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DIVISION III
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No. 297667

COURT OF APPEALS, DIVISION III OF THE STATE OF WASHINGTON

EVERGREEN MONEYSOURCE MORTGAGE COMPANY d/b/a EVERGREEN HOME
LOANS, a Washington corporation,

APPELLANT,

v.

LARRY SHANNON AND JANE DOE SHANNON, husband and wife; and GUILD
MORTGAGE COMPANY, a California corporation,

RESPONDENTS.

APPELLANT'S REPLY TO RESPONDENTS SHANNONS' BRIEF

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I. INTRODUCTION

Defendant Larry and Jane Doe Shannon's (hereinafter "Shannon") Respondent's Brief contains many misstatements of the fact in this case. Taking each of Shannon's arguments in turn, there is no basis upon which to dismiss Evergreen's claims. In fact, Evergreen is the party entitled to summary judgment.

As to Evergreen's claim that Shannon solicited Evergreen's employees to move to Respondent Guild Mortgage Company (hereinafter "Guild"), Shannon ignores the deposition testimony of Rita Nicholas (hereinafter "Nicholas"), a loan originator at the Moses Lake Branch. Nicholas testified that Shannon asked her to move to Guild with him. Also, Shannon ignores that he spent months speaking with Charles Nay (hereinafter "Nay") of Guild about working out a "package deal" to bring over Evergreen's entire Moses Lake Branch to Guild.¹

Furthermore, as to Evergreen's claim that Shannon improperly originated and closed Evergreen's customers loans at Guild, Shannon ignores that these customers were originally Evergreen's customers.

¹ Charles Nay is the employee at Guild that worked with Shannon on moving (or recruiting) the Moses Lake Branch to Guild.

These customers show up on both Evergreen's and Guild's pipeline reports.

Shannon also ignores that his employment contract with Evergreen provides that Evergreen's customers belonged to and would remain with Evergreen. Shannon blames Evergreen for the fact that its customers closed loans with Guild, but fails to cite to any evidence to support that claim. In short, Shannon does not deny that he improperly closed Evergreen's customers' loans with Guild, but rather provides a string of implausible and unsupported excuses for these events.

Moreover, Shannon's argument that Evergreen cannot support its damage claims mischaracterizes the evidence. Indeed, Evergreen has provided pipeline reports and financial records in support of its claim for damages. Keith Frachiseur (hereinafter "Frachiseur"), Evergreen's President, provided ample explanation regarding the formula to calculate Evergreen's damages at his deposition.

Additionally, dismissal of the Washington Consumer Protection Act (hereinafter "CPA") cause of action was unwarranted. Shannon did not raise any meaningful defense to his unlawful disclosure of Evergreen's proprietary business information to Guild, Evergreen's direct competitor.

In short, Shannon's misappropriation of Evergreen's customers, employees and confidential business information affects the public interest. Shannon could replicate the same anti-competitive conduct when dealing with another mortgage lender.

Finally, regarding the Motion to Amend the Complaint and the tortious interference claims, Evergreen will primarily rely on the arguments made in the Reply Brief to Guild's Respondent's Brief. Evergreen will only briefly address a few areas of Shannon's arguments in opposition to the Motion to Amend the Complaint. Again, most of the argument regarding those issues will not be repeated in this Reply Brief.

II. SHANNON SOLICITED EVERGREEN'S EMPLOYEES IN VIOLATION OF THE AGREEMENT.

A. Shannon Ignores Nicholas' Deposition Testimony.

Shannon ignores the Deposition of Nicholas and instead, inaccurately claims that Evergreen did not put forth any evidence of employee solicitation. Evergreen's Appellant's (Opening) Brief relied on Nicholas' deposition testimony which reveals the ways in which Shannon improperly solicited Evergreen's employees. Indeed, Nicholas plainly testified that Shannon asked her to move with him to Guild. CP 546

(Nicholas Dep. 35:6-14 (Sept. 15, 2010)).

Shannon was the primary, if not the sole, conduit and facilitator of the move of the entire branch to Guild. Indeed, Nicholas testified as follows:

Q: Who made the initial contact with Guild?

A: Larry did.

Q: To your knowledge, did Larry make contact with any other organization?

A: No.

Q: Did you make contact with any other organization?

A: No.

Q: You had no independent contact with Guild, other than through Larry, during the process of deciding to move to Guild; is that correct?

A: Correct.

CP 544 (Nicholas Dep. 22:10-20).

Also, Nicholas testified that Shannon apparently specifically negotiated terms of her employment with Guild on her behalf. Nicholas stated as follows:

Q: So, in other words, at some point in time it became clear that like the medical benefits available at Guild were little more expensive than the medical benefits at Evergreen; is that fair to say?

A: Yes...

Q: At some point in time, did somebody tell you there would be additional compensation from Guild to make up the difference in benefits?

A: Yes.

Q: And who told you that?

A: Larry.

CP 546 (Nicholas Dep. 37:11-15; 37:20-25).

Shannon incorrectly states that all of the employees had independently decided to quit Evergreen when he contacted Guild. Again, it is undisputed that Shannon and Nay first began discussing a move to Guild in February of 2009. Nay and Shannon discussed the transaction as a “package deal.” CP 536 (Nay Dep. 35:21-36:2 (Sept. 21, 2010)). There is no evidence that any employee of the Moses Lake Branch investigated the possibility of affiliating with any other mortgage lender outside of Guild. At the very least, there is a genuine issue of material fact whether Shannon solicited and/or cajoled the other employees of the Moses Lake Branch to follow him to Guild.² Indeed, Clark Schweigert and Sarah Bullinger of the Moses Lake Branch apparently did not want to go to Guild, but ended up there anyway. CP 675-676.

Additionally, Shannon’s argument that Evergreen’s solicitation claim only applied to the solicitation of its branch managers ignores the

² Interestingly, Shannon states that Nicholas’ deposition testimony shows that he did not solicit the Moses Lake Branch employees to move to Guild. *See* Respondent’s Brief, p. 10. However, Shannon provides no citation to any part of Nicholas’ deposition in support of his argument. *See* Respondent’s Brief, pp. 10-12. Again, Shannon ignores the substance of Nicholas’ deposition testimony.

deposition testimony is this case. As noted in the Appellant's (Opening) Brief, the solicitation of the entire Moses Lake Branch has been discussed and investigated throughout the discovery process. Shannon focuses only on Evergreen's written discovery answers and ignores the extensive deposition testimony. Again, the majority of Nicholas' deposition dealt with Shannon's solicitation of her to join him at Guild.

B. Evergreen Put Forth Admissible Evidence In Support Of Its Solicitation Claim.

Shannon not only overlooks the testimony of Nicholas, but also claims that "admissible evidence" shows that the solicitation of the Moses Lake Branch did not occur. Shannon is incorrect and frankly, the oft repeated argument that Evergreen did not rely on any "admissible evidence" is baffling.

There is no decision by the trial court establishing the inadmissibility of the evidence relied upon by Evergreen. For instance, Shannon did not bring a Motion to Strike the Declaration of Lindsey Truscott which contained exhibits with excerpts from Larry Shannon's Deposition, Charles Nay's Deposition and Rita Nicholas' Deposition.

Also, contrary to Shannon's claim, Evergreen did not rely on either the Declaration of Anne Fisher or Clark Schweigert, nor do those

Declarations address the issue. The Fisher and Schweigert declarations do not contain any reference to conversations that Shannon had with them about a move to Guild.

III. SHANNON USURPED EVERGREEN'S CUSTOMERS IN VIOLATION OF THE AGREEMENT.

A. Shannon Ignored Paragraph 6 of the Agreement.

As with the “employee solicitation” claim, Shannon fails to address the evidence that supports Evergreen’s “lost loan” claim. Shannon ignores that Paragraph 6 of the Agreement provides that Evergreen’s customers belong to and will remain with Evergreen. Again, that Paragraph provides:

Non-independently developed contacts, clients or customers shall remain the property of Evergreen... [a]gent acknowledges and agrees that the business opportunities and relationships reflected in all documents are Evergreen’s sole and exclusive property. Once processing on any customer or borrower’s application has commenced by Evergreen, Agent shall not remove any file or any documents from such file...

CP 554.

Instead of addressing Shannon’s breach of the above obligation, Shannon asserts that all customer files were returned to Evergreen. By simply returning the files to Evergreen, Shannon apparently is absolved

from liability for improperly closing Evergreen's customers' loans with Guild. The return of the customer files to Evergreen is beside the point. Shannon does not explain how Evergreen's customers appeared on Guild's pipeline reports. CP 621-655.

Again, all of the disputed 17 loans involved customers that first had contact with Shannon or the other employees at the Moses Lake Branch while they were employed with Evergreen. CP 523-529 (Shannon Dep. 102:2-129:23) & CP 334-350. In most cases, credit reports were pulled for the relevant customers, good faith estimates were drafted and they filled out loan applications. CP 529 (Shannon Dep. 129:1-25).

Furthermore, Shannon does not provide any evidence that loans were properly closed with Guild. In fact, the evidence relied upon by Shannon favors Evergreen's position. For instance, customer T.D. reveals that he first discussed a loan with Shannon in February of 2009. CP 965-970. It is undisputed that Shannon was still with Evergreen in February of 2009. T.D. stated that he eventually closed a loan with Shannon in May of 2009; the loan was closed with Guild. CP 621-655 & CP 965-970.

Additionally, on their face the arguments provided by loan originator Anne Fisher (hereinafter "Fisher") are suspect, if not incredible.

For instance, Fisher claims that customer C.G. came to her on May 11, 2009, to start a loan application on a Purchase and Sale Agreement dated March 14, 2009. CP 334-346. Sellers will generally not work with buyers unless they are pre-qualified for loans. CP 924-929. The buyer will typically provide evidence of his/her ability to obtain financing before the seller will execute a Purchase and Sale Agreement. CP 924-929. More important, it does not make sense that a buyer would apply for a loan a full two months after entering into a Purchase and Sale Agreement.

One explanation of why customer C.G. appears on Evergreen's pipeline is that he started the loan process with Evergreen by getting prequalified.³ CP 924-929. Also, contrary to Fisher's and Shannon's representation, the relationship created with a loan originator does not start and stop, but rather is continuous from inquiry, prequalification and through to closing. CP 924-929.

Significantly, Fisher does not offer any explanation regarding Evergreen's customers appearing in both Evergreen's and Guild's pipeline reports. CP 334-346 & CP 621-655. Indeed, Fisher's sole focus appears to be on why the loan closed with Guild. CP 334-346. Likewise, the

³ Notably, the same likely holds true for borrowers K.B., V.F., I.L., K.M., A.S. and G.W. also referenced in Fisher's Declaration. CP 334-346.

Declarations of Brenda Roosma, Trisha Bass and Joanne Selman do not even address the presence of the customers on the pipeline reports. CP 351-399; CP 392-406 & CP 407-427.

In light of Shannon's actions, it is certainly unfair of Shannon to claim that Evergreen could not close any of the 17 loans. Evergreen was not given an opportunity to close the loans. As noted, customer T.D. first contacted Shannon when he was with Evergreen and later went back to Shannon's office after it was affiliated with Guild. CP 969-970. T.D. stated that when he returned to Shannon's office in May of 2009, Shannon told him that he did not have any records for T.D. because his file was sent back to the "office with which his office had previously been affiliated." CP 970. Instead of contacting Evergreen about the file (a customer file that Shannon sent back to Evergreen), Shannon apparently re-started the file and closed the loan with Guild. CP 969-970.

B. Shannon's Reliance On The Absence Of A Non-Compete Provision In The Agreement Is Misplaced.

As Shannon points out, the Agreement does not contain a non-compete provision. *See* Respondent's Brief, p. 19. However, whether the Agreement contains such a provision is irrelevant to the issue at hand. Shannon's ability to continue working in the mortgage lending business

with another company besides Evergreen has nothing to do with the fact that Shannon was prohibited from closing Evergreen's customers' loans with Guild.

Again, Shannon completely ignores that Paragraph 6 of the Agreement states that Evergreen's customers belong to and will remain with Evergreen. CP 554. Shannon agreed to those terms. CP 550-563. Indeed, Shannon has not raised any issue regarding the enforceability of the Agreement.

Ultimately, Shannon's entire argument regarding "lost loans" further demonstrates that Evergreen is the party entitled to summary judgment.⁴ Indeed, Shannon cannot explain why Evergreen's customers' loans appeared on Guild's pipeline reports, thus violating the Agreement. CP 554 & CP 621-655. At the very least, there is a genuine issue of material fact whether the customers belonged to Evergreen or Guild.⁵

IV. EVERGREEN HAS PROVIDED SUPPORT FOR ITS DAMAGE CLAIMS.

Shannon incorrectly argues that Evergreen cannot provide any support for its damages. Indeed, Evergreen has provided detailed

⁴ Again, the claim supports Evergreen's cause of action for breach of contract.

⁵ Evergreen relies on the arguments made in its Appellant's (Opening) Brief in response to Shannon's arguments regarding the duty of loyalty cause of action.

information of the disputed loans through pipeline reports. CP 621-655. Also, Evergreen has provided Shannon with the financial records and other documentation in support of its damages during discovery. CP 916-919. In fact, Keith Frachiseur explained how to determine damages in his deposition several times. For example, Frachiseur testified that the damage for T.D.'s loan would be calculated as follows:

- Q: Tell us the net profit Evergreen would have received if it had funded the [T.D.] loan.
- A: Larry was running, in 2008, 450 basis points in gross revenue. These are approximate numbers. We had already paid the fixed cost to originate those loans. We would have had the variable costs, which ran about 100 basis points.
- Q: Let's use an example. Let's say that it was a \$50,000.00 loan. Tell us what the net profit Evergreen would have received if it had funded the [T.D.] loan for \$50,000.00 net profit Evergreen would have received.
- A: In this scenario where the fixed costs had already been paid through the origination, we would have received the difference between the gross revenue and the commissionable expense, roughly 350 basis points.
- Q: So tell me –
- A: On \$50,000.00, so \$1,750.00...

CP 916 (Keith Frachiseur Dep., 71:23-72:14 (Oct. 20, 2010)).

Frachiseur also detailed the damages sought against Shannon:

- Q: Detail if you would for me, please, each amount that Evergreen contends that Larry Shannon owes it.
- A: Do you mean in the different buckets or –
- Q: I just need a dollar amount. What is the dollar amount and the basis for the dollar amount?

A: The dollar amount is based on, as we delve through, which of these loans should or should not be included, the gross revenue minus the commission expense that we would have paid on the loans that we finally determine should have been funded through Evergreen. In addition to that, we believe that he owes the bonuses that were paid for him – to him, as he had already signed with Guild and was not representing – and violated his contract and was not presenting Evergreen Home Loans as management, and in directing his entire branch, he is responsible for damages for the loss of production in that branch.

CP 917 (Frachiseur Dep., 99:6-22).⁶

After Frachiseur explained the damages sought against Shannon, he was asked for the information again:

Q: Tell me the dollar amount that you contend – and I need the specific dollar amount that you contend that Larry Shannon owes to Evergreen for loans that you contend should have been funded through Evergreen.

A: I don't have that number for you...

Q: Getting back to Exhibit No. 39, how do I detail the amount that Evergreen contends that it is entitled to receive from Larry Shannon for lost loans? I need a dollar figure.

Mr. Hecker: For the record, this was an ER 408 statement. This was in anticipation of discussions of settlement. You have interrogatory answers, actually, that will provide that. Likewise, this has been asked and answered. He has answered at least three times that I remember to that effect that it's based on the amount of the loan, based on their basis points --

⁶ Interestingly, Shannon cited the same testimony regarding the calculation of damages for "lost loans" in his brief but insists on arguing that Evergreen provided no information for its damages. See Respondent's Brief, p. 32. Again, Shannon is ignoring the evidence.

CP 918 (Franchiseur Dep. 104:12-17) & CP 919 (Franchiseur Dep. 108:7-19).

Shannon's focus on the lack of an exact number is misplaced. "Where the fact of damage is firmly established, the wrongdoer is not free of liability because of difficulty in establishing the dollar amount of damages." See *Reefer Queen Co., Inc. v. Marine Const. & Design, Co.*, 73 Wn.2d 774, 781, 440 P.2d 448 (1968). Indeed, "damages are not precluded simply because they fail to fit some precise formula." See *Pugel v. Monheimer*, 83 Wn. App. 688, 692, 922 P.2d 1377 (1996) *rev. denied* by 131 Wash.2d 1024, 937 P.2d 1101 (1997) (quoting *Massey v. Tube Art Display, Inc.*, 15 Wn. App. 782, 791 (1976)).

Moreover, the "fact of damages" is established because Evergreen lost 17 loans and its entire Moses Lake Branch. Accordingly, Franchiseur provided more than enough explanation of Evergreen's damages and his inability to provide an exact number does not warrant dismissal on summary judgment. Indeed, the nature and method of calculating damages was explicitly provided. It is irrelevant that the exact number was not calculated in counsel's presence during a deposition.

Additionally, Shannon is apparently arguing that Evergreen did not adequately answer the written discovery requests regarding its damages. Evergreen maintains that its discovery answers are sufficient. Even if the answers are somehow insufficient, that issue is more appropriately addressed through a discovery conference or a Motion to Compel, not on summary judgment. Again, Shannon brought the issue up for the first time on summary judgment. Accordingly, there is a genuine issue of material fact regarding Evergreen's damages.

V. **SHANNON FAILED TO ADDRESS EVERGREEN'S CLAIM FOR THE UNLAWFUL DISCLOSURE OF ITS PROPRIETARY INFORMATION.**

A. **The "Confidential Information Claim" Is Distinct From The Misappropriation Of Trade Secrets Claim.**

Shannon does not appear to directly address the substance of Evergreen's argument that the trial court erred in dismissing its "confidential information claim" on Summary Judgment. Instead, Shannon apparently groups this argument with the error the trial court made in denying Evergreen's Motion to Amend the Complaint to add a cause of action for violating the Washington Trade Secrets Act. The two issues are distinct.

Again, the claim that Shannon disclosed Evergreen's proprietary and confidential information supports the breach of contract cause of action. Paragraph 6 of the Agreement provides that Shannon cannot disclose Evergreen's proprietary information. CP 554. Recital C also provides:

Evergreen's proprietary resources are to remain confidential and are of substantial monetary value to it, and that under no circumstances is [Shannon] authorized to publicize or use, independent of this Agreement, such resources.

CP 550.

Shannon violated the Agreement when he disclosed Evergreen's profit and loss statement, rate sheet, loan originator agreement and customer information to Guild. CP 565-618 & CP 621-655. The violation of a contractual obligation has nothing to do with a separate statutory cause of action for violation of the Washington Trade Secrets Act.⁷

B. The Parties Knew About Evergreen's Claim.

Shannon's argument that Evergreen's inadequate discovery answers precluded its claim that Shannon unlawfully disclosed its proprietary business information to Guild is without merit. When

⁷ Evergreen's response to Shannon's argument in opposition to the erroneous denial of Evergreen's Motion to Amend the Complaint is found in Section VIII below.

Evergreen filed its Complaint, it had knowledge of Shannon's activities and the unlawful transfer of Evergreen's customers to Guild. It was only during the discovery process that Evergreen first learned of Shannon's unlawful disclosure of its confidential business information to Guild.

Indeed, Guild turned over the documents that revealed the improper disclosures in February of 2010; the improper disclosures were further investigated in the depositions of Shannon and Nay. CP 515 (Shannon Dep. 24:14-25); CP 516 (Shannon Dep. 26:1-29:24); CP 517 (Shannon Dep. 31:8-12); CP 519 (Shannon Dep. 42:13-43:11); CP 520 (Shannon Dep. 51:1-52:25); CP 534 (Nay Dep., 28:14-29:4); CP 537 (Nay Dep. 51:6-8); CP 564-616; CP 658-662 & CP 1142-1145.

It is indisputable that Shannon received the same information from Guild and participated in the depositions. It is absurd for Shannon to argue that he apparently had no idea of the basis of Evergreen's claim that he unlawfully disclosed Evergreen's proprietary business information to Guild.

Moreover, Franchiseur revealed Evergreen's claim regarding the unlawful disclosure of its proprietary information during his deposition. It

is not Evergreen's fault that Shannon did not push for more information when he had the chance. Franchiseur testified as follows:

- Q: Do you contend that any actions that took place in the transfer of Larry Shannon's office from Evergreen Home Loans to Guild were improper?
- A: Were improper?
- Q: Yes.
- A: Yes.
- Q: And what?
- A: In what way?
- Q: What was improper?
- A: **That Larry Shannon transferred Evergreen proprietary information and loan files to Guild without our express consent.**

CP 1246 (Franchiseur Dep. 123:25-124:11) (emphasis added).

Shannon is attempting to transform his failure to seek additional discovery through the proper channels as a basis to support affirmation of the trial court's decision to dismiss Evergreen's lawsuit on Summary Judgment. If Shannon was truly caught by surprise, then he could have remedied the issue in a myriad of ways. For instance, Shannon could have requested a continuance pursuant to CR 56(f).

Also, Shannon could have requested a discovery conference or brought a Motion to Compel pursuant to CR 26. Shannon did not request either, but merely chose to complain about it once he realized he missed the issue. Ultimately, Shannon's complaint that he did not know about

Evergreen's claim overlooks the information disclosed during the discovery process.

VI. THERE IS A GENUINE ISSUE OF MATERIAL FACT REGARDING EVERGREEN'S CPA CAUSE OF ACTION.

There is a genuine issue of material fact whether Shannon's anti-competitive conduct impacts the public interest. Shannon did not directly answer the argument by Evergreen that his anti-competitive actions of misappropriating customers, employees and confidential business information violated the CPA. *See RCW 19.86 et. seq.* Apparently, Shannon argues that this is a private lawsuit and therefore, the CPA does not apply. However, it does not matter if the dispute is public or private; the impact on the public interest is an important consideration in both instances. *See Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 744, 935 P.2d 628 (1997) *rev. denied by* 133 Wash.2d 1033, 950 P.2d 477 (1998).

Here again, all of Shannon's improper acts are capable of repetition and stand to affect the public interest. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 790, 719 P.2d 531 (1986). Shannon has been in the mortgage lending business for

nearly 33 years. CP 174. During those years, he has worked for different mortgage lenders. CP 174. Accordingly, Shannon could replicate the misappropriation of customers, employees and confidential business information with another lender.

Furthermore, the cases cited by Shannon are distinguishable because they are not analogous to the instant situation. For instance, in *Goodyear*, the parties were not competitors. *See Goodyear*, 86 Wn. App. at 744-745. The dispute in *Goodyear* was between Goodyear and its dealers, not the anti-competitive conduct of an outside business with respect to a direct competitor's employees and confidential business information. *Id.*

VII. SHANNON INTENTIONALLY INTERFERED WITH EVERGREEN'S CONTRACTUAL AND BUSINESS EXPECTANCY WITH ITS EMPLOYEES AND CUSTOMERS.

For purposes of brevity, Evergreen incorporates the arguments made to the issue of interference with Evergreen's business and contractual expectancy as set forth in its Reply to Guild's Respondent's Brief. Shannon and Guild have made similar arguments with respect to their actions of tortious interference as to Evergreen's employees and customers. Accordingly, Evergreen incorporates Sections II and III of the

Reply to Guild's Respondent's Brief as though set forth herein.

VIII. SHANNON WOULD NOT HAVE SUFFERED PREJUDICE IF THE MOTION TO AMEND HAD BEEN GRANTED.

A. The Cases Cited By Shannon Are Distinguishable.

For purposes of brevity, Evergreen incorporates the arguments made in the Reply to Guild's Respondent's Brief to the issue of the trial court's error in denying Evergreen's Motion to Amend the Complaint. Those arguments are located in Section V of the Reply to Guild's Respondent's Brief. However, it is worth noting here that the cases Shannon relied upon are distinguishable from the instant situation.

If additional discovery is required as a result of the amendment of the complaint, it does not automatically create prejudice. In short, Shannon misconstrues the holding in *Oliver v. Flow Intl. Corp.*, 137 Wn. App. 655, 664 (2007). In *Oliver*, the motion for leave to amend the complaint was sought after the trial court's written decision on summary judgment. *Id.* The court denied the motion primarily based on the timing of the motion, not the fact that additional discovery may be required. *Id.*

Additionally, the cases that Shannon relies upon to show undue delay are distinguishable. For instance, in *Wallace*, the court determined

there was undue delay because the additional claims were significantly different than the original claims in the lawsuit, and there was a two-year delay in bringing the motion. *See Wallace v. Lewis County*, 134 Wn. App. 1, 26, 137 P.3d 101 (2006).

Here again, Shannon's improper disclosure of Evergreen's proprietary business information has already been investigated by the parties during discovery. The same facts support a cause of action for violation of the Washington Trade Secrets Act. Accordingly, the "new" cause of action/claim is not significantly different than the original claims.

Also, in *Wilson*, the court found prejudice resulting from undue delay because the matter was on the eve of trial. *See Wilson v. Horsley*, 137 Wn.2d 500, 507, 874 P.2d 316 (1999). Unlike *Wilson*, a trial date had not yet been set at the time of Evergreen's Motion to Amend the Complaint.

Lastly, it is noteworthy that Shannon misstates the court's decision in *Walla*. *See Walla v. Johnson*, 50 Wn. App. 879, 883, 751 P.2d 334 (1988). In *Walla*, the court stated:

Because the trial court in the case before us declined to state a reason on the record for its denial of the motion to amend the pleadings, we cannot ascertain whether its decision was based on untimeliness of the motion or on

some other reason. **We hold that the trial court abused its discretion in denying leave to amend the answer.**

See Walla, 50 Wn. App. at 883 (emphasis added).⁸

Although Shannon quotes the same decision, he failed to include the sentence (bold) which establishes that the lack of findings of prejudice is an abuse of discretion. Again, Shannon appears to not only ignore evidence, but also portions of case law.

B. The Alleged Inadequacy Of Evergreen's Discovery Answers Does Not Create Prejudice.

Shannon's argument regarding the alleged inadequacy of Evergreen's discovery answers is not relevant to the issue of prejudice. Again, Evergreen maintains that its discovery answers were sufficient. However, even if Shannon was correct, CR 26 and the accompanying court rules provide relief for inadequate discovery answers, not CR 15.

Also, Shannon's rendition of the information revealed in discovery

⁸ The court in *Walla* ended up deciding the issue anyway, stating:

We recognize that, strictly speaking, if the trial court fails to state its reasons on the record, one remedy is to give the trial court the opportunity to do so. However, because the lengthy delay of this trial in order to process Johnson's appeal has afforded Walla ample time to conduct discovery and prepare for trial, observance of that technical formality would unduly prolong this litigation.

50 Wn. App. at 885.

is misleading. As noted, the parties investigated the factual basis of the misappropriation of Evergreen's trade secrets throughout discovery. That "trade secrets" were not explicitly mentioned in the interrogatories or depositions should have very little, if any, impact on Shannon's case.

IX. CONCLUSION

As noted above, Shannon failed to establish that the trial court's decisions should be affirmed on appeal. The trial court erred in dismissing all of Evergreen's claims and causes of action against Shannon on Summary Judgment. The trial court also erred by denying Evergreen's request for Summary Judgment as to liability.

Further, the trial court erred by denying Evergreen's Motion to Amend the Complaint. Accordingly, the trial court's decisions should be reversed; for purposes of brevity, Evergreen incorporates the relief requested in its Appellant's (Opening) Brief.

DATED this 22nd day of August, 2011.


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