, as we do here, that court cannot properly award fees because the prevailing party has not yet been determined. Thus, at this time a fee award is premature, but the trial court may award appellate attorney fees after retrial, if appropriate.”).

CONCLUSION

Because of a Burnet error, remand for a new trial is required to address the unjust enrichment damages on the misappropriation of trade secrets claim, together with a determination of whether the misappropriation was willful and malicious for purposes of the UTA.

Therefore, we reverse and remand for further proceedings consistent with this opinion.

WE CONCUR:

Mann, A.C.J.

Verelsteyn, J.
Becker, J.

RCWs

19.108.010

19.108.030

19.108.040

RCW 19.108.010

Definitions.

Unless the context clearly requires otherwise, the definitions set forth in this section apply throughout this chapter.

(1) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means;

(2) "Misappropriation" means:

(a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(b) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(i) Used improper means to acquire knowledge of the trade secret; or

(ii) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was (A) derived from or through a person who had utilized improper means to acquire it, (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(iii) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

[1981 c 286 § 1.]

RCW 19.108.030

Remedies for misappropriation—Damages.

(1) In addition to or in lieu of injunctive relief, a complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.

(2) If wilful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (1).

[1981 c 286 § 3.]

RCW 19.108.040

Award of attorney's fees.

If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or wilful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party.

[1981 c 286 § 4.]

CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **PETITION FOR REVIEW** on the 20th day of February 2019 as follows:

Co-counsel for Petitioners

Brian P. Russell	<input type="checkbox"/>	U.S. Mail
17820 First Avenue South, Suite 107	<input checked="" type="checkbox"/>	E-Service
Normandy Park, WA 98148	<input type="checkbox"/>	Facsimile
bprattorney@msn.com		
bprparalegal@comcast.net		

Counsel for Respondent

Carney Badley Spellman, PS	<input type="checkbox"/>	U.S. Mail
Michael B. King	<input checked="" type="checkbox"/>	E-Service
701 Fifth Avenue, Suite 3600	<input type="checkbox"/>	Facsimile
Seattle, WA 98104		
king@carneylaw.com		

Fisher & Phillips, LLP	<input type="checkbox"/>	U.S. Mail
Suzanne K. Michael	<input checked="" type="checkbox"/>	E-Service
Matthew J. Macario	<input type="checkbox"/>	Facsimile
Kathleen A. Kline		
1201 Third Avenue, Suite 2750		
Seattle, WA 98101		
smichael@fisherphillips.com		
kkline@fisherphillips.com		
mmacario@fisherphillips.com		
kkline@bellevuewa.gov		



Kenneth W. Masters, WSBA 22278
Attorney for Petitioners

MASTERS LAW GROUP PLLC

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