

FILED
Court of Appeals
Division II
State of Washington
8/23/2019 4:06 PM

No. 52799-5-II

**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

NORTHWEST MOTORSPORT, INC.,

Appellee/Cross-Appellant/Plaintiff,

v.

**SUNSET CHEVROLET, INC., SUNSET TRUCKS, INC., and
PHILIP MITCHELL,**

Appellants/Cross-Appellees/Defendants.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

		Page
I.	ARGUMENT	1
	A. NWMS’s Brief is Misleading	1
	B. As a Matter of Law, Bidding on Keywords Does Not Fall Within the Settlement Agreement	2
	C. There Were at Least Genuine Issues of Material Fact That Precluded Summary Judgment	6
	D. This Court Should Reverse the Lower Court’s Construction of the Term “Violation”	11
	E. The Perjury Finding Against Mr. Mitchell and Mr. Conley Must Be Vacated	18
	F. This Court Should Reverse the Entry of the Permanent Injunction Related to NWMS’s Trade Secret Claim.....	23
II.	CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Barker v. Advanced Silicon</i> , 131 Wn. App. 616, 128 P.3d 633 (2006).....	8
<i>Brogan & Anensen, LLC v. Lamphiear</i> , 165 Wn.2d 773, 202 P.3d 960 (2009).....	9
<i>Brown v. Bank of Galveston, Nat’l Ass’n</i> , 963 S.W.2d 511 (Tex. 1998).....	17
<i>Bussard v. Fireman’s Fund Indemn. Co.</i> , 44 Wn.2d 417, 267 P.2d 1062 (1954).....	7
<i>Fisher Props. v. Arden-Mayfair, Inc.</i> , 106 Wn.2d 826, 726 P.2d 8 (1986).....	13, 14, 18
<i>Fluke Capital & Management Services Co. v. Richmond</i> , 106 Wn.2d 614, 724 P.2d 356 (1986).....	6
<i>Hall v. Custom Craft Fixtures, Inc.</i> , 81 Wn. App. 1, 937 P.2d 1143 (1997).....	9, 10
<i>Hearst Commc’ns, Inc. v. Seattle Times</i> , 154 Wn.2d 493, 115 P.3d 262 (2005).....	2
<i>Hydro Group, Inc. v. United States</i> , 17 Cl. Ct. 668, 1989 U.S. Cl. Ct. LEXIS 142, *29.....	17
<i>Keck v. Collins</i> , 181 Wn. App. 67, 325 P.3d 306 (2014).....	7
<i>King v. Rice</i> , 146 Wn. App. 662, 191 P.3d 946 (2008).....	10
<i>McDonald v. Murray</i> , 83 Wn.2d 17, 515 P.2d 151 (1973).....	24

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Miller v. Harget</i> , 458 F.3d 1251 (11th Cir. 2006)	24
<i>Saunders v. Meyers</i> , 175 Wn. App. 427, 306 P.3d 978 (2013)	5
<i>Scott v. Trans-System</i> , 148 Wn.2d 701, 64 P.3d 1 (2003)	23
<i>Stender v. Twin City Foods</i> , 82 Wn.2d 250, 510 P.2d 221 (1973)	3
<i>Stump v. Cyprus Kanawha Corp.</i> , 919 F. Supp. 221 (S.D. W. Va. 1995)	17
<i>Tanner Elec. v. Puget Sound</i> , 128 Wn.2d 656, 911 P.2d 1301 (1996)	10
<i>Volk v. DeMeerleer</i> , 184 Wn. App. 389, 337 P.3d 372 (2014)	24
<i>Wallace Real Estate Investment, Inc. v. Groves</i> , 124 Wn.2d 881, 881 P.2d 1010 (1994) (en banc)	12
<i>Watson v. Ingram</i> , 124 Wn.2d 845, 881 P.2d 247 (1994) (en banc)	12
<i>Wm. Dickson Co. v. Pierce Cty.</i> , 128 Wn. App. 488, 116 P.3d 409 (2005)	10, 25
 Other Authorities	
<i>Advertising, Merriam-Webster.com Dictionary</i> , available at https://www.merriam-webster.com/dictionary/advertising (last visited August 13, 2019)	3

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Advertising, The American Heritage Dictionary</i> (5th Ed.) (2019), available at https://ahdictionary.com/word/search.html?q=advertising (last visited August 13, 2019).....	3

I. ARGUMENT

A. NWMS's Brief is Misleading

NWMS's brief confuses the issues by reciting allegations from past disputes between the parties. The claims in this litigation do not involve claims of trademark infringement or likelihood of confusion. Sunset's accused activities did not "redirect[] Northwest customers to Sunset's website" (**Respondent's Brief ("Br.") at 1-2**) and did not "divert consumers from Northwest to Sunset each day." (*Id.* at 27). Presenting a non-confusing ad on a Google search page is not "attack[ing] NWMS's brand." (*Id.* at 28).¹ A consumer searching for NWMS on Google would be presented with a prominent link to the NWMS website, along with separate ads for competing products (*e.g.*, Sunset's trucks). There is no evidence that any confusion occurred, or that any customers seeking to purchase from NWMS purchased a Sunset vehicle instead.

NWMS also repeats the trope that Sunset hid the fact that it was advertising on Google during the arbitration and in the litigation in the lower court. To make the claim, NWMS has to ignore the undisputed facts that Sunset's principals testified at depositions in the arbitration that they did search engine advertising, but it was handled by vendors. Further, there is no question that NWMS was aware of Sunset's Google advertising, including its use of NWMS's name as a keyword, before the arbitration

¹ NWMS repeatedly refers to the label that Sunset's vendor, Michael Keenan, gave for his Google keyword campaign ("Brand and Conquest") as if it were focused on "attacking" NWMS. In fact, most of Mr. Keenan's keywords in the Brand and Conquest campaign had no relationship to NWMS. (**CP at 3338-3353**). They included "Used Trucks Puyallup" and "+Sunset +Trucks." (**CP at 3340, 3342**).

hearing, and certainly at the beginning of the lower court matter, when it made the allegation of trademark infringement in the Complaint. As the arbitrator (Judge Burdell) expressly held, NWMS “must have been aware of the complained conduct” when it filed its Complaint in the lower court. **(CP at 1493).**

These assertions are simply distractions from the issues raised in this appeal. The issues on appeal relate to the interpretation of the Settlement Agreement, and whether the lower court erred in finding that Sunset’s witnesses had committed perjury during the arbitration, thus resulting in it giving no weight to declarations from those witnesses.

B. As a Matter of Law, Bidding on Keywords Does Not Fall Within the Settlement Agreement

The parties agree that this Court reviews the lower court’s grant of summary judgment *de novo* and should give words in the Settlement Agreement their “ordinary, usual, and popular meaning.” *Hearst Commc’ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005). The ordinary meaning of the term “advertising” supports Sunset’s position. NWMS offers this Court only one of several definitions of “advertising” in the dictionary definitions it cites.² The other definitions are consistent with Sunset’s interpretation of the Agreement. The American Heritage Dictionary defines “advertising” as “[a]dvertisements considered as a

² Even those definitions, however, focus on “attracting public attention” by “paid announcements.” There was never any public disclosure of NWMS’s trademark in the accused Google advertising.

group,”³ while Merriam-Webster defines “advertising” as “advertisements.”⁴ Thus, “advertisements” and “advertising” can be used synonymously. For example, advertising executive David Ogilvy’s quote, “What you say in advertising is more important than how you say it”⁵ makes just as much sense if he said, “What you say in advertisements is more important than how you say it.” Thus, the ordinary meaning of the term “advertising” is consistent with Sunset’s position.

Further, the surrounding language of the Agreement supports Sunset’s position. “A contract provision must be read in *pari materia* with the whole contract and in light of all the circumstances surrounding the contract.” *Stender v. Twin City Foods*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973). The relevant provision precludes Sunset from using “in advertising in any manner or variation the terms ‘Northwest Motorsport,’ ‘NWMS Rocks,’ or the words ‘Truck’ or ‘Trucks’ consecutively in the same phrase or sentence.” (CP at 1748-1750). The prohibition on using words consecutively makes sense only in the context of displaying those words *in* advertisements. The term “in advertising” is narrower than “in connection with advertising activities” as the lower court appears to have construed the term. In this context, “in advertising” is most reasonably construed as synonymous with “in advertisements.”

³ *Advertising*, *The American Heritage Dictionary* (5th Ed.) (2019), available at <https://ahdictionary.com/word/search.html?q=advertising> (last visited August 13, 2019).

⁴ *Advertising*, *Merriam-Webster.com Dictionary*, available at <https://www.merriam-webster.com/dictionary/advertising> (last visited August 13, 2019).

⁵ Martin Meyer, *Madison Avenue, USA* at page 64 (Harper 1958).

This interpretation is also supported by the context that led to the Agreement. In particular, it was the use of NWMS's trademarks in domain names ("truckstrucksandmoretrucks.com") and Craigslist posts that prompted the lawsuit that resulted in the Agreement. (CP at 4674, 4676-77) (Complaint asserting use of "similarly confusing marks *in* its advertisements for automobile sales") (emphasis added); *see also* CP at 2069) (NWMS's arbitration brief characterizing relevant clause as prohibiting Sunset from using NWMS's trademarks "*in* their ads.") (emphasis added).

If, as NWMS contends, "use in advertising" encompasses the use of NWMS's trademarks in anything *relating* to Sunset's advertising, it would have nonsensical results. That interpretation, for example, would presumably prohibit Sunset from asking a print publisher to display Sunset's print advertisement on the same page as a NWMS advertisement (because Sunset would be using the NWMS trademark "in advertising"). But that is the essence of what occurred in the accused Google Ads activities. Sunset paid Google to present an advertisement for Sunset (in a non-confusing way) on the same page as search results for NWMS (or closely related searches). The NWMS trademark was never used in the Sunset advertisements themselves and interpreting the Agreement as precluding Sunset from even using NWMS's name in communications with a publisher, like Google, is unreasonable.

NWMS argues, however, that in addition to prohibiting "confusing advertisements," the Agreement was also based on "Sunset's 'flagging'

operation.” (**Br. at 19**). This argument is a red herring. Allegations of flagging were raised in the 2011 lawsuit, but the issue was addressed by a different section of the Agreement. (**CP at 4538**) (“7. Sunset, and anyone acting on their behalf, direction or control, shall not flag the Craigslist advertising of NWMS, or those of any other competing auto dealers.”). Paragraph (B)(7) of the Agreement deals with flagging, while paragraph (B)(4) addresses use of NWMS’s trademarks in Sunset’s advertising.

In sum, interpreting “advertising” in its broadest sense, as encompassing any actions relating to placing advertisements, such as communications with publishers, makes no sense in the context of the Agreement. Indeed, that broad definition would presumably prohibit Sunset from instructing its vendors *not to use* NWMS trademarks in advertisements. Bidding on a Google keyword is no different from asking a publisher to place Sunset’s ad on the same page as ads or information about competing dealers. There is nothing “unethical” or improper about such communications, and it did not violate Sunset’s agreement not to use NWMS’s trademarks in its advertisements.⁶ (**Br. at 20**) (quoting CP at 2216). This Court should hold that, as a matter of law, bidding on keywords is not use “in advertising” in the Agreement. *Cf. Saunders v. Meyers*, 175 Wn. App. 427, 438-45, 306 P.3d 978 (2013) (holding that a provision in a restrictive covenant was ambiguous because it was “subject to more than

⁶ NWMS implicitly concedes that there is no factual basis or legal basis to assert that Sunset’s activities created confusion or constituted trademark infringement. (**Br. at 21**). Nevertheless, it repeatedly characterizes Sunset’s activities as somehow improperly diverting customers, as being an “attack” on NWMS’s brand, or as otherwise unethical.

one interpretation,” reversing the trial court’s summary judgment ruling interpreting a provision, and concluding that the provision had the opposite meaning).

C. There Were at Least Genuine Issues of Material Fact That Precluded Summary Judgment

Alternatively, there were genuine issues of material fact that precluded summary judgment. In the original Complaint, for example, NWMS formally pled that Sunset’s bidding on keywords using NWMS’s trademarks was “outside of the Settlement Agreement” because the resulting ad “did not contain Northwest Motorsport’s name or unique slogan.” (CP at 8-9). NWMS cites *Fluke Capital & Management Services Co. v. Richmond*⁷, to argue that the original Complaint (because it was amended) has no evidentiary value. (Br. at 23). *Fluke*, however, simply addressed the impact of an amended pleading on *collateral estoppel*. In particular, the court reversed the lower court’s holding that the plaintiff’s claim was barred by collateral estoppel, because it was identical to a cross-claim the plaintiff had filed in an earlier lawsuit, which had subsequently been dropped. Holding that the claim had not been “actually litigated and determined,” the court explained that the defendant had “abandoned its cross claim . . . when the parties to the foreclosure action filed their final set of amended pleadings.” *Id.* at 619. *Fluke* never suggested that a party’s

⁷ 106 Wn.2d 614, 724 P.2d 356 (1986), *superseded by statute on other grounds as noted in Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. 106, 123, 780 P.2d 853 (1989).

admission in a pleading becomes inadmissible, or loses all evidentiary value, simply because the pleading is amended.

NWMS also contends that statements in a superseded pleading are not “judicial admissions.” **(Br. at 23)** (quoting *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988)). But “judicial admissions” are not required to defeat summary judgment; instead, the non-moving party need only “present admissible evidence showing a genuine issue of material fact exists.” *Keck v. Collins*, 181 Wn. App. 67, 90, 325 P.3d 306 (2014), *affirmed by* 184 Wn.2d 358, 357 P.3d 1080 (2015). Regardless of their weight, superseded portions of amended complaints continue to “exist[] as an utterance once deliberately made by the party.” *Bussard v. Fireman’s Fund Indemn. Co.*, 44 Wn.2d 417, 420, 267 P.2d 1062 (1954) (quoting 4 Wigmore on Evidence (3d Ed.) 61, § 1067).

The argument that an admission, and particularly one in a formal pleading, can somehow be extinguished by amending the pleading, makes no sense. Under that reasoning, a party could extinguish any past admission, simply by retracting or “amending” it. If a party cannot retract an oral admission in that manner, it should certainly not be able to retract a written admission in a formal pleading.

NWMS also argues that its admission should be given less weight because it was made before “Google provided Northwest the AdWord purchase information.” **(Br. at 23)**. This argument fails for two reasons. First, “[o]n motions for summary judgment the trial court does not weigh evidence.” *Barker v. Advanced Silicon*, 131 Wn. App. 616, 624, 128 P.3d

633 (2006). Second, NWMS’s argument is factually wrong. When NWMS admitted in its original Complaint that the parties did not intend the Agreement to cover search keywords, NWMS knew that Sunset had bid on NWMS trademarks as search keywords. The allegation is made in the Complaint, and NWMS had presented at the arbitration printouts of search results pages for the phrase “Trucks, Trucks and More Trucks” that showed Sunset’s advertisements displayed on the pages in the July 2016 arbitration hearing. **(CP at 2082)**. As Judge Burdell held, “[a]ll that has occurred since the complaint was filed is that the plaintiff has allegedly learned that the conduct was more pervasive than expected.” **(CP at 1493)**. This does not vitiate the admission that the parties never intended “in advertising” to encompass Google keywords.

NWMS also asserts that its original Complaint merely alleged that the “*website link* produced after searching for Northwest’s trade marks and names” did not violate the Settlement Agreement. **(Br. at 22)** (emphasis added). That is not what the original Complaint says: Paragraph 4.19 states that “the illegal acts referenced herein were outside of the Settlement Agreement.” **(CP at 9)**. In the very *next* sentence, NWMS gives an “example” of “Defendants *purchas[ing]* search terms for ‘Trucks Trucks and More Trucks,’ as well as ‘Northwest Motorsport.’” **(Id.)** (emphasis added). NWMS, not Sunset, ignores the “context language” of the original Complaint. **(Br. at 22)**.

Finally, NWMS argues that *Huey* left open whether admissions in a superseded complaint are sufficient, by themselves, to defeat summary

judgment. (**Br. at 24**). But Sunset did not oppose summary judgment based only on NWMS's admissions. (**See CP at 2055-2080, 2081-2216**). Sunset offered other extrinsic evidence, such as the context of the dispute and NWMS's earlier characterization of the clause, which courts may use to interpret a term and determine the contracting parties' intent.⁸ *Brogan & Anensen, LLC v. Lamphiear*, 165 Wn.2d 773, 775, 202 P.3d 960 (2009). For example, Sunset opposed summary judgment by citing to NWMS's Complaint from the first dispute between the parties, which alleged that Sunset displayed NWMS's trademarks in its advertisements and registered domain names that allegedly caused consumer confusion because they incorporated NWMS's trademarks. (**CP at 2058-59, 2089, 2092**). It was from this Complaint—which focused on NWMS's trademarks being displayed to the consumer, and not Sunset's ads being displayed next to NWMS's ads—that the Agreement arose. *See Hall v. Custom Craft Fixtures, Inc.*, 81 Wn. App. 1, 7-10, 937 P.2d 1143 (1997), *as amended by* 1996 Wash. App. LEXIS 93 (reversing trial court's grant of summary judgment interpreting parties' agreement because agreement was ambiguous based, in part, on history of parties' negotiations).

⁸ In its opening brief, Sunset indicated that NWMS's summary judgment motion was opposed with deposition testimony from Kenneth Wren, who executed the Settlement Agreement on behalf of NWMS. (**App. Br. at 27, 31**) (citing CP at 4698). That deposition testimony, however, was not presented to the lower court until after NWMS's summary judgment motion was granted. Sunset filed a letter with this Court upon realizing this error. (**See Spindle, Letter of June 17, 2019**).

Moreover, the different dictionary definitions of “advertising” describe above further establish that summary judgment was improper.⁹ *Wm. Dickson Co. v. Pierce Cty.*, 128 Wn. App. 488, 492-95, 116 P.3d 409 (2005) (reversing trial court’s grant of summary judgment because dictionary definitions “support[ed] different interpretations of the term ‘third parties’” and “more than one reasonable interpretation is possible here”).

If the evidence were interpreted in the light most favorable to Sunset, there were at least genuine issues of fact that precluded summary judgment as to the parties’ intent. *See, e.g., Tanner Elec. v. Puget Sound*, 128 Wn.2d 656, 685-86, 911 P.2d 1301 (1996) (reversing trial court’s summary judgment ruling interpreting an agreement, holding that the term “indirectly” in the agreement was ambiguous based on extrinsic evidence and that “[t]he court’s obligation is to ascertain the intent of the parties, and intent is very much a question here”); *Hall*, 81 Wn. App. at 7-10 (summary judgment was not proper because, based on vague wording of the agreement and extrinsic evidence, parties’ agreement was subject to “two reasonable but competing meanings”); *King v. Rice*, 146 Wn. App. 662, 668-71, 191 P.3d 946 (2008), *review denied by* 165 Wn.2d 1049, 208 P.3d 554 (2009) (reversing trial court’s summary judgment dismissal of plaintiff’s

⁹ Sunset offered dictionary definitions to the superior court in support of its cross-motion for summary judgment noted for the same day as NWMS’s motion. (CP at 1605-06). Although Sunset filed a reply in support of its cross-motion four days before the hearing (CP At 2236-2265), the lower court advised that it did not read Sunset’s cross-motion because it was not confirmed two days before the hearing under the Pierce County Local Rules. (VRP at 3:10-17).

complaint, where extrinsic evidence and ambiguity of the term “remove” in escrow instructions created genuine issues of material fact). If this Court does not rule as a matter of law that the Settlement Agreement excludes bidding on keywords, then it should at least reverse and remand for further proceedings.

D. This Court Should Reverse the Lower Court’s Construction of the Term “Violation”

NWMS does not dispute that the lower court’s construction of “violation” is subject to a *de novo* review and that the \$5,000-per-violation liquidated damages clause was agreed upon in the context of advertising that creates customer confusion and was intended to approximate the value of a lost customer. (CP at 5620, 5633). The lower court held that the liquidated damages amount should be awarded for every day that a bid on a relevant keyword was in effect. This construction of “violation” has an unconscionable result, has no support from the context of the Agreement, and is inconsistent with Judge Burdell’s earlier interpretation of the term.

First, the result is unconscionable because the award has no connection to any actual damage or harm. NWMS cannot point to any evidence that the accused Google advertising created confusion, or resulted

in NWMS losing customers or suffering economic damages of any kind.^{10,11} NWMS urges this Court to ignore the lack of damages evidence, relying on *Wallace Real Estate Investment, Inc. v. Groves*, 124 Wn.2d 881, 881 P.2d 1010 (1994) (en banc), as amended by 1994 Wash. LEXIS 639, and *Watson v. Ingram*, 124 Wn.2d 845, 881 P.2d 247 (1994) (en banc), as amended by 1994 Wash. LEXIS 638, to argue that actual damages are not required. **(Br. at 28)**. But in both of those cases an injury had occurred, and the only question was whether the liquidated damages were enforceable. *Wallace*, 124 Wn.2d at 883-86; *Watson*, 124 Wn.2d at 846-49.

In contrast, NWMS never established any injury of any kind. NWMS tries to excuse this failure by claiming it was “difficult to determine” actual damages, and the “consequences” of that “uncertainty” should fall on Sunset, not NWMS. **(Br. at 28-29)**. But again, the cases relied on by NWMS involve actual injury. Here, there was no evidence of any injury in the first place. It is perhaps fair to enforce liquidated damages

¹⁰ NWMS cites its expert’s assertion that “confusion actually occurred” whenever a Sunset advertisement appears on a search results page. **(Br. at 28)**. NWMS’s expert retracted this claim in his deposition, admitting that he could not assume that a user was confused simply because the user clicked on the advertisement. **(CP at 4805)**. As the expert also conceded, there is no evidence that the Sunset advertisements were confusing or misled consumers. **(CP at 4791, 4792)**. Again, the conduct at issue here is no different than a newspaper placing a Sunset advertisement on the same page as a NWMS advertisement. Both advertisements clearly identify their source.

¹¹ NWMS’s expert also conceded that Sunset’s ads would have been presented, even if the user was not searching for NWMS. Google’s algorithm could, for example, match a search for “used trucks in the northwest” with the keyword “northwest motorsport.” **(CP at 4784-86)**. Because Sunset bid on the “northwest motorsport” keyword, its advertisement would be displayed, even if the search was unrelated to NWMS (*i.e.*, “used trucks in the northwest”). **(Id.)**. He also acknowledged that a single user may be responsible for more than one click, and that the percentage of users who click on a company’s advertisement and then purchase a vehicle from the company was “nowhere near” 100%. **(CP at 4796, 4799)**.

against an offending party when it is difficult to quantify an actual injury, but it is not fair to impose liquidated damages of nearly \$1,000,000 when there is no evidence that *any* injury occurred.

Against this backdrop, the per-day definition of “violation” is unreasonable. *Fisher Props. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 837, 726 P.2d 8 (1986) (“When a provision is subject to two possible constructions, one of which would make the contract unreasonable and imprudent and the other of which would make it reasonable and just, we will adopt the latter interpretation.”) This definition estimates that NWMS lost a customer each day that Sunset’s Google Ads campaign ran. This is an “unreasonable and imprudent,” *Fisher Props.*, 106 Wn.2d at 837, reading of the Settlement Agreement,” given the absence of any consumer confusion or financial injury.¹² NWMS argues that the per-keyword definition would result in the same amount of liquidated damages regardless of the number of days that keyword was active. While true, that does not make the definition unreasonable.¹³

¹² NWMS cites to statutes that have nothing to do with advertisements to support its per-day definition. (**Br. at 27**). Further, NWMS does not indicate what alternative measures could be used for the types of violations in these statutes. For example, it is unclear how the state could fine a person for a public health violation on any basis other than by the number of days. Here, the lower court was presented with two competing definitions. The reasonableness of the definition he adopted must be viewed in contrast to the alternative definition and the context of this case as a whole. *Fisher Props.*, 106 Wn.2d at 837.

¹³ Moreover, NWMS could have raised the same objection to Judge Burdell’s construction of the term, but did not. In the arbitration, Judge Burdell found that a violation occurred each time Sunset “arranged” with a broadcaster for its television or radio advertisements to run, regardless of the number of times the advertisement was aired. (**CP at 4656**). Under Judge Burdell’s ruling, one violation would occur if a single arrangement resulted in the advertisement being aired 100 times or 10,000 times. NWMS did not appeal this ruling.

To the extent any award is justified, the amount of liquidated damages under the per-keyword definition (*i.e.*, \$50,000) is a more reasonable proxy of the purpose of the liquidated damages clause. For the auto industry, only six percent of clicks translate to “conversions” (defined as a user who clicks on an advertisement, visits a website, and takes an action such as signing up for a newsletter, filling a form, or making a purchase). **(CP at 5635-36, 5638)**. Applying that rate here results in 48 conversions (*i.e.*, six percent of 792 clicks). Because conversions include actions other than purchases, only a subset of the 48 conversions would have resulted in sales. While Sunset does not concede that NWMS lost any sales, this rough calculation is at least closer to the 10 violations under the per-keyword definition than 192 violations resulting from the per-day definition.

Lastly, NWMS misconstrues the record by comparing the amount of liquidated damages to Sunset’s monthly advertising budget. **(Br. at 31)**. Sunset spent only \$2,600 on the 10 keywords at issue during the 192 days of the campaign—roughly 0.3% of the liquidated damages amount. **(CP at 4231)**. The per-day definition results in \$369 of liquidated damages for every \$1 spent on the campaign—an absurd ratio given that no customer was ever confused. The per-keyword definition is the only “reasonable and just” understanding of the term “violation.” *Fisher Props.*, 106 Wn.2d at 837.

The lower court's construction of "violation" is also inconsistent with Judge Burdell's construction. Judge Burdell's construction should create collateral estoppel or, at the least, is persuasive as to the definition of the term. NWMS argues that collateral estoppel should not apply because of Sunset's "concealment" of its Google Ads campaign during the arbitration. **(Br. at 32)**. This accusation lacks any factual support. There is no evidence that before the arbitration hearing, NWMS sought information or documents related to search engine marketing, such as keyword bidding on Google Ads. In contrast, there is undisputed evidence that Philip Mitchell, Sunset's President, testified in deposition that Sunset engaged in "computer advertising" such as "search engine optimization, stuff like that," and Michael Conley, Sunset's Marketing Director, testified that Sunset used a "vendor" to conduct "digital marketing." **(CP at 4166, 4171)**.

There is also undisputed evidence that, prior to the hearing, NWMS knew that Sunset's advertisements appeared when certain search queries were entered in Google, such as "Northwest Motorsport." **(CP at 5943)**. And, at the hearing, NWMS presented printouts of search results pages for the phrase "Trucks, Trucks and More Trucks" that showed Sunset's advertisements displayed on the pages. **(CP at 2082)**. Further, even if bidding on keywords was not raised in the arbitration, the meaning of "violation" was litigated.

NWMS also contends that the lower court's construction of "violation" is consistent with Judge Burdell's ruling. **(Br. at 34-35)**. More

specifically, NWMS argues that Judge Burdell did not find that Sunset engaged in an affirmative act for each Craigslist post. (*Id.* at 35). Not so. Judge Burdell found that the postings were “engaged individually,” which is consistent with his “construing the term ‘violation’ as each time defendants engaged in an activity that breached the agreement, regardless of how many ads or posting[s] were actually created.” (CP at 4656). NWMS claims that the Craigslist posts were “created through an automated process,” but misleadingly cites to testimony from Mr. Conley stating only that Craigslist posts are automatically *removed* once the vehicle is sold. (CP at 5741). Judge Burdell used a per-day definition for Craigslist posts because there was an affirmative act taken each day. In contrast, Sunset’s advertisements were displayed on a user’s search engine results page without any action taken by Sunset. Indeed, NWMS acknowledges this. (Br. at 35) (stating that Sunset’s “Google ads . . . were created through an automated process”).

Even if the per-day definition used by Judge Burdell for Craigslist posts could be applied to Google Ads, the lower court’s construction is still inconsistent with Judge Burdell’s order. Judge Burdell found a violation for each day that Sunset took the step of making Craigslist posts, but then reduced the number of days from 180 to 60 to “allow[] a fair result.” (CP at 4656). The lower court, in contrast, simply calculated the pure number of days (192). Judge Burdell’s use of a per-day measurement for Craigslist posts (which Sunset affirmatively posted each day) does not apply to Google Ads (which ran passively each day). Moreover, the lower court did

not follow Judge Burdell’s approach of limiting the number of days in the interest of fairness.

Further, Judge Burdell held that the term “violation” must be defined in relation to an “activity” that Sunset “engaged in.” (CP at 4656). The lower court echoed this by ruling that “the focus of the agreement is on the action of Sunset.” (VRP 4/6/18 at 33-34). The only “action” taken for the accused activities in this case was Sunset’s vendor selecting the 10 keywords at issue. (CP at 4656). This is akin to “arrang[ing]” with a television or radio station to broadcast advertisements. (*Id.*). While Sunset’s vendor could contact Google to stop the campaign, Sunset had no control over how many times—or to whom—its advertisements would be displayed. Judge Burdell found 46 violations for Sunset’s radio and television advertisements, each violation representing an instance of Sunset “arrang[ing]” for the advertisement to run, regardless of any metrics associated with the running of the advertisement. (CP at 4656). Here, the only action “arranged” by Sunset was selecting the keywords.

Even if this Court does not hold that collateral estoppel precludes the per-day definition, this Court should at least consider Judge Burdell’s ruling as “strong evidence” of the Settlement Agreement’s interpretation. *Hydro Group, Inc. v. United States*, 17 Cl. Ct. 668, 679, 1989 U.S. Cl. Ct. LEXIS 142, *29; *Brown v. Bank of Galveston, Nat’l Ass’n*, 963 S.W.2d 511, 514 (Tex. 1998); *Stump v. Cyprus Kanawha Corp.*, 919 F. Supp. 221, 225 (S.D. W. Va. 1995). NWMS never appealed Judge Burdell’s ruling, essentially endorsing his interpretation of the Settlement Agreement. Judge

Burdell himself recognized that a strict, per-day definition would be unfair and accordingly limited the number of days for Craigslist posts to 60 from 180. The lower court imposed no such limitation, evincing the unfairness of his ruling. *Fisher Props.*, 106 Wn.2d at 837.

E. The Perjury Finding Against Mr. Mitchell and Mr. Conley Must Be Vacated

Substantial evidence does not support the lower court’s finding that Messrs. Mitchell and Conley testified at the arbitration hearing that Sunset did not advertise on Google. There was no transcript of the hearing presented, and the only evidence were two conclusory and at least arguably conflicting declaration from NWMS’s counsel. While the evidence supports a finding that Mr. Mitchell and/or Mr. Conley testified that neither Sunset nor they directly engaged in bidding on Google keywords, it is implausible that they would have testified that Sunset did not advertise on Google *at all*. In their transcribed deposition testimony taken during discovery in the arbitration proceeding, both witnesses indicated that they did “internet” and “search engine” advertising.¹⁴ No further inquiries were made by NWMS, and the issue of Google advertising did not come up until the arbitration hearing.

¹⁴ To narrow the issues on appeal, Sunset has not challenged the lower court’s conclusion that documents related to Sunset’s Google Ads campaign were “responsive to and discoverable in . . . the arbitration proceeding” and the accompanying \$75,000 sanction. (CP at 3074). Sunset, however, does not agree with that conclusion. NWMS never specifically sought discovery in the arbitration for Google advertising, presumably because the Sunset ads did not contain NWMS trademarks. Only after NWMS, in the litigation below, contrived the theory that the Settlement Agreement extended beyond advertisements did NWMS accuse Sunset of not producing information and documents during the arbitration.

At the time this litigation was filed, NWMS was well aware of Sunset's Google advertising, but took the position that bidding on a keyword does not constitute "use in advertising." (CP at 9, 493). Instead, NWMS asserted that bidding on a competitor's trademarks as keywords was a trademark violation. In the litigation below, NWMS served discovery related to any "search engine" that Sunset "advertised" on. (CP at 6365-66). *Before* receiving Sunset's responses, NWMS notified Sunset of its intent to subpoena Google for the same information that it sought through discovery requests to Sunset. (CP at 6371-77). Any suggestion that NWMS was somehow forced to subpoena Google because Sunset refused to respond to discovery is false.

While Sunset opposed the subpoena to Google, it raised no further objections or disputes after the lower court denied the motion to quash on January 6, 2017. (CP at 687-688). To the contrary, Sunset's counsel began a concerted effort throughout January and February 2017 to investigate whether any of Sunset's vendors bid on terms referenced in the Settlement Agreement. This investigation is documented through notes and emails. (CP at 5492, 6416-18). Sunset's counsel kept NWMS's apprised of the investigation, advising that none of Sunset's vendors stated that they bid on search terms referenced in the Settlement Agreement.¹⁵ (CP at 1855, 1858,

¹⁵ The lower court also sanctioned Sunset because it decided the evidence of Sunset's Google Ads campaign was "responsive to and discoverable in . . . this litigation," but was not produced until Google responded to NWMS's subpoena. (CP at 3074). Sunset disagrees with this conclusion as well, but has not appealed it for the sake of limiting the issues on appeal. After receiving NWMS's discovery requests and after its motion to quash the subpoena to Google was denied, Sunset conducted a reasonable search to locate information and documents about what search terms Sunset's vendors bid on, including

1861). There was never *any* attempt to conceal Sunset’s use of Google Ads. To the contrary, Sunset’s counsel repeatedly and openly acknowledged that Sunset used vendors to manage its Google Ads. (*Id.*)

Five months after Google responded to NWMS’s subpoena, NWMS filed its sanctions motion. The only evidence NWMS provided to the lower court as to what Mr. Mitchell and Mr. Conley said at the arbitration were declarations from Jon Morrone and Sheryl Willert, NWMS’s arbitration counsel. Mr. Morrone’s declaration indicated that NWMS had no idea Sunset was using Google Ads until “[m]id-arbitration,” and that “there was little [NWMS] could do about it at that stage.” (**CP at 1462**). He testified that NWMS only learned about Sunset’s use of Google Ads “by happenstance” and “during a lunch break” at the arbitration hearing. (**CP at 1462**). That statement was later shown to be false by an email sent by Mr. Morrone (never produced by NWMS during the litigation) showing that he was aware of Sunset’s use of Google Ads *before* the arbitration hearing. (**CP at 5943**). Further, Mr. Morrone’s declaration simply states that Messrs. Mitchell and Conley denied that *Sunset* bid on Google AdWords. This is consistent with their deposition testimony, which conceded that Sunset used vendors for all of such search engine advertising.

contacting each of Sunset’s vendors. (**CP at 5492, 6416-18**). The vendor who bid on the keywords at issue told Sunset’s counsel he no longer had access to the information to determine what keywords he bid on. (**CP at 5492**). The lower court apparently thought this was deserving of a \$75,000 monetary sanction. While mistaken, Sunset has not appealed that particular conclusion, focusing instead on the more significant error of concluding that Mr. Mitchell and Mr. Conley committed perjury.

Ms. Willert’s declaration does not suggest that Mr. Mitchell and Mr. Conley denied that Sunset advertised on Google. In fact, her declaration implicitly indicates that they acknowledged Sunset used “online Google advertising” (**CP at 1281**). At the least, Ms. Willert’s declaration is not substantial evidence that the witnesses denied at the arbitration hearing that Sunset advertised on Google.¹⁶

Moreover, the accusation that the witnesses denied at the arbitration hearing that Sunset advertised on Google at all was inconsistent with two declarations from Sunset’s vendors, Renegade Media and AdsUpNow—submitted in response to NWMS’s sanctions motion—stating that they had not bid on the specific keywords at issue in Sunset’s Google Ads campaigns. (**CP at 2217-2219, 2220-2222**). These declarations reflected that Sunset was not denying that it advertised on Google.

NWMS also points to the amount of money charged to Sunset for the Google Ads campaign. (**Br. at 41**). But this evidence has no bearing on what Mr. Mitchell or Mr. Conley testified to during the arbitration hearing. The Google Ads expenses are only probative if one believed that Mr. Mitchell and Mr. Conley denied at the arbitration hearing that Sunset

¹⁶ As Sunset predicted in its opening brief (**App. Br. at 44 n.11**), NWMS cites a declaration from Sunset’s counsel and suggests it supports the finding that Mr. Mitchell and Mr. Conley testified at the arbitration hearing that Sunset did not use Google Ads at all. (**Br. at 45**). The declaration says no such thing. It only states that Mr. Mitchell and Mr. Conley denied knowing specifics about the “purchases” of keywords. (**CP at 1315**). That is an accurate description of their testimony at the arbitration hearing, and consistent with what NWMS had already been told. (**CP at 5494**) (“Sunset states that it hires third parties to handle its on line presence” and “Mr. Mitchell and Mr. Conley do not control or direct how these vendors do their job, or know the potentially thousands of search terms these vendors purchased.”)

used Google Ads at all—a belief that, as explained above, is not supported by substantial evidence.

NWMS also points to the fact that Mr. Conley sent an email to Sunset personnel and vendors after the arbitration instructing them not to bid on specific phrases through Google Ads.¹⁷ **(Br. at 41-42)**. Mr. Conley was simply trying to avoid an unnecessary dispute. Upon being questioned about keywords at the hearing, Sunset realized that NWMS might try to assert that the keyword advertising was improper, so it took prophylactic measures to avoid a further dispute. **(CP at 3183)**. These actions are consistent with Mr. Mitchell and Mr. Conley’s testimony at the arbitration hearing that Sunset used Google Ads, but did not have firsthand knowledge of the specific keyword bidding.

Next, NWMS tries to downplay the deposition testimony of Mr. Mitchell and Mr. Conley from the arbitration. **(Br. at 42)**. For example, NWMS quibbles that Mr. Mitchell used the phrase ““search engine optimization”” but not ““search engine marketing.”” **(Br. at 42)** (quoting CP at 5079). NWMS’s own counsel, however, used “search engine optimization” to refer to the process of bidding on keywords to display advertisements. **(CP at 5943)** (email from Mr. Morrone stating that a

¹⁷ NWMS accuses Sunset of attempting to “conceal” this email. That is false. NWMS made the same accusation before the lower court. **(CP at 3216-3217)**. NWMS claimed that the email should have been produced by Sunset in response to a catch-call request for production for “any and all other documents which may support, disprove, relate to, concern or bear on any of the allegations or claims asserted in the complaint, your defenses thereto, or liability and damages issues in this case.” **(CP at 3090)**. NWMS’s counsel, who never contacted Sunset’s counsel to discuss the discovery request, simply moved for sanctions. Sunset responded that it would conduct a search for all emails between Sunset and its vendors. NWMS’s motion was denied. **(CP at 3090-3091)**.

“Sunset Trucks” advertisement appears when “Northwest Motorsport” is Googled, and referring to this occurrence as “SEO” (search engine optimization) (emphasis added)).

More to the point, the deposition testimony of Mr. Mitchell and Mr. Conley undermines any claim that they tried to *conceal* Sunset’s use of Google Ads. It would make no sense for Mr. Mitchell and Mr. Conley to testify that Sunset used “search engine optimization” and “digital marketing,” then later deny Sunset advertised on Google—the most popular search engine. Substantial evidence does not support the lower court’s perjury finding. *Cf. Scott v. Trans-System*, 148 Wn.2d 701, 718, 64 P.3d 1 (2003) (lower court’s finding that leases were oppressive or waste of assets not supported by substantial evidence).

F. This Court Should Reverse the Entry of the Permanent Injunction Related to NWMS’s Trade Secret Claim

NWMS does not dispute that, at the time the lower court issued a permanent injunction on NWMS’s trade secret claim, the record contained evidence contradicting NWMS’s claim of a “well-grounded fear of invasion.” (CP at 2357). Mr. Mitchell *twice* provided testimony that refuted NWMS’s declarations in support of its motion for an injunction. First in a declaration filed in December 2016 in opposition to NWMS’s request for a temporary restraining order, (CP at 452-456), and again as part of Sunset’s cross-motion to dismiss NWMS’s trade secret claim. (CP at 3062-3064). NWMS does not challenge the contents of these declarations. Instead, NWMS argues that they were not properly before the

lower court. This argument is without merit. First, there was nothing precluding the lower court from considering Mr. Mitchell's December 2016 declaration when deciding the parties' respective motions. Indeed, Sunset's opposition stated it was based on "the papers and pleadings filed with the Court." (CP 2448). In fact, that is how NWMS piggybacked on the declarations of Mr. Morrone and Ms. Willert from May 2017 in its motion for sanctions filed in August 2017. (CP at 1719). Second, Mr. Mitchell's declaration filed in support of Sunset's cross-motion could certainly be considered when the cross-motion was heard simultaneously with NWMS's motion.

Next, NWMS argues that it was appropriate for the lower court to weigh credibility on summary judgment because it had previously ruled on Mr. Mitchell's credibility. There is no legal authority for this proposition. To the contrary, lower courts must not rely on "personal views" of a witness's credibility to decide a summary judgment motion. *Volk v. DeMeerleer*, 184 Wn. App. 389, 337 P.3d 372, 386 (2014)¹⁸; *see also McDonald v. Murray*, 83 Wn.2d 17, 21, 515 P.2d 151 (1973) (lower courts should not determine whether evidence is "believable" on summary judgment); *Miller v. Harget*, 458 F.3d 1251, 1256 (11th Cir. 2006) ("Even if the district court believes that the evidence presented by one side is of doubtful veracity, it is not proper to grant summary judgment on the basis of credibility choices.") But that is exactly what the lower court did here.

¹⁸ *Overruled on other grounds by Volk v. DeMeerleer*, 187 Wn.2d 241, 386 P.3d 254 (2016).

Further, the discrediting of Mr. Mitchell on summary judgment is not “akin” to lower courts disregarding a declaration that contradicts deposition testimony. **(Br. at 49)**.

Mr. Mitchell’s declarations were consistent and squarely disputed the evidentiary basis for NWMS’s request for a permanent injunction. The lower court erred by making a credibility determination. The order granting a permanent injunction should be reversed.

II. CONCLUSION

This Court should reverse the summary judgment order and remand with instructions for the lower court to find that “use in advertising” does not, as a matter of law, cover the bidding of search keywords. Alternatively, NWMS’s original Complaint and the extrinsic evidence created a genuine issue of material fact that warrants a “hearing on the merits” to determine the parties’ intent. *Wm. Dickson*, 128 Wn. App. at 495.

If this Court reverses the lower court’s order applying the Agreement to search keyword bidding, then it need not address the subsequent adoption of the per-day definition of “violation.” If that issue is reached, however, this Court should hold that the per-day definition is unreasonable, unconscionable, and conflicts with Judge Burdell’s prior ruling, and that the per-keyword definition should be applied.

This Court should also reverse the lower court’s perjury finding, as it lacks substantial evidence, and vacate the permanent injunction on NWMS’s trade secret claim, which was entered after evidence was improperly weighed on summary judgment.

RESPECTFULLY SUBMITTED this 23rd day of August, 2019.

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CERTIFICATE OF SERVICE

On August 23, 2019, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington, on August 23, 2019.

s/ Sophia E. S. Katinas
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August 23, 2019 - 4:06 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52799-5
Appellate Court Case Title: Northwest Motorsport, Inc., Respondent v Sunset Chevrolet, Inc., Appellant
Superior Court Case Number: 16-2-12141-7

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