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NO. 70047-2-I

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

FILED
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STATE OF WASHINGTON
2014 APR -3 PM 12:33

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

Appellant/Cross-Respondent

vs.

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

RESPONDENTS' REPLY ON CROSS-APPEAL

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I. INTRODUCTION

In its response, Appellant/Cross-Respondent ADA Motors, Inc. d/b/a/ Burien Toyota (“Burien Toyota”) tries to escape addressing the points raised in Respondents’ cross-appeal by presumptively concluding that the issues are not properly before this Court for review. Burien Toyota fails to acknowledge, however, that this Court may review “those acts in the proceedings below which if repeated on remand would constitute error prejudicial to respondent.” RAP 2.4(a). The purpose of the cross-appeal filed by Respondents/Cross-Appellants, David Butler and Robert Larson Automotive Group (collectively “Respondents”), is to raise for the Court’s review acts in the trial of this matter which, if repeated on remand, would constitute error prejudicial to Respondents. Thus, the issues raised in Respondents’ cross-appeal are fully reviewable and properly raised.

Not only do the issues raised in Respondents’ cross-appeal show prejudicial errors in the trial of this matter that should not be repeated in the event of a remand, but they also show that remand is unnecessary and would be futile. The evidence in the record does not show that Respondents misappropriated any trade secret of Burien Toyota or that Burien Toyota suffered any damage whatsoever as a result of any acts of Respondents. The alleged trade secret is a customer list that Mr. Butler compiled during his long career at Nordstrom and brought with him when he left Nordstrom and

began working for Burien Toyota. Burien Toyota was aware of the existence of the list and did not tell Mr. Butler to keep his list confidential. Additionally, Burien Toyota shared its own customer list with third parties, rather than undertake efforts to keep the list secret. Because the list was Mr. Butler's own list, and because Burien Toyota made no effort to maintain the secrecy of the list, there simply cannot be any "misappropriation" of a "trade secret" with respect to Mr. Butler's list. Even if, however, Burien Toyota were to somehow overcome the hurdle of showing misappropriation of a trade secret under these facts, its claim under the Uniform Trade Secrets Act ("UTSA") still must fail because, as reflected in the jury's verdict, Burien Toyota has utterly failed to meet its burden of showing that it has been damaged by any acts on the part of Respondents. Remand would, therefore, be a futile undertaking.

II. REPLY TO RESPONSE TO CROSS-APPEAL

A. The Trial Court Erred in Denying Respondents' Motion for Summary Judgment Dismissal of Burien Toyota's UTSA Claim

1. This Issue is Reviewable

Burien Toyota's argument as to the reviewability of the trial court's summary judgment order on its UTSA claim ignores fundamental principles of appellate review that render the issue reviewable. First, the Rules of Appellate Procedure explicitly permit the court on appeal to review "those

acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent.” RAP 2.4(a). The trial court’s denial of Respondents’ motion for summary judgment is such an act.

Second, the Rules are to be “liberally interpreted to promote justice and facilitate the decision of cases on the merits.” RAP 1.2(a). Justice certainly would not be promoted if, by not reviewing Respondents’ arguments, the Court remanded this matter for further proceedings which, as explained in these arguments, would be futile.

Finally, it is well settled that on appeal, the party who prevailed below (i.e., David Butler and Robert Larson Automotive Group) is entitled to argue any grounds in support of the order on appeal that are supported by the record. *King County v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 310, 170 P.3d 53 (2007). The order on appeal is the judgment on the jury’s verdict in favor of Burien Toyota. Grounds supporting that order include the absence of a genuine issue of material fact as to Burien Toyota’s claim of misappropriation of a trade secret. For this reason as well, review is appropriate.

2. Burien Toyota Cannot Show “Misappropriation” of a “Trade Secret”

a. Misappropriation

As discussed fully in Respondents' opening brief,¹ there can be no misappropriation of a trade secret under the UTSA where the alleged misappropriator does not misappropriate a trade secret of "another." RCW 19.108.010(2) (UTSA's definition of "misappropriation"). Because the customer list Burien Toyota claims Mr. Butler misappropriated is not a trade secret of another, but rather was Mr. Butler's own list of customers compiled while he worked at Nordstrom, Burien Toyota's claim of misappropriation of a trade secret fails.

In its response, Burien Toyota argues that its management denied "ever having seen" the list Mr. Butler compiled while working at Nordstrom.² But this argument does nothing to contradict Mr. Butler's testimony that he initially created the list. And significantly, the argument conveniently omits the fact that Ted Klarich, Burien Toyota's general sales manager, testified that although he never actually saw the list, he was in fact aware of its existence. CP 570.

Burien Toyota also argues that whether Mr. Butler delivered his list directly to Sobel when he started working at Burien Toyota was "hotly contested."³ However, the three assertions that it claims illustrate how "hotly contested" this fact was do not, in fact, even relate to Mr. Butler's

¹ Brief of Respondents at 30-32.

² Appellant's Reply and Response at 14.

³ Appellant's Reply and Response at 14.

delivery of his list to Sobel. Specifically, the alleged evidence that Burien Toyota points to in order to “contest” whether Mr. Butler delivered his list directly to Sobel consists of the following: (1) it is against Burien Toyota’s policy to place outside customer information into *its own* database (but that is not the issue – the customer information was placed into *Sobel’s* database); (2) the list was not in *Burien Toyota’s own* database (again, Mr. Butler’s list was placed into *Sobel’s* database); and (3) Burien Toyota would not have allowed Mr. Butler to use his list (but this does not make the fact that Mr. Butler delivered his list directly to Sobel “hotly contested”; indeed, it has nothing to do with Mr. Butler’s delivery of his list to Sobel).

Burien Toyota fails to point to any evidence in the record to refute the fact that when Mr. Butler started working at Burien Toyota, he delivered *his* list of customers, compiled during his years of work at Nordstrom, *directly to Sobel*. See CP 45, 47. In fact, as discussed fully in Respondents’ opening brief,⁴ when Mr. Butler started working at Burien Toyota, the dealership put him in contact with Sobel so that Mr. Butler could continue to use his list of customers during his employment at the dealership. CP 45, 46, 60, 63.

⁴ Brief of Respondents at 5-6.

Similarly, Burien Toyota attempts to dispute the fact that the list Mr. Butler delivered to Sobel was his own list of customers from Nordstrom, but once again cannot provide any meaningful support in the record for such a claim. For example, in its response, Burien Toyota asserts “Butler admitted that he emailed people on the Sobel list.”⁵ This in no way shows that Mr. Butler’s list that he maintained through Sobel was not his own list. Mr. Butler’s list of customers was just that – *Mr. Butler’s list*, not the list “of another.”

In sum, Burien Toyota fails to cite to evidence in the record that meets, let alone responds to, Respondents’ argument that no misappropriation occurred. The record shows that the list at issue was Mr. Butler’s own list of customers. It was, therefore, impossible for there to be any misappropriation.

b. Trade Secret

As discussed fully in Respondents’ opening brief,⁶ in order to be a trade secret, information must be the subject of reasonable efforts to maintain its secrecy. RCW 19.108.010(4) (UTSA’s definition of “trade secret”). Here, the allegedly “secret” customer information that is now the subject of this appeal was freely shared by Burien Toyota with third parties

⁵ Appellant’s Reply and Response at 14.

⁶ Brief of Respondents at 32-36.

who were not required to keep the information “secret,” and in addition, Burien Toyota’s own employees had access to the information merely with the caveat that they had to follow federal regulations that pertained to the information. There was no noncompete or nondisclosure agreement in place to prevent someone like Mr. Butler from contacting any customers in the future. In light of such facts, because Burien Toyota fails to show that it took reasonable efforts to maintain the secrecy of Mr. Butler’s customer list or its own customer list, its claim of misappropriation of a trade secret fails for this reason as well.

In its response, Burien Toyota entirely fails to address the evidence in the record showing that Burien Toyota freely shared its customer information with outside entities – evidence that negates any argument that Burien Toyota attempted to keep its customer information secret. Specifically, the record shows that Burien Toyota shared its customer list with several third parties, including an advertising company and a marketing company. CP 101, 149, 151; *see also* Brief of Respondents at 8. There is no evidence in the record that Burien Toyota required any of these companies to execute confidentiality or nondisclosure agreements with regard to such allegedly “secret” information. Notably, in discovery, Burien Toyota stated that third parties with access to its customer information are required to comply with policies regarding safeguarding

customer information, but when asked to produce documents in support of this response, Burien Toyota produced only documents given to *employees*, not outside entities. CP 103 (Burien Toyota's response to Respondents Request for Production No. 4).

The evidence in the record shows that Burien Toyota shared its customer information with third parties and failed to take steps to ensure that those third parties kept the information confidential. There is no evidence in the record that Burien Toyota made any effort to maintain the secrecy of such information. The information cannot, therefore, constitute a trade secret. *See Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 828 P.2d 73 (1992) (holding that the plaintiff's disclosure of an alleged trade secret to a third party manufacturer, without taking any affirmative steps to ensure that the trade secret would be treated as confidential, destroyed any possible trade secret protection of the information).

Further, the evidence in the record does not show that Burien Toyota undertook the requisite reasonable efforts to maintain the secrecy of customer information that its employees had access to, including Mr. Butler, during the course of their employment.⁷ As discussed fully in

⁷ In its response Burien Toyota appears critical of Respondents for not stating that the trial court found genuine issues of material fact as to this issue and allowed the jury to decide it. *See* Appellant's Reply and Response at 21. It should, however, go without saying that the trial court's *denial* of Respondents' motion for summary judgment as to this issue

Respondents' opening brief,⁸ the documents offered by Burien Toyota at trial as alleged evidence of its efforts to keep customer information "secret" were, on the contrary, merely designed to bring Burien Toyota (just like all other auto dealerships) into compliance with federally mandated requirements regarding the safeguarding of customers' personal information. *Compare* CP 487 and CP 496 (National Automobile Dealers Association's (NADA's) sample form, identical to the form Burien Toyota required its employees to sign).

Specifically, Congress enacted the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. §§6801 et seq., and the Federal Trade Commission promulgated the Safeguards Rule, 16 C.F.R. §§314.1-314.5, to implement the GLBA insofar as it pertains to automobile dealers. Requiring employees to sign forms mandated by federal law with respect to customers' personal information does not constitute reasonable efforts to maintain the secrecy of information deemed a trade secret. The fact that Burien Toyota did not create these documents and require its employees to sign them until the federal government issued its mandate regarding safeguarding customers' personal information belies Burien Toyota's argument that the documents were designed for purposes of trade secret protection. The same regulations

means that the trial court found genuine issues of material fact as to this issue and allowed the jury to decide it.

⁸ Brief of Respondents at 34-36.

apply to the customer information at all other auto dealerships, too. Had this federal law not been enacted, Burien Toyota would, in all likelihood, never have utilized these documents. Mere compliance with a federal law that all auto dealerships are subject to does not constitute the type of effort to keep information “secret” that merits UTSA protection.

B. The Trial Court Erred in Denying Respondents’ Motion for a Directed Verdict

As with Respondents’ argument regarding summary judgment on Burien Toyota’s UTSA claim, the argument as to the trial court’s denial of Respondents’ motion for a directed verdict is appropriate under RAP 2.4(a) because the trial court’s decision is an act which, if repeated on remand, would constitute error prejudicial to Respondents. The evidence (or, more accurately, lack thereof) on which Respondents’ argument is based is the same as that on which Respondents’ argument as to the denial of their motion for summary judgment is based. In short, the evidence presented at trial, and the evidence in the record before this Court, shows that Burien Toyota failed to meet its burden of proving the “misappropriation” of a “trade secret.”

C. The Trial Court Erred in Denying Respondents’ Motion in Limine to Exclude Policies or Handbook Provisions Created or Implemented by Burien Toyota After Mr. Butler’s Employment with Burien Toyota Began

Prior to trial, Respondents moved in limine for an order excluding evidence and testimony relating to the employee handbook and other documents it required Mr. Butler to sign after he started his employment. CP 340. The trial court denied Respondents' motion in limine. RP Jan. 16, 2013 at 9. As discussed fully in Respondents' opening brief,⁹ the trial court erred in denying Respondents' motion to exclude this evidence. Again, this issue is reviewable under RAP 2.4(a) as an act which, if repeated on remand, would constitute error prejudicial to Respondents.

First, Burien Toyota relied on the employee handbook and other documents it required Mr. Butler to sign to support its breach of contract claim. That claim was, however, dismissed on Respondents' motion for summary judgment. The documents should have been excluded because they were not relevant to the claims that remained for trial.

Second, in its response, Burien Toyota argues that the documents were relevant to its UTSA claim because they showed the reasonable efforts Burien Toyota made to maintain the secrecy of information it claims is a trade secret. However, as discussed above, Burien Toyota implemented these documents in order to comply with the mandates of the federal GLBA and Safeguards Rule regarding protecting customers' personal information.

⁹ Brief of Respondents at 37-46.

The fact that these documents were created after the federal law was enacted, and the fact that they mirror the sample forms NADA created to help all automobile dealers comply with the GLBA and the Safeguards Rule, show that Burien Toyota's intent in implementing these documents from NADA was to avoid running afoul of federal law, rather than to protect any claimed "trade secret." Burien Toyota's self-serving assertion that the documents were created for trade secret purposes is simply not supported by the evidence in the record.

Burien Toyota strenuously maintains that it has not raised a claim under the GLBA. Respondents do not, however, claim that it did. Burien Toyota's arguments on the issue miss the point of Respondents' discussion of this federal law and are merely red herrings aimed at misdirecting this Court's review. As explained in Respondents' opening brief,¹⁰ Congress did not intend that the GLBA be used by private entities as an enforcement mechanism. The authority to enforce the GLBA and its implementing regulations is vested exclusively in the designated federal agencies – here, the FTC. Respondents raise this point not because they believe Burien Toyota brought a claim against them under the GLBA. Rather, Respondents' raise this point as additional evidence showing that Burien

¹⁰ Brief of Respondents at 43-46.

Toyota cannot use these documents as evidence of an intent on its part to protect any trade secret.

Further, because Burien Toyota (like Robert Larson and other automobile dealerships) is an entity against whom the GLBA is enforced, it cannot use the statute for its own benefit. *See American Family Mut. Ins. Co. v. Roth*, 2005 WL 3700232 (N.D. Ill. 2005), discussed in Brief of Respondents at 44-45 and not addressed by Burien Toyota. Again, Respondents raise this point not because they believe Burien Toyota has asserted a claim under the GLBA, as Burien Toyota attempts to suggest, but rather as further evidence of the fact that these documents cannot be construed as evidence of efforts by Burien Toyota to protect any alleged “trade secret.”

D. The Trial Court Erred in Failing to Give Certain of Respondents’ Proposed Jury Instructions

1. The Trial Court Erred in Failing to Give Respondents’ Proposed Instruction Nos. 3 and 5 Rather than the Court’s Instruction No. 17, Which Was Confusing and Unduly Emphasized Respondents’ Burden of Proof

The trial court’s Instruction No. 17 instructed the jury on both the plaintiff’s burden of proving its case by a preponderance of the evidence and the defendants’ burden of proving affirmative defenses by clear, cogent, and convincing evidence. The error in the court’s Instruction No. 17, as

discussed in Respondents' opening brief,¹¹ is that the instruction brings up defendant's burden of proof in both paragraphs, but mentions the plaintiff's burden of proof in only the first paragraph.¹²

In its response, Burien Toyota entirely ignores the fact that Instruction No. 17 gives twice the emphasis to defendants' burden of proof than to plaintiff's burden of proof. This is likely because there is no argument to counter the fact that such undue emphasis on defendants' burden of proof renders Instruction No. 17 erroneous because it is not impartial and fair to both sides in a lawsuit, as instructions are required to be. *See Dods v. Harrison*, 51 Wn.2d 446, 451, 319 P.2d 558 (1957). Burien Toyota fails to address or provided any argument that Instruction No. 17 is not erroneous on this ground. The trial court abused its discretion in giving Instruction No. 17, rather than Respondents' proposed Instructions Nos. 3 and 5. Should this matter be remanded, this Court should direct that the trial court give separate instructions on each party's burdens of proof that do not unduly repeat and emphasize Respondent's burden of proof.

2. **Failing to Give Respondents' Instruction No. 12 Prevented Respondents from Fully Arguing Their Theory of the Case**

¹¹ Brief of Respondents at 46-48.

¹² Respondents' objected to Instruction No. 17 on the ground that it unduly emphasized Respondents' burden of proof and also objected to the trial court's failure to give their proposed Instructions Nos. 3 and 5, which were WPI 21.01 and WPA 160.03. RP Jan. 31, 2013 at 14-16.

Respondents' Instruction No. 12 is a correct statement of the federal law, discussed above, pertaining to the obligation of automobile dealerships to safeguard the personal information of their customers. As discussed above and in Respondents' opening brief,¹³ evidence of this federal law is relevant to Respondents' theory that the documents at issue cannot be viewed as efforts on the part of Burien Toyota to protect information claimed to be a trade secret.

Once again, in its response, Burien Toyota argues that evidence of this federal law is not relevant because it has not raised a claim under that law. But, once again, Burien Toyota's argument misses the point and is merely a red herring. As explained above in response to Burien Toyota's repeated assertion of this erroneous premise, the federal law is important to show that the purpose of the documents relied on by Burien Toyota at trial was to bring the dealership into compliance with federal law governing customer information, rather than to protect an alleged "trade secret." The jury should have been informed of this legal requirement.

Viewed in light of the purpose for which evidence of the federal law was offered, the trial court's error in failing to give Instruction No. 12 is evident. By failing to give this proposed instruction, the trial court

¹³ Brief of Respondents at 39-46, 48-49.

prevented Respondents from arguing a theory of their case. As discussed in Respondents' opening brief, this was error. *See De Koning v. Williams*, 47 Wn.2d 139, 141, 286 P.2d 694 (1955) ("Each party is entitled to have his theory of a case presented to the jury by proper instructions, if there is any evidence to support it"); *Owens v. City of Seattle*, 49 Wn.2d 187, 193, 299 P.2d 560 (1956) (the failure to give an instruction that is a correct statement of the law pertinent to a party's theory of the case, where the theory is supported by the evidence, is prejudicial error). Should this matter be remanded, the trial court should be directed to give Respondents' Instruction No. 12.

III. CONCLUSION

For the reasons stated here and in Respondents' opening brief, this Court should affirm the judgment on the jury verdict in favor of Respondents and deny Burien Toyota's request for an award of attorney fees. Should, however, this Court remand this matter for further proceedings, this Court should grant Respondents the relief requested in their cross-appeal. Respondents request an award of their costs on appeal.

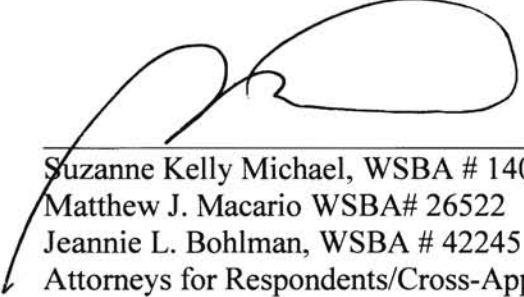
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DATED this 3 day of April, 2014.

Respectfully submitted,

MICHAEL & ALEXANDER PLLC



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I hereby certify that I served the foregoing Respondents' Reply on Cross-Appeal on:

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by the following indicated method or methods:

- by **emailing** full, true, and correct copies thereof to the individuals at the email address shown above, which is the last-known email address for the individuals' offices, on the date set forth below.
- by **mailing** full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the individuals as shown above, the last-known office address of the individuals, and deposited with the United States Postal Service at Seattle, Washington, on the date set forth below.
- by sending full, true and correct copies thereof via **overnight courier** in a sealed, prepaid envelope, addressed to _____ as shown above, his last-known office address, on the date set forth below.
- by causing full, true and correct copies thereof to be **hand-delivered** to the individuals at their last-known office address listed above on the date set forth below.

DATED this 3rd day of April, 2014.


Lois Widmer

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2. Burien Toyota Cannot Show “Misappropriation” of a “Trade Secret”

a. Misappropriation

As discussed fully in Respondents' opening brief,¹ there can be no misappropriation of a trade secret under the UTSA where the alleged misappropriator does not misappropriate a trade secret of "another." RCW 19.108.010(2) (UTSA's definition of "misappropriation"). Because the customer list Burien Toyota claims Mr. Butler misappropriated is not a trade secret of another, but rather was Mr. Butler's own list of customers compiled while he worked at Nordstrom, Burien Toyota's claim of misappropriation of a trade secret fails.

In its response, Burien Toyota argues that its management denied "ever having seen" the list Mr. Butler compiled while working at Nordstrom.² But this argument does nothing to contradict Mr. Butler's testimony that he initially created the list. And significantly, the argument conveniently omits the fact that Ted Klarich, Burien Toyota's general sales manager, testified that although he never actually saw the list, he was in fact aware of its existence. CP 570.

Burien Toyota also argues that whether Mr. Butler delivered his list directly to Sobel when he started working at Burien Toyota was "hotly contested."³ However, the three assertions that it claims illustrate how "hotly contested" this fact was do not, in fact, even relate to Mr. Butler's

¹ Brief of Respondents at 30-32.

² Appellant's Reply and Response at 14.

³ Appellant's Reply and Response at 14.

delivery of his list to Sobel. Specifically, the alleged evidence that Burien Toyota points to in order to “contest” whether Mr. Butler delivered his list directly to Sobel consists of the following: (1) it is against Burien Toyota’s policy to place outside customer information into *its own* database (but that is not the issue – the customer information was placed into *Sobel’s* database); (2) the list was not in *Burien Toyota’s own* database (again, Mr. Butler’s list was placed into *Sobel’s* database); and (3) Burien Toyota would not have allowed Mr. Butler to use his list (but this does not make the fact that Mr. Butler delivered his list directly to Sobel “hotly contested”; indeed, it has nothing to do with Mr. Butler’s delivery of his list to Sobel).

Burien Toyota fails to point to any evidence in the record to refute the fact that when Mr. Butler started working at Burien Toyota, he delivered *his* list of customers, compiled during his years of work at Nordstrom, *directly to Sobel*. See CP 45, 47. In fact, as discussed fully in Respondents’ opening brief,⁴ when Mr. Butler started working at Burien Toyota, the dealership put him in contact with Sobel so that Mr. Butler could continue to use his list of customers during his employment at the dealership. CP 45, 46, 60, 63.

⁴ Brief of Respondents at 5-6.

Similarly, Burien Toyota attempts to dispute the fact that the list Mr. Butler delivered to Sobel was his own list of customers from Nordstrom, but once again cannot provide any meaningful support in the record for such a claim. For example, in its response, Burien Toyota asserts “Butler admitted that he emailed people on the Sobel list.”⁵ This in no way shows that Mr. Butler’s list that he maintained through Sobel was not his own list. Mr. Butler’s list of customers was just that – *Mr. Butler’s list*, not the list “of another.”

In sum, Burien Toyota fails to cite to evidence in the record that meets, let alone responds to, Respondents’ argument that no misappropriation occurred. The record shows that the list at issue was Mr. Butler’s own list of customers. It was, therefore, impossible for there to be any misappropriation.

b. Trade Secret

As discussed fully in Respondents’ opening brief,⁶ in order to be a trade secret, information must be the subject of reasonable efforts to maintain its secrecy. RCW 19.108.010(4) (UTSA’s definition of “trade secret”). Here, the allegedly “secret” customer information that is now the subject of this appeal was freely shared by Burien Toyota with third parties

⁵ Appellant’s Reply and Response at 14.

⁶ Brief of Respondents at 32-36.

who were not required to keep the information “secret,” and in addition, Burien Toyota’s own employees had access to the information merely with the caveat that they had to follow federal regulations that pertained to the information. There was no noncompete or nondisclosure agreement in place to prevent someone like Mr. Butler from contacting any customers in the future. In light of such facts, because Burien Toyota fails to show that it took reasonable efforts to maintain the secrecy of Mr. Butler’s customer list or its own customer list, its claim of misappropriation of a trade secret fails for this reason as well.

In its response, Burien Toyota entirely fails to address the evidence in the record showing that Burien Toyota freely shared its customer information with outside entities – evidence that negates any argument that Burien Toyota attempted to keep its customer information secret. Specifically, the record shows that Burien Toyota shared its customer list with several third parties, including an advertising company and a marketing company. CP 101, 149, 151; *see also* Brief of Respondents at 8. There is no evidence in the record that Burien Toyota required any of these companies to execute confidentiality or nondisclosure agreements with regard to such allegedly “secret” information. Notably, in discovery, Burien Toyota stated that third parties with access to its customer information are required to comply with policies regarding safeguarding

customer information, but when asked to produce documents in support of this response, Burien Toyota produced only documents given to *employees*, not outside entities. CP 103 (Burien Toyota's response to Respondents Request for Production No. 4).

The evidence in the record shows that Burien Toyota shared its customer information with third parties and failed to take steps to ensure that those third parties kept the information confidential. There is no evidence in the record that Burien Toyota made any effort to maintain the secrecy of such information. The information cannot, therefore, constitute a trade secret. *See Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 828 P.2d 73 (1992) (holding that the plaintiff's disclosure of an alleged trade secret to a third party manufacturer, without taking any affirmative steps to ensure that the trade secret would be treated as confidential, destroyed any possible trade secret protection of the information).

Further, the evidence in the record does not show that Burien Toyota undertook the requisite reasonable efforts to maintain the secrecy of customer information that its employees had access to, including Mr. Butler, during the course of their employment.⁷ As discussed fully in

⁷ In its response Burien Toyota appears critical of Respondents for not stating that the trial court found genuine issues of material fact as to this issue and allowed the jury to decide it. *See Appellant's Reply and Response* at 21. It should, however, go without saying that the trial court's *denial* of Respondents' motion for summary judgment as to this issue

Respondents' opening brief,⁸ the documents offered by Burien Toyota at trial as alleged evidence of its efforts to keep customer information "secret" were, on the contrary, merely designed to bring Burien Toyota (just like all other auto dealerships) into compliance with federally mandated requirements regarding the safeguarding of customers' personal information. *Compare* CP 487 and CP 496 (National Automobile Dealers Association's (NADA's) sample form, identical to the form Burien Toyota required its employees to sign).

Specifically, Congress enacted the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. §§6801 et seq., and the Federal Trade Commission promulgated the Safeguards Rule, 16 C.F.R. §§314.1-314.5, to implement the GLBA insofar as it pertains to automobile dealers. Requiring employees to sign forms mandated by federal law with respect to customers' personal information does not constitute reasonable efforts to maintain the secrecy of information deemed a trade secret. The fact that Burien Toyota did not create these documents and require its employees to sign them until the federal government issued its mandate regarding safeguarding customers' personal information belies Burien Toyota's argument that the documents were designed for purposes of trade secret protection. The same regulations

means that the trial court found genuine issues of material fact as to this issue and allowed the jury to decide it.

⁸ Brief of Respondents at 34-36.

apply to the customer information at all other auto dealerships, too. Had this federal law not been enacted, Burien Toyota would, in all likelihood, never have utilized these documents. Mere compliance with a federal law that all auto dealerships are subject to does not constitute the type of effort to keep information “secret” that merits UTSA protection.

B. The Trial Court Erred in Denying Respondents’ Motion for a Directed Verdict

As with Respondents’ argument regarding summary judgment on Burien Toyota’s UTSA claim, the argument as to the trial court’s denial of Respondents’ motion for a directed verdict is appropriate under RAP 2.4(a) because the trial court’s decision is an act which, if repeated on remand, would constitute error prejudicial to Respondents. The evidence (or, more accurately, lack thereof) on which Respondents’ argument is based is the same as that on which Respondents’ argument as to the denial of their motion for summary judgment is based. In short, the evidence presented at trial, and the evidence in the record before this Court, shows that Burien Toyota failed to meet its burden of proving the “misappropriation” of a “trade secret.”

C. The Trial Court Erred in Denying Respondents’ Motion in Limine to Exclude Policies or Handbook Provisions Created or Implemented by Burien Toyota After Mr. Butler’s Employment with Burien Toyota Began

Prior to trial, Respondents moved in limine for an order excluding evidence and testimony relating to the employee handbook and other documents it required Mr. Butler to sign after he started his employment. CP 340. The trial court denied Respondents' motion in limine. RP Jan. 16, 2013 at 9. As discussed fully in Respondents' opening brief,⁹ the trial court erred in denying Respondents' motion to exclude this evidence. Again, this issue is reviewable under RAP 2.4(a) as an act which, if repeated on remand, would constitute error prejudicial to Respondents.

First, Burien Toyota relied on the employee handbook and other documents it required Mr. Butler to sign to support its breach of contract claim. That claim was, however, dismissed on Respondents' motion for summary judgment. The documents should have been excluded because they were not relevant to the claims that remained for trial.

Second, in its response, Burien Toyota argues that the documents were relevant to its UTSA claim because they showed the reasonable efforts Burien Toyota made to maintain the secrecy of information it claims is a trade secret. However, as discussed above, Burien Toyota implemented these documents in order to comply with the mandates of the federal GLBA and Safeguards Rule regarding protecting customers' personal information.

⁹ Brief of Respondents at 37-46.

The fact that these documents were created after the federal law was enacted, and the fact that they mirror the sample forms NADA created to help all automobile dealers comply with the GLBA and the Safeguards Rule, show that Burien Toyota's intent in implementing these documents from NADA was to avoid running afoul of federal law, rather than to protect any claimed "trade secret." Burien Toyota's self-serving assertion that the documents were created for trade secret purposes is simply not supported by the evidence in the record.

Burien Toyota strenuously maintains that it has not raised a claim under the GLBA. Respondents do not, however, claim that it did. Burien Toyota's arguments on the issue miss the point of Respondents' discussion of this federal law and are merely red herrings aimed at misdirecting this Court's review. As explained in Respondents' opening brief,¹⁰ Congress did not intend that the GLBA be used by private entities as an enforcement mechanism. The authority to enforce the GLBA and its implementing regulations is vested exclusively in the designated federal agencies – here, the FTC. Respondents raise this point not because they believe Burien Toyota brought a claim against them under the GLBA. Rather, Respondents' raise this point as additional evidence showing that Burien

¹⁰ Brief of Respondents at 43-46.

Toyota cannot use these documents as evidence of an intent on its part to protect any trade secret.

Further, because Burien Toyota (like Robert Larson and other automobile dealerships) is an entity against whom the GLBA is enforced, it cannot use the statute for its own benefit. *See American Family Mut. Ins. Co. v. Roth*, 2005 WL 3700232 (N.D. Ill. 2005), discussed in Brief of Respondents at 44-45 and not addressed by Burien Toyota. Again, Respondents raise this point not because they believe Burien Toyota has asserted a claim under the GLBA, as Burien Toyota attempts to suggest, but rather as further evidence of the fact that these documents cannot be construed as evidence of efforts by Burien Toyota to protect any alleged “trade secret.”

D. The Trial Court Erred in Failing to Give Certain of Respondents’ Proposed Jury Instructions

1. The Trial Court Erred in Failing to Give Respondents’ Proposed Instruction Nos. 3 and 5 Rather than the Court’s Instruction No. 17, Which Was Confusing and Unduly Emphasized Respondents’ Burden of Proof

The trial court’s Instruction No. 17 instructed the jury on both the plaintiff’s burden of proving its case by a preponderance of the evidence and the defendants’ burden of proving affirmative defenses by clear, cogent, and convincing evidence. The error in the court’s Instruction No. 17, as

discussed in Respondents' opening brief,¹¹ is that the instruction brings up defendant's burden of proof in both paragraphs, but mentions the plaintiff's burden of proof in only the first paragraph.¹²

In its response, Burién Toyota entirely ignores the fact that Instruction No. 17 gives twice the emphasis to defendants' burden of proof than to plaintiff's burden of proof. This is likely because there is no argument to counter the fact that such undue emphasis on defendants' burden of proof renders Instruction No. 17 erroneous because it is not impartial and fair to both sides in a lawsuit, as instructions are required to be. *See Dods v. Harrison*, 51 Wn.2d 446, 451, 319 P.2d 558 (1957). Burién Toyota fails to address or provided any argument that Instruction No. 17 is not erroneous on this ground. The trial court abused its discretion in giving Instruction No. 17, rather than Respondents' proposed Instructions Nos. 3 and 5. Should this matter be remanded, this Court should direct that the trial court give separate instructions on each party's burdens of proof that do not unduly repeat and emphasize Respondent's burden of proof.

2. **Failing to Give Respondents' Instruction No. 12 Prevented Respondents from Fully Arguing Their Theory of the Case**

¹¹ Brief of Respondents at 46-48.

¹² Respondents' objected to Instruction No. 17 on the ground that it unduly emphasized Respondents' burden of proof and also objected to the trial court's failure to give their proposed Instructions Nos. 3 and 5, which were WPI 21.01 and WPA 160.03. RP Jan. 31, 2013 at 14-16.

Respondents' Instruction No. 12 is a correct statement of the federal law, discussed above, pertaining to the obligation of automobile dealerships to safeguard the personal information of their customers. As discussed above and in Respondents' opening brief,¹³ evidence of this federal law is relevant to Respondents' theory that the documents at issue cannot be viewed as efforts on the part of Burien Toyota to protect information claimed to be a trade secret.

Once again, in its response, Burien Toyota argues that evidence of this federal law is not relevant because it has not raised a claim under that law. But, once again, Burien Toyota's argument misses the point and is merely a red herring. As explained above in response to Burien Toyota's repeated assertion of this erroneous premise, the federal law is important to show that the purpose of the documents relied on by Burien Toyota at trial was to bring the dealership into compliance with federal law governing customer information, rather than to protect an alleged "trade secret." The jury should have been informed of this legal requirement.

Viewed in light of the purpose for which evidence of the federal law was offered, the trial court's error in failing to give Instruction No. 12 is evident. By failing to give this proposed instruction, the trial court

¹³ Brief of Respondents at 39-46, 48-49.

prevented Respondents from arguing a theory of their case. As discussed in Respondents' opening brief, this was error. *See De Koning v. Williams*, 47 Wn.2d 139, 141, 286 P.2d 694 (1955) ("Each party is entitled to have his theory of a case presented to the jury by proper instructions, if there is any evidence to support it"); *Owens v. City of Seattle*, 49 Wn.2d 187, 193, 299 P.2d 560 (1956) (the failure to give an instruction that is a correct statement of the law pertinent to a party's theory of the case, where the theory is supported by the evidence, is prejudicial error). Should this matter be remanded, the trial court should be directed to give Respondents' Instruction No. 12.

III. CONCLUSION

For the reasons stated here and in Respondents' opening brief, this Court should affirm the judgment on the jury verdict in favor of Respondents and deny Burien Toyota's request for an award of attorney fees. Should, however, this Court remand this matter for further proceedings, this Court should grant Respondents the relief requested in their cross-appeal. Respondents request an award of their costs on appeal.

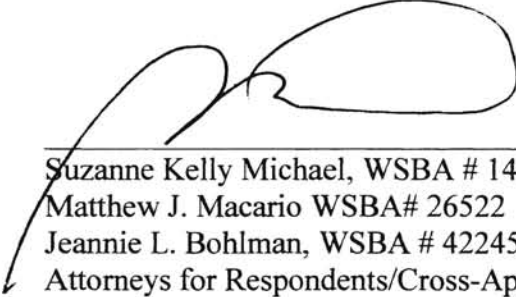
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DATED this 3 day of April, 2014.

Respectfully submitted,

MICHAEL & ALEXANDER PLLC

A handwritten signature in black ink, appearing to read 'Suzanne Kelly Michael', is written over a horizontal line. The signature is stylized with a large loop at the end.

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APR 15 2014

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Respondents' Reply on Cross-Appeal on:

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by the following indicated method or methods:

- by **emailing** full, true, and correct copies thereof to the individuals at the email address shown above, which is the last-known email address for the individuals' offices, on the date set forth below.
- by **mailing** full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the individuals as shown above, the last-known office address of the individuals, and deposited with the United States Postal Service at Seattle, Washington, on the date set forth below.
- by sending full, true and correct copies thereof via **overnight courier** in a sealed, prepaid envelope, addressed to _____ as shown above, his last-known office address, on the date set forth below.
- by causing full, true and correct copies thereof to be **hand-delivered** to the individuals at their last-known office address listed above on the date set forth below.

DATED this 3rd day of April, 2014.


Lois Widmer