Supreme Court No. 96800-4

SUPREME COURT OF
THE STATE OF WASHINGTON

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

Plaintiff-Petitioner,

v.

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,

Defendants-Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Uniform Trade Secrets Act (UTSA)'s legislative mandate directs Washington courts to uniformize trade-secrets law among the nearly 50 states who have enacted it. RCW 19.108.910. The Court of Appeals here enforced that mandate and discouraged Burien Toyota's efforts to chase over $600,000 dollars in fees—nearly 50 times more than it ultimately recovered in damages—and millions of dollars in damages to which Burien is not entitled.

The first jury awarded Burien zero damages for a claim Burien valued at an astonishing $3.5 million. On remand from an instructional error, the second jury awarded Burien $12,496.12 in damages, but only because Larson Toyota was unable to account for four car sales after four of its witnesses were excluded during trial. Those four sales amounted to the damages Burien sought for each of the sales allegedly caused by Larson's misappropriation: $3,129.03. Had those witnesses been allowed to testify, they would have uniformly told the jury that their decision to buy a car from Larson had nothing to do with any misappropriation. And the second jury, like the first one, could easily have found no damages.

The protections afforded trade secrets under the UTSA should not license a business to pursue misappropriation of a trade secret on an implausible and unnecessary damages award. The only injustice here is Burien's incessant pursuit of a misappropriation that caused it zero damages and that tortured the policies underlying the protection of trade secrets. This

Court should deny review so that Larson can finally and fairly prove on remand that Burien's damages case never had any merit from the get-go.

II. RESTATEMENT OF THE ISSUES

1. **Trial Courts Routinely and Easily Apply This Court's *Burnet* and *Jones* Decisions.** Is this Court's *Jones* decision, requiring trial courts to consider the *Burnet* factors of prejudice, willfulness, and lesser sanctions on the record before excluding evidence during trial, correct? *Yes.*

2. **Harmful Error in Excluding Four Witnesses During Trial Without Doing a *Burnet* Analysis.** Did the Court of Appeals correctly conclude that the trial court's excluding four of Larson's witnesses during trial was harmful, when those witnesses would have uniformly testified that their decision to buy cars from both dealerships had nothing to do with misappropriation? *Yes.*

3. **Trade-Secret Misappropriation Requires Plaintiffs to Prove Causation Under the UTSA.** Is the Court of Appeals' decision, directing the trial court on remand to instruct the jury that Burien must prove sales "attributable to the trade secret," consistent with Washington law, the *Restatement*, and the UTSA? *Yes.*

4. **Definition of UTSA "Maliciousness" to Support Exemplary-Damages Award Must Include "Ill Will or Improper Motive."** Did the Court of Appeals correctly conclude that the trial court's instruction defining UTSA malicious as "without just cause of excuse" failed to capture the level of malice required in a UTSA case? *Yes.*

5. **Fees Award in UTSA Case Must Be Proportional to the Damages Award.** Did the Court of Appeals correctly guide the trial court on remand in assessing the proportionality of fees requested compared to the damages awarded and Burien's counsel's billing judgment? *Yes.*

III. COUNTERSTATEMENT OF THE CASE

A. David Butler began selling cars at Burien Toyota after a long career at Nordstrom. He left Burien after eight years and brought his customer list to Larson Toyota. Larson contacted customers from that list one time. Once Burien asked Larson to stop using the list, Larson promptly did so.

David Butler left a successful, 30-year career as a Nordstrom salesperson to sell cars at Burien Toyota. RP 525-26. He brought a list of his Nordstrom customers, numbering in the thousands, to Burien. RP 526-27, 1309. He gave that list to Sobel & Associates, a third-party marketer hired to manage the list to assist the salespersons. Butler paid Sobel $500/month to manage the list. RP 508, 528, 533-34. During his employment at Burien, Butler paid Sobel a total of $15,000. RP 524.

After eight years, Butler left Burien and began selling cars at Larson Toyota. He took a copy of the customer list to Larson, reflecting the persons to whom he had sold cars at Burien. RP 512, 514, 536-37, 543-44, 1302-05. Since Butler had paid Sobel thousands of dollars to manage the list, he mistakenly believed it belonged to him. RP 523-24. Larson contacted customers on the list once, either by e-mail or letter. RP 513-14, 1310.

A few weeks later, Burien directed Larson to stop using the list. RP 1087-88, 1309-11. Larson promptly did so and marked the customers on the list as "dead clients." RP 513, 1088, 1311.

B. Burien sued Larson and Butler for misappropriating the customer list. While the first jury found Larson had misappropriated a trade secret, it awarded zero damages.

Burien sued Larson and Butler for trade-secret misappropriation. The jury found that the customer list was a trade secret and that Larson and Butler had misappropriated it. It awarded zero damages. *ADA I*, at 3.

C. *ADA I* reversed on an instructional error and remanded for a new trial on damages.

Burien raised one issue on appeal, arguing that the unjust-enrichment instruction misstated its burden of proof. *ADA I*, at 3. The trial court had instructed the jury that Burien had "the initial burden of proving *damages from sales* attributable to the use of a trade secret." *Id.* at 4 (emphasis added). The Court of Appeals reversed on instructional error and held that inserting the term "damages" in the instruction misstated the law by requiring Burien "to prove something beyond sales" attributable to the use of a trade secret. *Id.* at 6.

D. On remand, Burien offered a damages calculation claiming millions of dollars in lost sales, based on a sales list. Burien did not call a single Larson customer to corroborate that they were lured away from Burien by Butler and Larson.

On remand, contentious discovery ensued. Larson repeatedly asked Burien for information on its claimed damages of $3.5 million. *ADA II*, at 3. Because of Burien's failure to produce timely discovery, the trial court compelled Burien to produce all documents related to persons it claimed were its customers who were later sold cars by Larson. CP 1061, 1063. With just two months before the second trial, Burien finally produced a list

of 412 sales it claimed Larson made to Burien's customers. *ADA II*, at 3; CP 1027-28.

Burien did not call any customers from the list to testify. It offered no evidence that any of Larson's sales were attributable to Larson's use of the list, beyond pointing to the list of overlapping customers and implying that Larson's sales should be attributed to its mere possession of the list.

By contrast, Larson presented testimony from six persons whose name appeared on the list of 412 sales. Many of these witnesses testified that they had never done any business with Burien and did not know why they were on the list. RP 1075-76, 1243-48, 1256-57. Others testified that they had bought cars or had service work done at both dealerships, but their decision to work with Larson and Butler was not because Larson and Butler had solicited them. RP 1217-21, 1224-28, 1234-39.

E. In reviewing the sales list, Larson identified only five Larson customers who fit the profile of someone who may have been lured away from Burien through exploitation of the customer list that Butler brought with him to Larson. But the trial court barred Larson from calling four of the five customers based on a violation of a witness-disclosure requirement. The court failed to address the *Burnet* factors. The one customer allowed to testify rebutted Burien's claim that he had been lured away to Larson.

Larson identified only five customers who had bought cars from Butler at both dealerships. RP 1339-40, 1368-69. The trial court allowed only one of those customers to testify and excluded the four others because they had not been listed by name on the pre-trial joint statement of evidence. RP 1071-73; KCLCR 4(k). The trial court did not consider *Burnet*. The

one customer allowed to testify told the jury that his decision to buy from Larson had nothing to do with any solicitation from Larson or Butler. RP 1135-38. The four witnesses who the trial court excluded filed declarations attesting that Larson and Butler had not solicited them before buying their cars at Larson. CP 2387, 2390, 2393, 2396 (attached as Appendix A).

F. The jury in the first trial did not make a finding that Larson's misappropriation had been willful and malicious. The Uniform Trade Secrets Act requires a showing of both willful and malicious conduct before exemplary damages and attorney's fees may be awarded. The trial court instructed the jury that malicious means "without just cause or excuse." Larson excepted to this instruction.

The trial court proposed to instruct the jury on the definition of malicious as "without just cause or excuse." CP 2200. Larson objected and argued the trial court's proposed instruction was "overly simplistic" and failed to convey "an element of evil, improper, [or] wicked conduct, [or] some kind of motive that's involved in a malicious standard." RP 1537. Larson argued that the trial court's instruction "minimize[d] the meaning of the term and the burden that is required to meet it." RP 1537.

Larson proposed a correct instruction on the definition of "malicious." CP 1602. Over Larson's objection, the trial court instructed the jury that malicious means "without just cause or excuse." CP 2200; RP 1550.

G. The jury returned a verdict of $12,496.12 in damages. That award matched multiplying Burien's net damages per sale number by four—the four sales that Larson would have rebutted if allowed to call the four witnesses excluded by the trial court. Larson proved that all four witnesses would have rebutted Burien's damages claim if they had testified.

The jury entered a verdict for Burien, finding that Butler and Larson's misappropriation was willful and malicious and awarding Burien $12,496.12 in damages. CP 2222. The trial court awarded Burien exemplary damages for the jury's willful and malicious finding, for a total damages award of $24,992. CP 2829. It also awarded Burien $610,071.90 in fees but refused to grant Burien injunctive relief. CP 2833.

H. *ADA II* remanded for a new trial on damages because of the trial court's *Burnet* violation. To guide the trial court on remand and —hopefully—to avoid a third appeal in this case, *ADA II* addressed three additional issues raised by Larson on appeal, including applying the legislative mandate that Washington's version of the UTSA be interpreted to promote a uniform body of trade-secret law.

Because the trial court excluded four witnesses without first applying the *Burnet* factors, the Court of Appeals remanded for a new trial on damages and also for whether the misappropriation was willful and malicious. *ADA II*, at 1. It rejected Burien's argument that the *Burnet* error was harmless, because the declarations Larson submitted showed the four excluded witnesses would have uniformly testified that "they bought cars from Larson for reasons unrelated to the misappropriation." *ADA II*, at 5; *see also* CP 2386-96.

The Court of Appeals also addressed several additional issues to guide the trial court on remand. It articulated the language to be used in a

damages instruction. *ADA II*, at 7-9. It articulated the language to be used in an instruction on the definition of "malicious." *Id.* at 10-15. And it raised concerns about the "billing judgment" of Burien's counsel "request[ing] fees nearly 50 times as large as the amount [of damages] recovered" and ordered the trial court to address this issue should Burien be entitled to a fees award on remand. *Id.* at 15-16.

IV. REASONS REVIEW SHOULD BE DENIED

A. This Court's decision in *Jones v. City of Seattle,* requiring trial courts to conduct a *Burnet* analysis on the record before excluding witness testimony during trial, and requiring a party assigning error to a failure to do so to show harmless error before granting relief from such error, does not warrant revisiting by this Court. The Court of Appeals correctly concluded that the trial court's failure to conduct a *Burnet* balancing before excluding Larson's witnesses was harmful.

Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997), first declared that before a trial court may exclude witnesses as a sanction for a discovery violation, it must consider on the record (1) the willfulness of the discovery violation, (1) whether the complaining party has been prejudiced, and (3) whether a lesser sanction than exclusion is sufficient. After a series of decisions addressing the scope of what has come to be known as the requirement to balance the *Burnet* factors, this Court held in *Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013), that these requirements also applied during trial. This Court also held that any error during trial about a failure to balance the *Burnet* factors could not be a basis for ordering a new trial, if the *Burnet* error was harmless. *Jones*, 179 Wn.2d at 356.

Burien asks this Court to grant review, gut the central holding of *Jones*, and allow trial courts during trial to exclude witnesses without considering the *Burnet* factors. This Court will "not lightly set aside precedent." *State v. Johnson*, 188 Wn.2d 742, 756, 399 P.3d 507 (2017). To do so, this Court requires a "clear showing" that the precedent is incorrect and harmful. *Id.* at 756-57 (citing *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)).

Burien asserts that applying the *Burnet* factors during trial has unduly burdened and confused trial courts. But Burien never explains precisely what is so burdensome or confusing about requiring a trial court to consider willfulness, prejudice, and lesser sanctions before imposing the harsh sanction of excluding a witness—testimony that by definition must be relevant to resolving the case on the merits, because if it were not, there would be no need to resort to a sanction to exclude it. Tellingly, the trial court in this very case acknowledged, in addressing a separate sanction issue, that "trial courts in King County now receive hundreds of *Burnet* motions to exclude witnesses, almost all of which are denied and properly so." RP 1014. Burien offers no proof to substantiate its claim of undue burden or confusion.

Burien treats the *Burnet* balancing requirement as if it always plays out to the offending party's benefit, and unfairly so. But *Burnet* merely ensures that only in the most egregious of cases, such as "willful intentional nondisclosure, willful violation of a court order, or other unconscionable conduct," will a party's late-disclosed evidence be excluded as a discovery

sanction. *Burnet*, 131 Wn.2d at 494. And that is as it should be, given this state's long-standing policy favoring "resolution of cases on their merits." *See Lane v. Brown & Haley*, 81 Wn. App. 102, 106, 912 P.2d 1040 (1996) (cited with approval in *Burnet*, 131 Wn.2d at 498). *Burnet* furthers that policy by requiring trial courts to consider willfulness, prejudice, and lesser sanctions before excluding evidence relevant to a party's ability either to defend itself or to present its case on the merits.

As stated, Burien has offered no evidence that trial courts have actually been burdened or confused by having to follow the *Burnet* balancing requirements during trial. At most, Burien has identified a grab bag of Washington appellate decisions that show there may be an issue with how our appellate courts understand their role in reviewing the *Burnet* issues that come before them. For instance, in *Farah v. Hertz Transportation, Inc.*, 196 Wn. App. 171, 383 P.3d 552 (2016), and *Farrow v. Alfa Laval, Inc.*, 179 Wn. App. 652, 319 P.3d 861 (2014), the Court of Appeals apparently presumed to dispose of cases on *Burnet* grounds without giving the parties the opportunity to address those issues. While these decisions certainly present concerns about the willingness of the Court of Appeals to proceed in disregard of RAP 12.1's general mandate, which provides that Washington appellate courts should "decide a case on the basis of issues set forth by the parties in their briefs," this case does not implicate that concern. As for *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (2015), and *Porter v. Kirkendoll*, 5 Wn. App. 2d 686, 421 P.3d 1036 (2018), both involved summary judgments, and this Court previously held in *Blair v. Ta-*

Seattle E. No. 176, 171 Wn.2d 342, 254 P.3d 797 (2011), that a harmless-error analysis is not required when reviewing a *Burnet* issue that arises during summary judgment. *See Blair*, 171 Wn.2d at 351 n.5.

Here Larson met its burden on appeal to show that the trial court's decision to exclude evidence without a *Burnet* analysis was harmful. The trial court made no finding that Larson's trial tactics were "unconscionable" or that Larson "blatantly" violated court rules. *PFR*, at 9. Burien's theory of damages was that the persons on the list of customers Butler took with him to Larson were its customers, and that Larson had been unjustly enriched by making sales attributable to this misappropriation. Yet despite repeated requests, Burien failed to turn over its claimed 412 "matches" or "hits" of customers until two months before trial; Larson promptly began trying to contact these 412 persons, but Burien's list had missing, incomplete, or incorrect contact information for many of the persons identified on the list. RP 1020, 1323. By the deadline for filing trial-witness lists and the joint statement of the evidence, Larson had not been able to contact every person on the list. So Larson reserved the right to call any of the 412 persons identified on the list Burien provided a month earlier to testify at trial—just as Burien had done. CP 1157-63, 1159, 1168-73, 1537.

Ultimately, Larson was able to identify only five persons—out of the 412—who had bought cars from both dealerships.[1] RP 1368-69. Of those five persons, Larson was able to name only one on its joint statement

[1] Of course, Burien had to have known of these five persons' identities when it filed its complaint. CP 2248, 2278-81.

of the evidence. The trial court allowed that person to testify, but excluded the four others because they were not named individually, and did so without conducting the required *Burnet* balancing. The Court of Appeals correctly concluded that this decision was harmful. All of these witnesses would have uniformly testified that they decided to buy cars from Larson for reasons unrelated to their having previously bought cars from Burien. And the amount of the jury's damages award strongly suggested that it was made only because the jury did not get a chance to hear these four witnesses discredit any notion that their purchases were somehow related to the misappropriated customer list.[2]

Jones extended the *Burnet* balancing requirement to trial in 2013, tempering its impact with a harmless-error requirement. In a few more years' time, perhaps Burien's claims of undue burden and confusion will be validated. For now, they are just complaints, unsupported by the kind of "clear showing" that could warrant this Court's attention.

[2] The record here distinguishes this case from the two dependency cases cited by Burien. The Court of Appeals in *Dependency of M.P.* was unable to do a harmless-error analysis because the record did not indicate the nature of the testimony expected to be elicited from the excluded witnesses. 185 Wn. App. 108, 118, 340 P.3d 908 (2014). And the Court of Appeals in *Dependency of Lee* concluded that the exclusion of the parents' expert during the fact-finding phase of the trial was not harmless because the trial court discounted the expert's dispositional-phase testimony based on its earlier findings. 200 Wn. App. 414, 432, 404 P.3d 575 (2017). Here the nature of the testimony the four witnesses would have presented was made clear by Larson, and the Court of Appeals correctly concluded that their exclusion was harmful.

B. This UTSA case implicates the uniformity mandate of RCW 19.108.910. The Court of Appeals appropriately addressed the UTSA instructional issues raised by Larson to guide the trial court on remand and to assure the jury instructions comply with that mandate.

The UTSA became law in Washington in 1982 and incorporated nearly verbatim the model UTSA drafted three years earlier by the National Conference of Commissioners on Uniform State Laws. WPI 351.01 cmt. The model UTSA was drafted to address concerns about the "uneven" development of trade-secret law and to combat the resulting "undue uncertainty" about the scope of trade-secret protection and the remedies for misappropriation. *BlueEarth Biofuels, LLC v. Hawaiian Elec. Co.*, 235 P.3d 310, 313 (Haw. 2010). It sought to provide "unitary definitions" for trade secrets and trade-secret misappropriation. *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Ops., Inc.*, 171 Cal. App. 4th 939, 957, 90 Cal. Rptr. 3d 247 (2009). And it sought to "assure businesses that their efforts will be tested against the same measure of care in every state." *CDC Restoration & Constr., LC v. Tradesmen Contractors, LLC*, 274 P.3d 317, 329 (Utah Ct. App. 2012).

Nearly every state has enacted some form of the UTSA, and Washington's version of the UTSA contains the interpretive mandate that it be applied and construed to effectuate its general purpose to uniformize trade-secret law among states enacting it. RCW 19.108.910.

Interpreting a uniform law in harmony with the interpretations given by most jurisdictions is not foreign to this Court. *See, e.g., Swank v. Valley Christian Sch.*, 188 Wn.2d 663, 678-79, 398 P.3d 1108 (2017); *Matter of*

Paternity of M.H., 187 Wn.2d 1, 9, 383 P.3d 1031 (2016); *In re Schneider*, 173 Wn.2d 353, 369, 268 P.3d 215 (2011); *Kinney v. Cook*, 159 Wn.2d 837, 844, 154 P.3d 206 (2007). Nor is this job foreign to Division One. *See, e.g.*, *Rimon v. Schultz*, 162 Wn. App. 274, 280 n.3, 253 P.3d 462 (2011); *Thompson v. Hanson*, 142 Wn. App. 53, 66, 174 P.3d 120 (2007).

The Court of Appeals here reversed the jury verdict and damages award and remanded for a new trial because of the trial court's *Burnet* error. *ADA II*, at 5. It did not remand for a new trial because of an instructional error, as it had previously done in *ADA I*. But because the trial court's instructions did not conform to UTSA law, the Court of Appeals prudently addressed those instructional issues to guide the trial court on remand for a third trial. *Id.* at 6 n.10 (citing cases); *see also* RAP 12.2 (authority to "take any other action as the merits of the case and the interest of justice may require."); David S. Almeling, *Seven Reasons Why Trade Secrets Are Increasingly Important*, 27 BERKELEY TECH. L.J. 1091, 1092 (2002) (noting that trade-secret litigation in state courts "has increased at a rate faster than that of state litigation in general" over the past two decades).

1. The Court of Appeals correctly clarified that the plaintiff's initial burden of proof in an unjust-enrichment claim under the UTSA is to establish "sales attributable to the trade secret."

The Court of Appeals had already once addressed this instructional issue in *ADA I*. In *ADA I*, the court held that the phrase "damages from sales"—as opposed to "sales"—attributable to the use of a trade secret incorrectly stated the plaintiff's burden of proof in an unjust-enrichment

claim under the UTSA. *ADA I*, at 1, 4-7. The trial court here unfortunately failed to follow that directive on remand, further underscoring why the Court of Appeals in *ADA II* went out of its way to guide the trial court on remand for a third trial.

The trial court's instruction on Burien's unjust-enrichment claim stated that Burien's initial burden was to prove only "sales." CP 2198. But "[w]ithout the phrase 'attributable to the trade secret,' [that instruction] can be read to allow the plaintiff to satisfy its burden with gross sales data, whether or not attributable to the trade secret." *ADA II*, at 9. Burien had the burden to prove causation—that is, Larson's trade-secret misappropriation caused Burien's damages. *See* RCW 19.108.030(1) (allowing a plaintiff to "recover for the unjust enrichment caused by misappropriation"). The term "attribute" is defined as "caused or brought about by." WEBSTER'S THIRD NEW INT'L DICTIONARY 142 (2002). Absent the phrase "attributable to the trade secret" preceding the term "sales," the burden to prove causation would have been improperly shifted to Larson. The Court of Appeals thus guided the trial court on remand *for a third trial* that the damages instruction should include the provision: "The plaintiff has the initial burden of proving sales attributable to the trade secret" (*ADA II*, at 9)—precisely as Larson proposed in the second trial. CP 1600.

The Court of Appeals' decision is consistent with *Petters v. Williamson & Associates, Inc.*, 151 Wn. App. 154, 210 P.3d 1048 (2009), the *Restatement (Third) of Unfair Competition*, and its prior decision in *ADA I*.

Petters adopted the *Restatement*'s approach to proving damages in a trade-secret-misappropriation case:

> 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.

Petters, 151 Wn. App. at 165 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 45 cmt. f (1995)). As the comments to WPI 351.01 explain, the plaintiff's initial burden is to "prove[] sales attributable to the use of a trade secret." WPI 351.01 cmt.; *see also T-Mobile USA, Inc. v. Huawei Device USA, Inc.*, C14-1351-RAJ, 2017 WL 3503405, at *1 (W.D. Wash. 2017) (citing WPI 351.01 cmt. and quoting the "accurate description of the Washington Court of Appeals' holding in *Petters*"). And other UTSA courts that have addressed this issue have uniformly required a causal connection between the damages claimed by the plaintiff and the defendant's misappropriation. *Reply Brief*, at 30-31 n.15 (citing UTSA cases).

Burien rested its entire instructional theory on one phrase in the *Restatement*: the "plaintiff has the burden of establishing the defendant's sales." But that theory would have shifted the burden of proving causation—that Larson's misappropriation of the trade secret caused Burien damages—to Larson. At oral argument, Burien's counsel argued that "Burden had to prove sales," and "Burien was [merely] following the law." But as Judge Becker astutely pointed out, Burien was actually "following a sentence"—and not the law. Wash. State Court of Appeals oral argument,

Ada Motors v. Larson Toyota, No. 76613-9 (Nov. 7, 2018), at 25 min., 42-43 sec.

Consistent with *Petters*, the *Restatement*, and the majority to UTSA jurisdictions, RCW 19.108.030 requires a plaintiff to prove "sales attributable to the use of a trade secret" in a trade-secret-misappropriation case. The Court of Appeals has simply assured that there will be no chance of confusion on this vital point when this case is tried again for a third, and hopefully final, time.

2. The Court of Appeals correctly recognized that in a UTSA case, both willful and malicious must be shown to support exemplary damages; willful and malicious represent distinct concepts; and the Garner-based definition of "without just cause or excuse," endorsed by the trial court, impermissibly collapses the two concepts into what amounts to just a willfulness test.

A trial court "may" award exemplary damages and attorney's fees if "willful and malicious misappropriation exists" under the UTSA. RCW 19.108.030(2). The UTSA does not define willful and malicious.

The trial court defined "willful" as "voluntary or intentional, but not necessarily malicious." *ADA II*, at 10. It defined "malicious" as "without just cause or excuse." *Id.* When read together, these instructions allowed the jury to find willful and malicious misappropriation without finding the critical element of maliciousness: "ill will or improper motive." The definition of "misappropriation" means that a party had no just cause or excuse to use another's property for its own use. *See* BLACK'S LAW DICTIONARY 1148-49 (10th ed. 2014). But a party must both willfully and

maliciously misappropriate another's trade secret to be entitled to exemplary damages and attorney's fees under the UTSA. So the trial court's defining "malicious" as "without just cause or excuse" "unjustifiably narrowed" what constitutes malicious misappropriation under the UTSA. *ADA II*, at 13; *Petters*, 151 Wn. App. at 173.

Tellingly, Burien cites no UTSA cases from other jurisdictions holding that the trial court's instruction defining "malicious" as "without just cause of excuse" complies with the UTSA. The only case it cites, *Petters*, endorsed the Black's Law Dictionary definition of "malicious" as "substantially certain to cause injury" and "without just cause of excuse." 151 Wn. App. at 173. But *Petters* was not a jury-instruction case; its endorsing the phrase "without just cause or excuse" to define malicious did not address the proper form of a jury instruction under the UTSA. *ADA II*, at 11. Nor was that issue explored in *Boeing v. Sierracin Corp.*, 108 Wn.2d 38, 738 P.2d 665 (1987), when this Court, as the Court of Appeals did in *Petters*, analyzed only the sufficiency of evidence supporting the trial court's finding of willful and malicious misappropriation. *ADA II*, at 11-12.

As the Court of Appeals correctly noted, the trial court's instruction defining "malicious" failed to capture the overwhelming majority rule of UTSA jurisdictions that malicious means "ill will or improper motive."

ADA II, at 13-15 (citing cases from UTSA jurisdictions).[3] The Court of Appeals recognized that malicious must mean something more than "without just cause of excuse" because it does not convey the level of malice required to support exemplary damages and a fees award under the UTSA. *ADA II*, at 13.

C. Troubled by the evident lack of sound billing judgment from Burien's counsel, the Court of Appeals correctly addressed the fees award to guide the trial court on remand.

The Court of Appeals had serious concerns about Burien's counsel's billing judgment. And rightly so. Burien requested more than $850,000 in fees in a case where one jury had awarded zero damages and another had awarded only $12,500. CP 2459.

To be sure, the trial court awarded Burien $610,000 in fees in a case involving multiple trials and one appeal. And the Court of Appeals did not conclude that the trial court would abuse its discretion in awarding Burien fees, assuming a finding of willful and malicious conduct was made by a properly instructed jury. The Court of Appeals instead signaled that on remand Burien would have to do substantially more than it had done to date to justify an award of fees of hundreds of thousands of dollars for a case supposedly worth $3.5 million—even though the record to date strongly

[3] *See, e.g.*, *Haught v. Louis Berkman LLC*, 417 F. Supp. 2d 777, 784 (N.D. W. Va. 2006) (defining "malice" as "having, or done with, evil or mischievous intentions or motive"); *MicroStrategy Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396, 430 (E.D. Vir. 2004) (defining "malice" as action taken with "ill will, malevolence, grudge, spite, wicked intention or a conscious disregard of the rights of another"); *Boehm v. Black Diamond Casino Events, LLC*, 116 N.E.3d 704, 710 (Ohio Ct. App. 2018) (defining "malicious" as "ill will" and "wickedness of heart").

suggests this case is worth at best only a tiny fraction of that amount, if anything at all.

No authority supports that the Court of Appeals' decision will undermine the UTSA or dissuade persons from bringing UTSA claims. The UTSA was not intended to encourage litigants to seek implausible and unnecessary damages awards with endless litigation. Indeed, the record supports that had Larson been allowed to present the testimony of its four excluded witnesses, the jury could easily have found no damages. Burien should have accepted Larson's voluntary withdrawal of using the customer list in 2011. It didn't and instead chose to chase millions of dollars in damages to which it is not entitled. The Court of Appeals correctly determined that any fair fees award must be informed by these realities.

V. CONCLUSION

This Court should deny review for the reasons stated in this Answer.

Respectfully submitted: April 30, 2019.

FISHER PHILLIPS LLP

By MBKing #14405 for
Suzanne Kelly Michael, WSBA No. 14072
Matthew J. Macario, WSBA No. 26522

CARNEY BADLEY SPELLMAN, P.S.

By Michael B. King
Michael B. King, WSBA No. 14405
Rory D. Cosgrove, WSBA No. 48647

Counsel for Defendants-Respondents

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via Appellate Portal the following:

Brian Paul Russell 17820 1st Ave S Ste 102 Burien WA 98148-1794 bprlaw@comcast.net	Suzanne Kelly Michael Matthew J. Macario Fisher & Phillips LLP 1201 Third Avenue, Ste 2750 Seattle WA 98101 smichael@fisherphillips.com mmacario@fisherphillips.com
Kenneth Wendell Masters Shelby R. Frost Lemmel Masters Law Group PLLC 241 Madison Ave N Bainbridge Island, WA98110-1811 ken@appeal-law.com shelby@appeal-law.com	Kathleen Ann Kline Bellevue City Attorney's Office 450 110th Avenue NE Bellevue, WA 98004-5514

DATED this 30th day of April, 2019.

Patti Saiden, Legal Assistant

APPENDIX A

THE HONORABLE JAMES E. ROGERS

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

ADA MOTORS, INC., dba BURIEN TOYOTA, a Washington Corporation, Plaintiff, vs. DAVID L. BUTLER and ELIZABETH BUTLER, and their marital community, and THE ROBERT LARSON AUTOMOTIVE GROUP, INC., a Washington corporation, dba LARSON TOYOTA, Defendants.	)	No. 11-2-14916-1 KNT DECLARATION OF TOM BANFILL

I, Tom Banfill, hereby declare as follows:

1. My name is Tom Banfill and I live in Puyallup, Washington. I previously lived in Burien, Washington. I am over eighteen years of age. This declaration is based on my personal knowledge, and I am competent to testify to the matters in this declaration.

2. I was served with a subpoena and witness fee check to testify at the trial in this matter. I was willing and able to testify if the Court had allowed my testimony. In fact, I traveled to the King County Courthouse and was prepared to testify, until I was informed by one of the attorneys for the defendants that the Court was not allowing my testimony and that I could leave.

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3. In 2005, I bought a Toyota Corolla from Burien Toyota. At the time, Burien Toyota was close to my home, so it was convenient for me to go there. I don't remember who my salesperson was at Burien Toyota. It may have been David Butler, but I do not recall. Burien Toyota performed some service on my car as well.

4. Sometime in approximately 2012, I wanted to get a new car. I went online to look at prices. One of the dealerships I checked was Larson Toyota in Tacoma. I noticed that Larson Toyota had a 2011 Corolla that fit my needs, so I called their dealership. Mr. Butler is the salesperson who took the call and helped me buy the car. It was pure coincidence that I ended up with Mr. Butler as my salesperson.

5. In 2013, I bought another car from Larson Toyota. Just like the previous time, I went online first to check for the best deals. Larson had the 2013 Prius that I wanted, at the right price. Mr. Butler was my salesperson on this car purchase as well, but I called Larson Toyota. They did not call me.

6. To the best of my recollection, I had not been contacted or solicited by David Butler in any way prior to purchasing my vehicles at Larson Toyota.

7. To the best of my recollection, I had not been contacted or solicited by Larson Toyota in any way prior to my visit to Larson Toyota.

I hereby declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge, information, and belief.

DATED this ____ day of February, 2017.

_____
Tom Banfill

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701 Pike Street, Suite 1150
Seattle, Washington, 98101
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THE HONORABLE JAMES E. ROGERS

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

ADA MOTORS, INC., dba BURIEN TOYOTA, a Washington Corporation, Plaintiff, vs. DAVID L. BUTLER and ELIZABETH BUTLER, and their marital community, and THE ROBERT LARSON AUTOMOTIVE GROUP, INC., a Washington corporation, dba LARSON TOYOTA, Defendants.	No. 11-2-14916-1 KNT DECLARATION OF ABEL BRAMBILA

I, Abel Brambila, hereby declare as follows:

1. My name is Abel Brambila and I live at 3430 382nd St., Auburn, WA 98001. My phone number is (206) 445-4098. I am over eighteen years of age. This declaration is based on my personal knowledge, and I am competent to testify to the matters in this declaration.

2. I was served with a subpoena to testify at the trial in this matter on January 4, 2017. I was willing and able to testify if the Court had allowed my testimony.

3. In 2006, I purchased a Toyota Camry from Burien Toyota. David Butler was my salesperson at Burien Toyota, and this was the first time I had met him.

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4. In 2014, I was looking for a new car. I went to Larson Toyota to look at cars. I did not know that David Butler was working at Larson Toyota until I saw him there. I liked working with David in the past, so I purchased a Toyota Highlander from him in or around May of 2014.

5. I had not been contacted or solicited by David Butler in any way prior to my visit to Larson Toyota.

6. I had not been contacted or solicited by Larson Toyota in any way prior to my visit to Larson Toyota.

I hereby declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge, information, and belief.

DATED this 3 day of February, 2017.

Abel Brambila

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THE HONORABLE JAMES E. ROGERS

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

ADA MOTORS, INC., dba BURIEN TOYOTA, a Washington Corporation, Plaintiff, vs. DAVID L. BUTLER and ELIZABETH BUTLER, and their marital community, and THE ROBERT LARSON AUTOMOTIVE GROUP, INC., a Washington corporation, dba LARSON TOYOTA, Defendants.	No. 11-2-14916-1 KNT DECLARATION OF DANIEL DUNNE

I, Daniel Dunne, hereby declare as follows:

1. My name is Daniel Dunne and I live at 6026 37th Ave SW, Seattle, WA 98126. My phone number is (206) 933-8969. I am over eighteen years of age. This declaration is based on my personal knowledge, and I am competent to testify to the matters in this declaration.

2. I was served with a subpoena and witness fee check to testify at the trial in this matter in December, 2016. I was prepared to testify and had been properly subpoenaed. I was willing and able to testify if the Court had allowed my testimony.

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3. In 2005, I bought a Toyota Coralla from Burien Toyota. Burien Toyota is close to my home, so it was convie ient for me to go there. David Butler was my salesperson at Burien Toyota.

4. In late 2011, I wanted to trade in my car. My wife and I went back to Burien Toyota. We were looking for David Butler. The staff at Burien Toyota informed us that David Butler no longer worked at Burien Toyota, but they did not tell us where he was currently employed.

5. I wanted to do business with David Butler again. When we got home, my wife did some digging and located David Butler at Larson Toyota. We called David Butler at Larson Toyota and set up an appoi itment.

6. I purchased a Toyota Corolla from David Butler at Larson Toyota in or around December 2011.

7. I had not been contacted or solicited by David Butler in any way prior to my visit to Larson Toyota.

8. I had not been contacted or solicited by Larson Toyota in any way prior to my visit to Larson Toyota.

I hereby declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge, information, and belief.

DATED this 4 day of February, 2017.

Daniel Dunne

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THE HONORABLE JAMES E. ROGERS

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

ADA MOTORS, INC., dba BURIEN TOYOTA, a Washington Corporation, Plaintiff, vs. DAVID L. BUTLER and ELIZABETH BUTLER, and their marital community, and THE ROBERT LARSON AUTOMOTIVE GROUP, INC., a Washington corporation, dba LARSON TOYOTA, Defendants.	)	No. 11-2-14916-1 KNT DECLARATION OF JOHN-MARK GALANG

I, John-Mark Galang, hereby declare as follows:

1. My name is John-Mark Galang and I live at 1203 N 10th Pl, Apt 1201, Renton, WA 98057. My phone number is (206) 802-5871. I am over eighteen years of age. This declaration is based on my personal knowledge, and I am competent to testify to the matters in this declaration.

2. I was served with a subpoena and witness fee check to testify at the trial in this matter in January. I was prepared to testify and had been properly subpoenaed. I was willing and able to testify if the Court had allowed my testimony.

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3. In or around 2009, I bought a Toyota Coralla from Burien Toyota. David Butler was my salesperson at Burien Toyota.

4. In 2013, I was looking for a new car. I wanted to do business with David Butler again. I was told by my friend, Ronel Orilla, that David Butler was working at Larson Toyota.

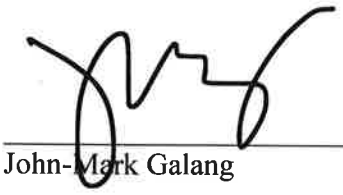
5. I purchased a Toyota Sienna from David Butler at Larson Toyota in 2013.

6. I had not been contacted or solicited by David Butler in any way prior to my visit to Larson Toyota.

7. I had not been contacted or solicited by Larson Toyota in any way prior to my visit to Larson Toyota.

I hereby declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge, information, and belief.

DATED this 3rd day of February, 2017.



John-Mark Galang

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CARNEY BADLEY SPELLMAN

April 30, 2019 - 10:35 AM

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