

NO. 67278-9

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

NORTHWEST PRODUCT DESIGN GROUP, LLC, a Washington limited liability corporation; TODD D. ANDERSEN, an individual; MAC CAMERON, an individual; JERRY CHAMBERS, an individual; and ELLIS MASSEY, an individual,

Appellants/Cross-Respondents

v.

HOMAX PRODUCTS, INC., a Delaware corporation; RANDAL W. HANSON and JANE DOE HANSON, husband and wife, and the marital community thereof; ROSS CLAWSON and JANE DOE CLAWSON, husband and wife, and the marital community thereof; LESTER GREER, JR. and Jane Doe Greer, husband and wife, and the marital community thereof; and WILFRED HOFFMANN and Jane Doe Hoffmann, husband and wife, and the marital community thereof,

Respondents/Cross-Appellants.

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APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

From the beginning of this litigation, the trial court improperly limited Northwest Product Design Group's ("NPDG") case. It erroneously dismissed NPDG's properly pled claims of fraud, negligent misrepresentation, and violation of the Consumer Protection Act ("CPA"), RCW 19.86.020. It perpetuated this error by later denying NPDG's motion for leave to amend its complaint to assert a CPA claim. Moreover, it improperly sanctioned NPDG for asserting a trade secret cause of action even though NPDG timely withdrew this claim.

In addition to restricting NPDG's claims, the trial court limited the evidence that NPDG could present in support of its remaining claims. The court disallowed testimony of lost profits for the Jaws Clip and excluded Jaws Clips damages charts and exhibits.

Finally, the court erroneously decided that NPDG was not damaged by the Respondents' (collectively "Homax") misappropriation of the Jaws Clip. In fact, such misappropriation was the reason this clip was not marketed or patented as of the trial.

II. REBUTTAL TO HOMAX'S STATEMENT OF THE CASE

In its brief,¹ Homax misstates the facts regarding the Rhino Clip and its relationship with CGAC. Although Mr. Cameron described Homax's agreement to market CGAC's clip as a "godsend," VRP Test. of RC 2/10-2/16, 2011, p. 117:2-6, he was not referring to Homax's future success in marketing and selling the clip to Lowes and Home Depot. Moreover, he was not referring to any "fail[ure] to accomplish that goal," as CGAC had not yet even begun the marketing process. *Id.*; Homax's Brief p. 5.

Similarly, Homax's statements regarding the Rhino Clip are inaccurate. Homax's Brief p. 5-9. First, the transaction described as "selling tens of thousands of Rhino Clips" was in fact the purchase of 10,000 Rhino Clips on September 3, 2002. VRP Test. of RC 2/10-2/16, 2011, p.127:22-128:21; Homax's Brief p. 7. Second, the already-filed Rhino patent application obviated the need for confidentiality agreements. VRP Test. of RC 2/10-2/16, 2011, p. 136:4-137:4; Homax's Brief p. 7. Third, Mr. Hanson countered Mr. Clawson's concern about the effect on Crocodile Clip sales by stating that the Rhino Clip "would be an asset." VRP Test. of RC 2/10-2/16, 2011, p. 29:10-13; Homax's Brief p. 8. These are important distinctions readily apparent from the record.

¹ Homax filed a cross-appeal on a number of issues; however, it did not affirmatively raise them in its response brief. Thus, NPDG considers this appeal to not involve any cross-appeal on the part of Homax.

III. ARGUMENT

A. ASSIGNMENT OF ERROR NO. 1

For the Court's convenience, NPDG uses its section headings.

1. NPDG's Statement of Additional Facts

NPDG's summary of the facts is relevant to its CPA, fraud, and misrepresentation claims—some of which were expressly stated in the first amended complaint, while others were implied or learned later in the case. Homax's Brief p. 9; NPDG's Brief p. 9-10.

In particular, the description of Homax's business as one that "centers on soliciting and acquiring ideas, trade secrets, and patent rights from individuals and entities," NPDG's Brief p. 9, is an accurate description of the express and implied facts pled in paragraph ¶ 16. CP 1281 ¶ 16. Homax's resistance to the term "solicit" betrays its well-founded concern that the facts of this case fits a claim of a CPA violation, as well as claims of fraud and misrepresentation.

Similarly, Homax's argument that NPDG is precluded from alleging the existence of any Rhino or Jaws confidentiality agreement falls flat. Homax's Brief p. 10-11. As Homax itself stated, this assignment of error relates to the sufficiency of the first amended complaint, which, at a minimum, alleges the existence of such an agreement. Homax's Brief p.

9; CP 1821 ¶¶ 16-20. Any subsequent findings regarding the facts alleged in the first amended complaint are outside the scope of review.

2. - 4. NPDG Sufficiently Pled the Public Interest Element

The allegations in NPDG’s first amended complaint closely align with the elements required for a CPA claim, and, in particular, NPDG sufficiently pled the public interest element. Homax’s acts had or have the capacity to injure other persons. RCW 19.86.093(3).

a. NPDG Pled Unequal Bargaining Positions

In attempting to negate the existence of the fourth Hangman Ridge factor—namely, that the parties were unequal bargainers—Homax focuses only on the sophistication of Mr. Cameron and NPDG. Homax’s Brief p. 13-16. While this may be relevant, the test is “unequal *bargainers*,” which is not necessarily the same as general business sophistication. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 794, 719 P.2d 531 (1986) (emphasis supplied).

Mr. Cameron and NPDG may be sophisticated in certain respects, but in their interactions with Homax, they were in an unequal bargaining position. In the beginning, Homax was negotiating and dealing with Mr. Cameron only, as an individual, considered to be a “serial inventor.” VRP Test. of RC 2/10-2/16, 2011, p. 26:11-22; 28:16-29:4; CP 1462:8. Unlike the Hangman Ridge plaintiffs, Mr. Cameron did not have sufficient

business experience and familiarity with the subject matter of the negotiations to be in an equal bargaining position. In fact, Mr. Cameron's past business experience with licensing a clip product was limited to the single negotiation with Homax regarding the Crocodile Clip. CP 1695-1710. In addition, Mr. Cameron's negotiations with Homax betray his lack of familiarity with the area of licensing and marketing products to big box stores. VRP Test. of RC, 2/10-2/16, 2011, 24:11-26:6. Indeed, Mr. Cameron was simply an undercapitalized inventor. VRP Test. of RC 2/10-2/16, 2011, p. 154:10-162:23; VRP Test. of RC, 2/10-2/16, 2011 25:1-26:6; VRP Test. of RC 2/10-2/16, 2011, p. 23:6-12. Even the trial court, after presiding over the entire trial and hearing Mr. Cameron's testimony, concluded that Mr. Cameron was unsophisticated when compared to Homax. VRP Feb. 23, 2011, p. 23:15-16; 24:21.

In sharp contrast to Mr. Cameron, Homax occupied a far stronger bargaining position based on its experience, industry position, and expertise. Homax was a sophisticated company that was doing business on a nationwide scale, with vast experience in licensing negotiations, patents, sales into the millions of dollars, and complex business dealings with other large corporations such as big box retail stores. VRP Test. of RC on Cross 2/14, 2011, 64:2-4; CP 1280-1281, CP 1218; VRP Test. of

RC 2/10-2/16, 2011, p. 29:18-19; 31:20-23; Partial VRP 2/10, 14-16, 2011, p. 144:5-15.

These stark differences in negotiation and bargaining experience show that NPDG and Mr. Cameron and Homax held unequal bargaining positions in their licensing negotiations.

b. NPDG Pled Advertising and Soliciting

Homax contradictorily argues that NPDG did not allege advertising in the first amended complaint, but recognizes that it alleged in ¶ 28 that Homax “advertises to the general public.” Homax’s Brief p. 16. The pleading standard for a complaint is “a short and plain statement”; NPDG’s “lone allegation” is sufficient. Superior Court Civil Rule 8.

Moreover, Homax’s reliance on Burbo v. Harley C. Douglass, Inc., 125 Wn. App. 684, 700, 106 P.3d 258 (2005) is misplaced. That case properly states the question at the core of the public interest element as “whether the action has the capacity to deceive a substantial portion of the purchasing public” and the relevant factors of that element: namely, a pattern of conduct, the potential for repetition, and the likelihood that others will be affected. Id. (internal citations removed). However, it does not require that the defendant’s advertising to the general public “brought” the plaintiff to him. Id.; Homax’s Brief p. 17. Mr. Cameron’s prior

relationship² with Homax obviates neither the public interest impact nor NPDG's CPA claim.

c. Homax's Actions Were Not Reasonable Business Practices

Homax's representations of interest in NPDG's products, as well as of its derivative interest in negotiating an agreement, were not reasonable business practices when such interest was not actually present. As such, they should not be exempted from the CPA. Indeed, such conduct is not reasonably related to the development and preservation of business. Dwyer v. J.I. Kislak Mortg. Corp., 103 Wn. App. 542, 548, 13 P.3d 240 (2000). The court below and Homax improperly characterized Homax's conduct as a negotiation and then failure to finalize a deal. VRP March 16, 2007, 23:15-24:5. Homax's Brief p. 18. Instead, these two events were the predictable result of Homax's false representation of interest in NPDG's products.

d. The Case Law Does Not Require Causal Connection

Although Homax claims that NPDG must establish a causal connection between the conduct complained of and the defendant's advertising and solicitation, it cites no case law to support that argument.

² The negotiations at issue actually arose after Homax approached Mr. Cameron regarding the Rhino and Jaws Clips. VRP VRP Test. of RC 2/10-2/16, 2011, p. 23:12-16; 26:11-24; Partial VRP 2/10,14-16, 2011, p. 46:9-10.

Homax's Brief p. 20. In fact, Homax's advertising and soliciting, even without more, establishes the requisite likelihood that additional people have been or will be injured in the same fashion as NPDG; NPDG's prior relationship with Homax is irrelevant. Dwyer v. J.I. Kislak Mortg. Corp., 103 Wn. App. at 547; Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc., 64 Wn. App. 553, 563, 825 P.2d 714 (1992).

5. NPDG Sufficiently Pled Fraud and Misrepresentation Claims

The allegations in NPDG's first amended complaint also satisfy the elements required for its fraud and misrepresentation claims,³ and, in particular, whether an existing fact was misrepresented and whether NPDG's reliance was reasonable. CP 1270.

Similar to the court below, Homax continues to mischaracterize its conduct as a promise of future performance. Homax's Brief p. 21-26. NPDG does not argue that Homax's failure to close the deal⁴ is the basis of its claims. Homax's Brief p. 22. Rather, Homax misrepresents the existing fact of Homax's interest in NPDG's products and its negotiations with Mr. Cameron when it had no actual interest in the products. NPDG's

³ Trial testimony confirmed that there were ongoing discussions regarding the Rhino Clip for three years, which began with Homax instructing Mr. Cameron to not take the clip to anyone else. VRP Test. of RC 2/10-2/16, 2011, p. 13:2-3; 23:12-16; 28:16-18; 30:25; 31:12-15; 32:25-33:2; 35:17-20. This contradicts Homax's statements that the company was never interested in the clip. Partial VRP 2/10,14,-16, 2011, p.52:10-14.

⁴ NPDG also does not argue that Homax promised to close the deal.

Brief p. 17-20; Partial VRP 2/10,14-16, 2011, p. 52:10-14; VRP Test. of RC 2/10-2/16, 2011, p.13:2-3; 26:15-22; 28:16-18; 30:25; 31:12-15; 32:25-33:2; 35:17-20. (i.e. NPDG does not assert that the existing fact misrepresented was that “Homax was not interested in taking a license *because* of litigation and corporate acquisition.” Homax’s Brief p. 25 (emphasis added).) CP 1281-1282. Just as the defendant in Beckendorf lied about his intentions, Homax admitted it was not interested in NPDG’s products from the beginning. Partial VRP 2/10,14-16, 2011, p. 52:10-14; Beckendorf v. Beckendorf, 76 Wn.2d 457, 458, 457 P.2d 603 (1969).

And, as Homax’s representation was made with no intent at the time of abiding by it, it constitutes fraud. Lovell v. Dotson, 128 Wash. 669, 673, 223 P. 1061 (1924); Rennebohm v. Rennebohm, 153 Wash. 102, 108, 279 P. 402 (1929); Murdoch v. Leonard, 1 Wn.2d 37, 39, 95 P.2d 37 (1939).

Moreover, Homax made such representations intending to induce NPDG to negotiate with it; Homax’s lack of actual interest in NPDG’s products was not a fact that was readily available to NPDG and NPDG was entitled to rely on Homax’s representation. Westby v. Gorsuch, 112 Wn. App. 558, 570, 50 P.3d 284 (2002). Such reliance supports a finding of a misrepresentation of an existing fact. Holland Furnace Co. v. Korth, 43 Wn.2d 618, 622, 262 P.2d 772 (1953).

As the result of its reliance on Homax's representations on interest, NPDG did not contact other companies regarding distribution or licensing. CP 1281-1282; VRP Test. of RC 2/10-2/16, 2011, p. 23:12-16. Instead, NPDG continued to negotiate with Homax. VRP Test. of RC 2/10-2/16, 2011, p. 35:17-20.

This reliance was reasonable based upon Homax's representation of interest, the trust Mr. Cameron felt based on his prior relationship with Homax, and Homax's pretextual explanations for its delay in closing the deal. Westby, 112 Wn. App. at 574 (reliance on opinion justified where maker stands in relation of trust and confidence to recipient); Beckendorf, 76 Wn.2d at 464 (no evidence of reliance where persons were fitted by knowledge and experience to evaluate the truth or falsity of the representation). These circumstances did not belie Homax's misrepresentation of interest. In fact, the litigation and acquisition lent support to the misrepresentation by providing alternative explanations for the protracted negotiations. Homax's Brief p. 24-25.

Thus, the court below erred in determining that allegations in the first amended complaint were insufficient to establish NPDG's CPA violation, fraud, and misrepresentation claims.

B. ASSIGNMENT OF ERROR NO. 2

1. Facts Alleged in Proposed Complaint

The additional facts described on pages 20 through 22 of NPDG's brief relate to the sufficiency of the second amended complaint, as these additional facts were either included in the proposed second amended complaint or in NPDG's motion for leave to amend. CP 1216-1227, CP 1143-1215, CP 1081-1142, CP 854-859.

2. NPDG Established Abuse of Discretion in the Trial Court's Denial of NPDG's Motion to Amend

NPDG's proposed second amended complaint did not restate previously pled claims, but rather bolstered the public interest impact element of its CPA claim with newly discovered evidence. Pepper v. King County, 61 Wn. App. 339, 343, 810 P.2d 527 (1991). Such evidence defeats any argument of futility.

The futility analysis for a motion to amend and the analysis for a motion to dismiss are not the same. In considering a motion to amend, futility is one of four factors analyzed, whereas the question regarding a motion to dismiss is whether the complaint alleges no facts that would justify recovery. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 142, 937 P.2d 154 (1997); NT & SA v. Hubert, 153 Wn.2d 102, 122-123, 101 P.3d 409 (2004); Wilson v. Horsley, 137 Wn.2d 500, 506, 974 P.2d 316 (1999); Wright v. Jeckle, 104 Wn. App. 478, 481, 16 P.3d 1268 (2001). The lower court's failure to consider the other factors and its blanket

reliance on its prior decision to dismiss the CPA claim reflect a clear abuse of discretion.

The CPA violation claim was not futile because the facts of this case, particularly in light of the newly discovered evidence of solicitation, support a CPA violation claim. As discussed above, Homax cites no case that supports its contention that there must be a causal connection between the solicitation and the interaction of the parties.

C. ASSIGNMENT OF ERROR NO. 3

1. The Court's Ruling *Limited* Messrs. Ruble and Cameron's Testimony Regarding Lost Profits of the Jaws Clip.

Homax asserts that “the trial Court granted on narrow motion in liminie [sic] only, excluding lost profits evidence related to the Jaws Clip.” Homax’s Brief p. 31. To clarify, NPDG asserted in its procedural history that the trial court *limited* (but did not preclude) Mr. Cameron’s and Mr. Ruble’s testimony related to lost profits for the Jaws Clip and *excluded* NPDG’s damages charts and related exhibits, which showed lost profits evidence for the Jaws Clip. NPDG’s Opening Brief pp. 27-28.

One basis for Homax’s Motion in Limine was to prevent Mr. Cameron from presenting NPDG’s damages theory based on Homax’s lost profits; Homax argued the theory was speculative and NPDG lacked the resources to sell its products to large retailers. VRP February 8, 2011, 5:6-

7:7. Another basis for Homax's Motion in Limine was to prevent Mr. Ruble from presenting the damages charts and related exhibits as part of his testimony. VRP February 8, 2011, 29:15-30:18. The trial court ruled that this evidence could not be presented as part of NPDG's damages presentation, thereby precluding Messrs. Cameron and Ruble from testifying regarding this subject. In fact, Mr. Ruble was not called because the basis for his testimony was eliminated by the trial court's rulings. Accordingly, stating that the basis for Mr. Ruble's testimony would have been to quantify "NPDG's loss as an expert in the field of damages calculation" is not improper, particularly considering that the foundation for his calculation was excluded by the trial court. Homax's Brief p. 33.

2. Homax's Misappropriation of the Jaws Clip Was the Reason It Was Never Sold, Marketed, or Patented.

Homax attempts to mislead the Court by stating "the Jaws clip was never sold, marketed or patented as of 2011 because NPDG 'didn't have the money' and because NPDG was 'concentrating on the Rhino.'" Homax's Brief p. 33. Here, Homax attempts to conceal the larger issue that as of March, 2, 2004, the date the '071 Patent was published, NPDG was precluded from *ever* receiving patent protection for the Jaws Clip and its inventions placed in the public domain. Although Mr. Cameron testified that he had not yet received patent protection for the Jaws Clip

because he lacked the resources in 2001 and 2002, the reason the Jaws Clip was never sold, marketed, or patented *as of 2011* was because Homax had misappropriated NPDG's trade secret.

In fact, Mr. Cameron testified that he was in discussions regarding Homax's interest in the Jaws Clip for nearly three years. VRP Test. of RC 2/10-2/16, 2011, p. 35: 17-20. Homax used this extended time period, which it created, to disclose Mr. Cameron's invention in the '071 Patent. This disclosure amounted to a preemption of the entire market, thus preventing NPDG from licensing to other parties, as well as making entry into the market by NPDG impossible.

Homax also improperly relies on Golf Landscaping to support its assertion that NPDG's damages theory was too speculative. In Golf Landscaping, the trial court awarded the plaintiff contractor lost profits due to the defendant subcontractor's delays in performance. Golf Landscaping, Inc. v. Century Const. Co., a Div. of Orvco, Inc., 39 Wn. App. 895, 896, 696 P.2d 590 (1984). The plaintiff contractor's lost profit claim was based entirely on (1) a list of projects appearing in a journal that it could have bid on during the delay caused by Century and (2) testimony that it would normally bid on one job per week with a 25 percent success rate. Golf Landscaping, 39 Wn. App. at 903. In reversing the lost profits

award, Division One held that the evidence was too attenuated to support a lost profits claim:

Such consequential damages are not recoverable because they would not have been reasonably foreseeable by the defendant at the time when the breaches of contract ... were committed. *It is wholly conjectural whether [the contractor] would have been awarded those additional contracts. The petition states only that [plaintiff contractor] was unable to bid on them and that he had a "reasonable expectation" of receiving them. Such an attenuated theory of damages is legally insufficient.*

Id. at 903–04 (first and second alterations and emphasis in original; internal quotations and citations omitted).

Here, NPDG’s theory of damages was not similarly attenuated. Unlike the plaintiff in Golf Landscaping, NPDG’s claim for lost profits was based on a specific product NPDG was working to develop with Homax. Instead of completing this process, Homax misappropriated the product by placing it in the public domain. Further, unlike the plaintiff in Golf Landscaping who based his lost profits claim on potential projects listed in a trade magazine, NPDG’s continuous business relationship with Homax since 2000 gave it a reasonable basis to believe that Homax would have developed the Jaws Clip.

Contrary to Homax’s contention, NPDG was not required to establish with absolute certainty that, but for Homax’s misappropriation, it would have developed this product. Riverview Floral, Ltd. v. Watkins, 51

Wn. App. 658, 663, 754 P.2d 1055 (1988), amended by 764 P.2d 1012.

Washington courts abide by the principle that “the wrongdoer shall bear the risk of the uncertainty which its own wrong has created.” Jacqueline's Washington, Inc. v. Mercantile Stores Co., 80 Wn.2d 784, 790, 498 P.2d 870 (1972) (internal quotation omitted). Here, the trial court abused its discretion by improperly denying lost profit damages evidence and this Court should therefore reverse the decision.

3. Page Thirty-Four of NPDG's Opening Brief Is Supported by the Record.

The information referred to on page thirty-four of NPDG's opening brief is supported in the Statement of Facts. In particular, the statements regarding how Mr. Cameron would have testified was part of Mr. Cameron's testimony in opposition to Homax's Motions in Limine. *See* Opening Brief at p. 6-8. This testimony relates to the facts that support his methods for calculating lost profits. There, Mr. Cameron testified that the Jaws Clip would have displaced Homax's clip products. However, because he was precluded from referring to the damages charts and exhibits that included Homax's profit history for its clip products, he could not provide testimony regarding the nexus between the value of the Jaws Clip and how it would have affected Homax's clip sales.

4. Robert Cameron Was Not Given Wide Latitude to Present Evidence of Damages.

Homax also contends that Mr. Cameron was given wide latitude to present evidence of damages, but this was simply not the case. While he did testify about the dollar value of the Jaws Clip being “[f]our hundred to five hundred thousand dollars,” he was entirely precluded from explaining how he came up with this number.

Homax also asserts that because Mr. Cameron testified that on two occasions he sold interests in the Jaws Clips, that he was able to “introduce a value” for the clip. While this information is important, it does not provide evidence related to the market value of the Jaws Clip.

D. ASSIGNMENT OF ERROR NO. 4

1. Mr. Cameron Was Improperly Excluded as an Expert Witness.

Mr. Cameron has been inventing, marketing, sourcing, manufacturing, and licensing various locking clip products since the early 1990s. Partial VRP 2/10,14-16 2011, p. 4:14- 7:11. He designed “all of the artwork, the blister cards, the brochures, laying out all of the contacts to contract, which [he] learned heavily through the years, and locating a company that would manufacture them, and put tooling up.” Partial VRP 2/10,14-16, 2011, p. 5:10-14. Mr. Cameron invented and helped bring to market the first successful product of its kind, the Crocodile Clip, which

Homax stated was its fastest growing product *ever*. VRP Test. of RC 2/10-2/16, 2011, p. 3:14-10:22.

Additionally, Mr. Cameron was heavily involved with the development, advertising, and marketing of the Crocodile Clip. Partial VRP 2/10,14-16, 2011, p. 4:14- 7:11. Mr. Cameron has promoted clip products at trade shows and solicited and acquired marketing data and information from others in the agriculture and sporting goods markets. Partial VRP 2/10,14-16, 2011, p. 4:14- 7:11. He expended marketing efforts and introduced locking clips to the marine market: “we had all the leads in the marine market, we had already been dealing with people in the marine market with the safety whistles and we did have a lot of people I talked to about the clips. We already sold the Crocodile Clip in the marine market *before* we licensed it to Homax. We had all the contacts and everything ready to go.” VRP Test. of RC 2/10-2/16, 2011, p. 172:6-173:25 (emphasis added). Additionally, Mr. Cameron testified about his efforts to place the clip products in the automotive market, an idea that he brought to Randy Hanson of Homax. VRP Test. of RC 2/10-2/16, 2011, p. 12:20-13:6.

However, the trial judge only permitted Mr. Cameron to testify about the following subjects: “with regard to comparison of the clips and the advantages and disadvantages, certainly the witness is allowed -- he

has designed clips and I have no problem with him testifying about the advantage or disadvantage between the various types of clips.” Partial VRP, 2/10, 14-16, 2011, p. 12:11-15. The trial judge went on to say that regarding market displacement, “he is not qualified to testify to that by training, education, and he has no experience in marketing.” Partial VRP, 2/10, 14-16, 2011, p. 30:15-17.

Contrary to the trial judge’s statement, Mr. Cameron’s testimony demonstrates that he could have opined about placing a value on a new clip product: he discussed the various markets to which he already had access; he discussed his previous experience regarding introducing products to the market, including his participation in inventing and licensing the Crocodile Clip to Homax; and he discussed his extensive participation at trade shows and connections with different sectors of the market. While Mr. Cameron had no formal education or training in marketing, the record revealed he had a deep institutional knowledge regarding the clip market. In fact, if allowed, he could even have testified regarding how the improvements to the subject clips would have displaced Homax’s own Cinch-Tite Clip in the market.

2. The Proposed Scope of Mr. Cameron’s Testimony Was Not Speculative.

Mr. Cameron's proposed testimony did not amount to mere speculation or conjecture. Although Homax improperly argues that the limitations placed on Mr. Cameron's testimony are supported by the ruling in Wilson v. Brand S. Corporation, 27 Wn. App. 743, 621 P.2d 748 (1980), that case is inapposite. In Wilson, a trespasser damaged slate on Mr. Wilson's property and Mr. Wilson argued he was owed lost profits from retail sales of that slate and from products he planned to sell. Id. at 741; 746. However, the Wilson court found that the evidence of profit was speculative because Mr. Wilson's work on the property had been merely *exploratory* prior to the time the trespass occurred. Id. at 747.

In this case, NPDG had already invented the Jaws Clip, created a prototype of the Jaws Clip, developed marketing materials for the Jaws Clip, and presented the clip and materials to Homax. Additionally, Mr. Cameron testified that he brought sketches and marketing materials of this design to Randy Hanson at Homax, who then requested that Mr. Cameron create a prototype of the product. VRP Test. of RC 2/10-2/16, 2011, p. 38:19-40:6 Discussions regarding this product went on for several years until Mr. Cameron learned Homax had disclosed the Jaws Clip invention in its '071 Patent. VRP Test. of RC 2/10-2/16, 2011, p. 35:17-20, 67:16-20. Unlike Mr. Wilson's mere exploratory efforts in Wilson, NPDG's efforts in this case with respect to the Jaws Clip were substantial and

encompassed the full range of product development: design, prototyping, marketing development, and presentation to a potential customer.

More importantly, Homax's disclosure amounted to a preemption of the entire market and prevented NPDG from licensing the Jaws Clip to others, as well as making entry into the market by NPDG impossible. The fact that the lost profits for the Jaws Clip are difficult to calculate is a problem that Homax single-handedly caused by its conduct. Homax cannot now argue that NPDG's inability to enter the market was its own problem and that Mr. Cameron's proposed testimony suffered from the same "defect" as the property owner in Wilson. Indeed, the limitations placed by the trial court on Mr. Cameron's testimony were not warranted and not within its discretion.

E. Assignments of Error 5-7, 9.

1. NPDG Properly Presented a Question for Review

Rule 10.3 states in pertinent part that "[a] separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number." Rule 10.3 is a procedural rule requiring a party to refer to the instruction at issue by its number. In the instant case, NPDG raised an issue related to the jury entering a *special verdict form*, not an instruction. As NPDG properly identified the verdict form, Homax's

claim to the contrary is merely an attempt to procedurally evade the gravamen of this appeal.

2. The Jury Verdict Is Not Supported by the Evidence.

There is not substantial evidence to support the jury verdict that NPDG suffered no damages as a result of Homax's misappropriations of the Jaws Clip. In deciding whether it will overturn a jury verdict, an appellate court considers three factors: (1) whether substantial evidence supports the verdict; (2) whether the verdict was motivated by passion or prejudice; and (3) is whether the verdict shocks our conscience. Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 179, 116 P.3d 381 (2005) (quoting Bingaman v. Grays Harbor Com'ty Hosp., 103 Wn.2d 831, 835, 699 P.2d 1230 (1985)).

Substantial evidence is that which 'convince[s] an unprejudiced, thinking mind of the truth of the declared premise.' Nord v. Shoreline Sav. Ass'n, 116 Wn.2d 477, 486, 805 P.2d 800 (1991) (quoting Cowsert v. Crowley Maritime Corp., 101 Wn.2d 402, 405, 680 P.2d 46 (1984)). Additionally, the lack of evidence or insufficient evidence relative to the verdict can lead to the conclusion that the award shocks the court's conscience. Hill v. GTE Directories Sales Corp., 71 Wn. App. 132, 140, 856 P.2d 746 (1993).

Under RCW 19.108.010(4)(a) of the Washington Uniform Trade Secrets Act (“UTSA”), a trade secret is information that “derives independent economic value . . . from not being generally known to . . . other persons.” In cases of misappropriation of a trade secret, “a complainant may recover damages for the *actual loss* caused by misappropriation,” together with any additional damages needed to compensate for unjust enrichment. RCW 19.108.030(1) (emphasis added). Additionally, actual loss includes recovery for the *value of lost business opportunities* or future profits. Eagle Group, Inc. v. Pullen, 114 Wn. App. 409, 421 58 P.3d 292 (2002).

As discussed above, the trial court improperly limited NPDG’s testimony regarding lost profits of the Jaws Clip by precluding (1) NPDG from presenting its damages charts and (2) Mr. Cameron from testifying regarding market displacement of Homax’s clip products. Although this severely restricted NPDG’s ability to present its claims for damages, there was still evidence in the record to support a finding of damages due to Homax’s misappropriations of the Jaws Clip.

Homax incorrectly states that the only clip sales in the record were those of the Crocodile Clip and Homax’s own Cinch-Tite Clip. However, there was also evidence in the record concerning sales of the Rhino Clip and Mr. Cameron testified that NPDG sold over 250,000 Rhino Clips.

VRP Test. of RC 2/10-2/16, 2011, p. 66:14-22. Additionally, Mr. Cameron testified that manufacturing the Rhino Clips cost between \$0.33 and \$0.36 per clip, which were then sold for around \$0.65 to \$0.70 apiece. VRP Test. of RC 2/10-2/16, 2011, p. 63:19-25, 175:20-24. The Rhino Clip was arguably a comparable clip for the Jaws Clip in that it was invented, marketed, and eventually sold by NPDG. Additionally, Mr. Cameron's communications with Homax regarding its interest in the Jaws Clip and Rhino Clip occurred contemporaneously for almost three years. VRP Test. of RC 2/10-2/16, 2011, p. 35:17-20.

While the Jaws Clip invention had not yet been sold or licensed, NPDG developed marketing materials for the clip, created a prototype of the clip at Homax's request, and had a marketing plan for the clip. VRP Test. of RC 2/10-2/16, 2011, p. 16:17-18:14, 39:12-40:6, 171:7-16. Mr. Cameron also testified that it cost \$3,500 - \$4,000 to develop a prototype of the Jaws Clip at Homax's request and further testified the Jaws Clip was valued at \$400,000-\$500,000.

In addition to the independent economic value of a trade secret such as the Jaws Clip discussed above, a party can recover the actual loss caused by misappropriation under the UTSA. Here, Mr. Cameron testified that NPDG paid \$3,500 - \$4,000 to develop the prototype of the Jaws Clip at Homax's request. Homax then took this prototype and misappropriated

the Jaws Clip invention by disclosing it in the '071 Patent. NPDG suffered an actual loss by paying thousands of dollars to develop the prototype only to have its trade secret disclosed. At a minimum, this is evidence of actual loss suffered by NPDG.

Because there is evidence in the record that would allow an unprejudiced jury to conclude that NPDG suffered damages as a result of Homax's misappropriation of the Jaws Clip trade secret, the jury verdict is not supported by the substantial evidence in the record and should be overturned.

F. ASSIGNMENT OF ERROR NO. 8

NPDG's assertion of the Rhino Clip trade secret cause of action was reasonable and should not have been the basis for sanctions. The trial court erred in finding that the Plaintiffs had no reasonable basis in fact or law to pursue this claim when it in fact permitted the claim to proceed despite Homax's motion to dismiss. VRP March 16, 2007, 24:12-14; 25:4-8. The trial court abused its discretion by punishing NPDG for a claim that it voluntarily dismissed after a comprehensive review of the information available at the time of Homax's summary judgment motion.

IV. CONCLUSION

Based on the forgoing, NPDG respectfully requests that this Court grant the relief requested in its Opening Brief.

Dated this 27th day of February, 2012.

Respectfully submitted,

BADGLEY MULLINS LAW GROUP PLLC

A handwritten signature in cursive script, appearing to read "Donald H. Mullins".

Donald H. Mullins, WSBA #4966

Allyssa J. Hale, WSBA #38429

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COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

NORTHWEST PRODUCT DESIGN)
GROUP, LLC, a Washington limited
liability corporation; TODD D.
ANDERSEN, an individual; MAC
CAMERON, an individual; JERRY
CHAMBERS, an individual; and
ELLIS MASSEY, an individual,

Appellants/Cross-Respondents,

v.

HOMAX PRODUCTS, INC., a
Delaware corporation; RANDAL W.
HANSON and JANE DOE
HANSON, husband and wife, and
the marital community thereof;
ROSS CLAWSON and JANE DOE
CLAWSON, husband and wife, and
the marital community thereof;
LESTER GREER, JR. and Jane Doe
Greer, husband and wife, and the
marital community thereof; and
WILFRED HOFFMANN and Jane
Doe Hoffmann, husband and wife,
and the marital community thereof,

Respondents/Cross-Appellants.

Court of Appeal No. 67278-9

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I, Christina Limon, paralegal for BADGLEY~MULLINS LAW GROUP, attorneys for Appellants/Cross-Respondents in the above entitled action, hereby certify under penalty of perjury that I am over the age of eighteen (18), and am competent to testify to the facts contained herein. On the 27th day of February, 2012, I served by sending a true and correct copy in the manner indicated below of the following documents:

1. Appellants' Reply Brief; and
2. Proof of Service.

Upon the attorney of record herein, as follows, to wit:

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DATED this 27th day of February, 2012 in Seattle, WA.


Christina Limon, Paralegal