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COURT OF APPEALS
OF THE STATE OF
WASHINGTON

**IN THE WASHINGTON STATE COURT OF APPEALS,
DIVISION III**

COURT OF APPEALS NO. 326161

On Appeal From
SPOKANE COUNTY SUPERIOR COURT
CAUSE NO. 2011-2-01911-4
The Honorable Annette S. Plese

LAKODA, INC., a Washington corporation; DALE AMES and
DODIE AMES, husband and wife, and the marital community
comprised thereof,
Plaintiffs/Respondents,

v.

OMH PROSCREEN USA, INC., a Washington corporation;
and BRAD HILMOE, a married individual; JOHN
O'CONNELL, a married individual; OMH INNOVATIONS,
USA, INC., a Washington corporation; and OMH
INNOVATIONS, INC., a foreign corporation,
Defendants/Appellants.

APPELLANTS' AMENDED BRIEF

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II. INTRODUCTION

OMH Innovations USA, Inc. manufactures commercial soil screening machines in China.¹ Brad Hilmoe is an owner and officer of OMH and handles most of OMH's manufacturing activities.

Lakoda, Inc. is a contract manufacturer that facilitates manufacturing in China. Dales Ames is an owner and officer of Lakoda and was the primary contact with OMH.

In April 2010, OMH and Lakoda contracted to produce OMH's soil screeners at the Longfei factory in China. As part of the arrangement, the parties signed a reciprocal non-disclosure agreement ("NDA").

In early 2011, the Longfei factory notified OMH that it was going to quit production because it was unprofitable. Longfei also notified OMH that Longfei had registered OMH

¹Lakoda, Inc. sued three separate OMH entities. OMH Innovations, Inc. is the Canadian branch and was dismissed from the case. OMH Proscreen USA, Inc. is a non-functioning corporation. OMH Innovations USA, Inc. is the U.S. branch. They are collectively referred to as OMH unless otherwise referenced.

designs, giving them exclusive rights to manufacture OMH's product in China.

OMH fired Lakoda in April, 2011, but continued to work directly with the Longfei factory under a revised compensation arrangement for approximately one year. During that time, OMH redesigned its screeners and then moved to a different manufacturing facility.

Lakoda sued OMH, alleging that OMH breached the NDA by cutting Lakoda out and working directly with Longfei. Lakoda also brought claims for violation of the Trade Secrets Act and tortious interference with its business expectancy with Longfei.

OMH filed counterclaims alleging Lakoda breached the NDA agreement by failing to protect its designs. OMH also claimed Trade Secret Act violations by Lakoda for arranging to have knock-off screeners built and sold to a competitor of OMH.

Lakoda prevailed on its breach of contract claim at trial and was awarded \$250,000 against OMH Proscreen USA, Inc. and John O’Connell only.² Lakoda was also awarded nominal damages on its trade secrets and tortious interference claims. In post-trial proceedings, Lakoda was also awarded attorney fees relating to its trade secrets claim.

OMH did not prevail on its counterclaims.

III. ASSIGNMENTS OF ERROR

1. OMH assigns error to the trial court’s ruling that OMH was not allowed to present evidence that Longfei had registered OMH’s designs.

2. OMH assigns error to the trial court’s ruling that Lakoda did not open the door to testimony about the design registrations by questioning OMH witness about patents on the designs.

²The NDA Agreement named OMH Proscreen USA, Inc. only. John O’Connell was a shareholder of Proscreen and he signed the NDA. O’Connell was found personally liable as a promoter of Proscreen because the corporation had not been incorporated at the time the NDA was signed.

3. OMH assigns error to the damages awarded.
4. OMH assigns error to the trial court's denial of directed verdict on Lakoda's breach of contract claim.
5. OMH assigns error to the trial court's denial of directed verdict on Lakoda's trade secrets claim.
6. OMH assigns error to the trial court's exclusion of the perpetuation testimony of Gerald Clancy.
7. OMH assigns error to the trial court's award of attorney fees.

IV. STATEMENT OF THE CASE

OMH is a manufacturer of soil screening equipment. RP 454-459. Brad Hilmoe ("Hilmoe") and John O'Connell (O'Connell) are officers and owners of each of the entities. RP 460-462.

Hilmoe and Ames met on an airplane and discussed how they both were doing business in China. RP 475. Ames offered his services to help with manufacturing OMH's products in China. RP 475-76. Hilmoe had been manufacturing

screeners at the Yantai Sky factory prior to meeting with Ames. RP 473-475. Hilmoe was therefore aware of the cost of manufacturing in China as well as the cost of parts needed to build the screeners. RP 485-487.

Ames told Hilmoe he would look for lower priced parts and negotiate the best price for the best quality on the manufacture of screeners. RP 484-485. Ames, Hilmoe and John O'Connell met on or about March 19, 2010 and O'Connell signed Lakoda's Vendor Non-Disclosure Agreement ("NDA") on behalf of OMH Proscreen USA, Inc. RP 82-83; 87-88. Lakoda was given target pricing from Hilmoe so that Ames could negotiate a price with the manufacturers. RP 93. Lakoda then obtained a quote to produce the screeners. RP 486. Although the Longfei factory actually built the screeners, Lakoda received its quote through another company, Tomorrow Product Development ("TPD"), a company owned by Geng Min (aka "Peter"). RP 74-75;158. Peter located the Longfei factory and obtained the quote for manufacturing the screeners.

RP 74; 158-159; 161; 954. Peter was good friends with the boss at Longfei and regularly brought work to Longfei. RP 955. Peter sourced the parts for the screeners. RP 205; 207. Peter paid the Longfei factory for the screeners. RP 207-208. Peter taught and controlled the factory and every item relating to the production of OMH's screeners. RP 75. Ames did not know where the bulk of the money he paid Peter was going. RP 227. Xiao Ping, the owner of the Longfei factory, never met Ames before Longfei began manufacturing the screeners. RP 295. Xiao Ping testified that he had a relationship with Peter (RP 298), that Longfei was building the screeners for Peter (RP 299), and that Peter was Longfei's customer (RP 294).

The purchasing of the screeners worked as follows: OMH would submit a Purchase Order ("P.O.") to Lakoda. RP 402. Lakoda would issue a P.O. to TPD. RP 402. TPD would issue an invoice to Lakoda. RP 402. Lakoda would issue an invoice to OMH. RP 403. After Lakoda received payment from

OMH, Lakoda issued payment to various different entities or individuals as instructed by Peter. RP 403.

Hilmoe was at the factory on a regular basis instructing the factory and its workers on the manufacturing processes and the parts needed for production. RP 495 – 497; 520. When production began, there were numerous problems with screeners being assembled incorrectly, finished screeners being damaged due to improper handling, and the factory was not completing the screeners on schedule. RP 506; 508; 516; 721-722. Hilmoe stayed at the factory to deal with the problems. RP 495 – 497. Hilmoe also hired an engineer in China, known by his English name “Jack,” to work at Longfei factory full-time. RP 504. Jack would advise Hilmoe of production concerns and helped communicate with the factory owner and workers. RP 504.

Hilmoe became concerned that OMH's designs were not properly protected. CP at 208³. He needed to show that the designs were protected as part of ongoing litigation in Canada with a former business partner. CP at 208; RP 169. Hilmoe asked Ames to provide him with a copy of the NDA with the Longfei factory. CP at 208. Ames produced an NDA purportedly signed by Longfei on April 15, 2010. RP 166-167, Defendants' Exhibit 300. The NDA also states it was entered into on July 9, 2010. RP 166-167, Defendants' Exhibit 300. Lakoda did not obtain an NDA with Longfei until after Hilmoe requested a copy. RP 167.

Hilmoe was confronted by the owner of Longfei and was advised the factory was losing money on the project and would be terminating the manufacturing of the OMH product. RP 300-304; 525-530. Hilmoe learned TPD was paying Longfei substantially less than what OMH was paying Lakoda. RP 529-

³ Assignments of Error 1, 2 and 6 require citation to the clerk's papers to present facts that are relevant to the precise issue raised. All references to clerk's papers in the statement of facts are made in reference to those assignments of error.

532. Longfei's owner advised that it quoted a lower price to manufacture based on Ames' representation that OMH would be manufacturing between 1000 and 2000 units per year. RP 300-302.

In March 2011, Hilmoe learned that the Longfei factory had registered the designs for OMH's Proscreen products back in December 2010. CP at 205; CP at 208. Hilmoe learned the effect of the registrations was that Longfei now owned the exclusive right to manufacture the screeners in China. CP at 205. The factory owner told Hilmoe he would continue to manufacture screeners whether OMH bought them or not. CP at 205. If OMH did not buy the screeners from Longfei, the factory would sell them to OMH competitors. CP at 205. This forced OMH to agree to purchase all of the OMH screeners manufactured by the factory. CP at 205.

Hilmoe also learned that Ames was charging OMH more than cost plus 10%. RP 138-140, 525-532, 720. When Hilmoe learned that Ames was over-charging OMH and underpaying

the factory, he confronted Ames about the issue. RP 138-140; Exhibit 48, Bates OMH00607. Hilmoe fired Lakoda. CP 208; RP 138-140; Exhibit 48, Bates OMH00607. OMH had no recourse against the Longfei factory because of the registrations and continued to do business with them for a time. CP at 208.

Because the Longfei factory registered the designs, Hilmoe undertook a total redesign of the Proscreen product to allow OMH to manufacture the screeners in its own name. CP at 205; RP 545-552. OMH needed to design and manufacture six new models to replace the old designs. CP at 205; RP 545-552. The redesigned screeners were completely re-engineered and required substantial time and expense by Hilmoe. CP at 205; RP 545-552. OMH established a new factory that it could control and manage to manufacture new screeners in OMH's name. CP at 205; RP 545-552.

Lakoda filed suit against OMH, Hilmoe and O'Connell on May 5, 2011. CP at 3. Lakoda claimed the Longfei factory was its trade secret, that OMH violated the NDA by cutting

Lakoda out of the program, and that OMH tortiously interfered with Lakoda's relationship with Longfei. CP at 37-47. OMH answered and counterclaimed that Lakoda breached the NDA by failing to obtain similar non-disclosure agreements from those that had access to OMH's designs and drawings, including Peter Geng and the Longfei factory. CP at 50-63.

Hilmoe later discovered that OMH-designed screeners were being sold by Valid Manufacturing in Canada under the Terra Pro brand name. RP 835-839. Gerald Clancy ("Clancy") is the owner of Valid Manufacturing. CP at 572⁴. Valid Manufacturing is an equipment manufacturer in Salmon Arm, British Columbia. CP at 572. Hilmoe confronted Clancy about the screeners. CP at 616-619; RP 552-555. Clancy admitted he had met with Ames within weeks of being fired by OMH (CP at 577, RP 138-140) but denied Ames sold him the screeners. CP at 586. Clancy and Ames had met in early May 2011 along

⁴ The perpetuation deposition of Gerald Clancy was read at trial. RP 817. The deposition was not re-transcribed as part of the record. Clerk's Papers pages 569-646 contain the perpetuation deposition and subsequent references herein are made thereto.

with Viorel Mazilescu (“Viorel”). CP at 577-578. Viorel was Hilmoie and O’Connell’s prior business partner in Canada. RP 460-462. Ames and Viorel discussed screeners during that meeting. CP at 577. Following the meeting on May 5, 2011, Ames sent an email communication to Clancy identifying Peter as Lakoda’s “agent in China.” CP at 578.

On June 29, 2011 Clancy received a pro forma invoice for the purchase of soil screeners from “Peter G”. CP at 582-584. The pro forma invoice used the same model numbers as OMH used for its screeners and even contained OMH’s name. CP at 582-584.

The email address for “Peter G,” was the same email address that Peter used to communicate with Ames and Hilmoie. RP 924-927, 930-931. In August 2011, “Peter G” e-mailed Clancy and asked to start using a new email account and to start calling him “TG.” CP at 590-591. The same e-mail changed the OMH screener model numbers from PVG to STH. CP at

591. In a subsequent email between Clancy and TG, Clancy also addressed the email to Ames. CP at 596.

Trial was conducted from May 5, 2014 until May 16, 2014. Lakoda brought a motion in limine to exclude any mention of the registration of design drawings by Longfei. RP 6, 1.11-14. Plaintiffs' argument was based on Defendants' not pleading foreign law. RP 6, 1.15-8, 1.19. Defendants argued the registration documents were admissible for the purposes of understanding the effect registering the designs had on Hilmoe and his reason for remaining with the Longfei factory. RP 8, 1.21- 9, 1.13. The trial court ruled that the factory owner could say that he registered the document and told OMH that, but would not allow the registrations in as exhibits because "if we start getting into the actual registration, probably not going to be relevant." RP 10, 1. 8 - 11, 1.12.

Before the close of Plaintiffs' case, the trial court allowed Defendants to call two witnesses out of order to accommodate witness scheduling. RP 240. One of these witness was the

factory owner Xiao Ping. RP 292. When defendants attempted to authenticate the documents through the factory owner the court stated it was not relevant. RP 296, l. 1-14. The trial court also sustained objections to any mention of the registration of the drawings.

Later in the trial, Plaintiffs' attorneys cross-examined Hilmoie and O'Connell on whether they had patented the screener designs in the U.S. or Canada. RP 640. OMH argued that this line of questioning opened the door to allow testimony regarding the registration of the designs in China, because the patent testimony implied to the jury that OMH had not taken reasonable precautions to protect the designs, when, in fact, Longfei now controlled the designs. RP 839. The court denied OMH's argument and OMH made an offer of proof on that issue. RP 861-862.

At the close of Plaintiffs' case in chief Defendants made several motions for a directed verdict. RP 431-453. Defendants requested that the court interpret paragraph 15 of

the NDA, which precludes the remedy of damages in both contract and tort. RP 434, l. 5-11; RP 441, l.23-44, l.1. The trial court held that there was conflicting testimony on the meaning of the no-damage clause and, therefore, the jury would have to determine what the contract meant. RP 452, l.25-453, l. 17. Ames was the only witness who testified about the no-damage clause and his testimony was that he didn't know what it meant. RP 349, l. 19.

In OMH's case in chief, OMH offered the perpetuation testimony of Gerald Clancy. Clancy testified that he had received email communications from Peter G., but that he did not know who Peter G. was. CP at 585-586. He surmised that Peter may have gotten one of his cards at a trade show in China and thought that Clancy might be interested in buying soil screeners. *Id.* Clancy had never previously sold soil screeners. CP at 586-587. One of the emails Clancy received contained an attached video, showing the Terra Pro screeners being tested. CP at 622-623. An individual appeared in the video, but

Clancy testified he did not know the identity of the individual. CP at 623. Lakoda made several motions to exclude the portion of Clancy's deposition discussing the video. OMH argued that the only purpose for introducing the video testimony was to authenticate that it was the video Clancy received. RP 820-821. The court originally ruled that it was authenticated. RP 796-797. The court later excluded the video as irrelevant and not authenticated. RP 822. OMH intended to use the video in Hilmoe's examination to identify the individual testing the Terra Pro screeners as Peter. RP 821.

Peter did not testify in Lakoda's case in chief. However, after the video was excluded, he was called as a rebuttal witness. RP 908. Peter then testified that a worker at the Longfei factory used his internet password without permission to send emails to Clancy. RP 928-930. OMH was unable to impeach Peter with the excluded video evidence.

The jury returned a special verdict form on May 15, 2014. CP at 1059-1061. The jury found that OMH tortuously

interfered with Lakoda's business expectancy with damages in the amount of \$1. CP at 1060. The jury found that OMH willfully and maliciously misappropriated a trade secret owned by Lakoda with damages in the amount of \$1. CP at 1060. The jury found that OMH Proscreen USA breached a contract with Lakoda with damages in the amount of \$250,000. CP at 1060. The jury found Lakoda did not breach a contract with OMH and did not misappropriate a trade secret owned by OMH. CP at 1060–1061.

A hearing on Plaintiffs' motion for attorney fees was held on June 27, 2014. June 27, 2014 RP 1. Plaintiffs' motion for attorney fees was based on a finding of willful and malicious behavior under the misappropriation of trade secrets statute. June 27, 2014 RP 7, 1.4-7. Defendants filed a brief in response to Plaintiffs' motion for attorney fees arguing an award of attorney fees is inappropriate when the plaintiff obtains only a nominal damages award; Plaintiffs' argument that an award of attorney fees is justified because it offered to walk away from

the lawsuit is meritless; Plaintiffs failed to establish those fees that were related to the prosecution of the trade secrets claim; and that Plaintiffs are not entitled to the costs claimed. CP at 1062-1068. The trial court granted attorney fees and costs to plaintiffs. June 27, 2014 RP 21, 1.4-10.

V. LAW AND ARGUMENT

1. The Trial Court Erred by Precluding Evidence Regarding Longfei's Registration of OMH Drawings in China.

Admission of evidence lies within the sound discretion of the trial court. *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 262, 828 P.2d 597, 601 (1992). Appellate courts review admission of evidence under an abuse of discretion standard. *Riss v. Angel*, 80 Wn. App. 553, 562, 912 P.2d 1028, 1033 (1996), *amended* (Feb. 13, 1996), *aff'd and remanded*, 131 Wn. 2d 612, 934 P.2d 669 (1997). If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis, it necessarily abuses its discretion. *Dix*

v. ICT Grp., Inc., 160 Wn.2d 826, 833, 161 P.3d 1016, 1020 (2007).

The trial court abused its discretion when it precluded Defendants from presenting evidence that OMH's designs were registered in China by the Longfei factory showing a violation of the NDA agreement by Lakoda.

Lakoda argued in motions in limine that OMH was required to plead foreign law relating to the legal effect of design registrations in China. RP 6, l. 11 – 8, l.19. A party who wishes to rely upon a foreign country's law must give notice in his pleading of the foreign jurisdiction whose law he contends may be applicable to the facts of the case. CR 9(k)(2); CR 44.1. However, in the absence of such pleading, the law of a foreign jurisdiction is presumed to be the same as the law of Washington. *In re Marriage of Landry*, 103 Wn.2d 807, 811, 699 P.2d 214, 216 (1985).

OMH did not intend to argue foreign law. The purpose of offering evidence of Longfei's design registration was

multifaceted. First, it was intended to prove that OMH continued to work directly with Longfei after Lakoda was fired in order to protect OMH's own financial interest, which is a defense to Lakoda's tortious interference claim. WPI 352.06. Second, it was intended to prove that OMH did not act willfully and maliciously, which is a defense to Lakoda's claim for enhanced damages and attorney fees under the trade secrets act. *See Comments to* WPI 351.01; RCW 19.108.030. Finally, it was intended to prove OMH's counter claim that Lakoda failed to protect OMH's designs as it was required to do under the NDA agreement.

Witnesses may testify to their understanding of the legal effect of a document. *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 745 P.2d 37 (1987) (witness can testify regarding his understanding of legal effect of loan documents); *Bennett v. Shinoda Floral, Inc.*, 108 Wn.2d 386, 739 P.2d 648 (1987)(plaintiff allowed to testify to his understanding of the legal effect of a settlement release); *Nationwide Transport v. Cass*

Information Systems, Inc., 523 F. 3d 1051 (9th Cir. 2008) (witness could not testify to what the law says, but may testify to the circumstances that led him to formulate his opinion).

Evidence is also allowed to be presented for the purpose of showing the motive and intent of a party at the time of an event. *Hardie v. Cotter & Co.*, 849 F.2d 1097, 1101 (8th Cir. 1988) (documents offered to demonstrate supervisor's state of mind and understanding of the circumstances existing at the time of plaintiffs discharge were admissible); *Moore v. Sears, Roebuck & Co.*, 683 F.2d 1321, 1322-23 (11th Cir. 1982) (documents were admissible evidence to show employer was motivated in good faith to discharge the employee). This is particularly the case when state of mind is an essential element of a claim. *Bruning v. Pixler*, 949 F.2d 352 (10th Cir. 1991). Opinions by lay witnesses need only be "rationally based on the perception of the witness and ... helpful to ... the determination of a fact in issue." *Hansard v. Pepsi-Cola Metro. Bottling Co., Inc.*, 865 F.2d 1461, 1466 (5th Cir. 1989).

The trial court originally ruled that the factory owner could testify that the designs were registered and that they belong to the factory and that they told OMH that the designs now belonged to the factory but that the actual registrations were not relevant. RP 10, l.12- RP 11. l. 12. When the factory owner was on the stand the court changed its mind and precluded him from discussing the registrations at all. RP 295, l.15-296, l. 14. Hilmoe was also precluded from testifying about the registrations. RP 540, l. 2-11.

By precluding the registration from being admitted the trial court allowed the Plaintiffs to state “there’s lots of stuff [OMH] didn’t do to protect themselves from Longfei.” May 15, 2014 RP 100, l. 11-13.

OMH should have been allowed to fully present evidence of Longfei’s registration of OMH’s designs. Longfei’s registration of OMH’s screener designs is highly relevant to OMH’s defenses and its counter claims.

2. Defendants should have been permitted to discuss the registration of the drawing in China because Plaintiffs opened the door to discussing the registrations.

Fairness dictates that an opposing party be given the opportunity to question on a subject matter the opposing party first introduced. *State v. Gallagher*, 112 Wn. App. 601, 610, 51 P.3d 100, 105 (2002). To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17, 20 (1969). It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. *Id.*

After OMH's witnesses were precluded from testifying regarding the design registrations, Lakoda then cross examined Hilmoie and O'Connell on whether they had patented their designs in the U.S. or Canada. RP 568-572; RP 640. In a side-

bar, OMH argued that this line of questioning opened the door to testimony regarding the design registrations in China. RP 839. Lakoda disagreed, arguing that the jurors understand what a patent in the U.S. or Canada means, but that China is different. The Court agreed with Lakoda. RP 864, 1.21- 865, 1.20.

Plaintiffs used this preclusion of evidence to argue that OMH was free to walk away from Lakoda so long as it did not work directly with Longfei. May 15, 2014 RP 93. Lakoda also argued that OMH's only motivation for cutting Lakoda out of the process was profit. May 15, 2014 RP 144.

The trial court's decision to exclude evidence regarding the registrations was manifestly unreasonable because it allowed Lakoda to distort OMH's motivation for working with the Longfei factory directly.

Plaintiffs elicited testimony regarding Canadian patents which by their own previous argument would require a pleading of foreign law. RP 569, 1.1; RP 572, 1.17-18; RP 604, 1.9; RP

640, l.5-6. Plaintiffs also argued for admission of an unratified draft licensing agreement on the premise “that any evidence of any type that’s talking about who owns these designs is relevant to the dispute before the Court.” RP 859, l. 11-13. Plaintiffs also stated in their closing argument that OMH failed to protect themselves from Longfei by not getting a patent. May 15, 2014 RP 100, l.10-15. Plaintiffs brought up the lack of patents twice more in closing arguments. May 15, 2014 RP 111, l.6-14; May 15, 2014 RP 140, l. 7-12.

A relevant case on the issue is *Kubista v. Romaine*, 87 Wn. 2d 62, 549 P.2d 491 (1976). A concise summary of *Kubista* is found in *Hawkins v. Diel*, 166 Wn. App. 1, 8-9, 269 P.3d 1049, 1053 (2011), it states:

“In *Kubista*, the plaintiff, a shipfitter, suffered back injuries and had to find another occupation due to the defendant's negligence. *Kubista*, 87 Wash.2d at 62–63, 549 P.2d 491. The defendant's insurance adjuster encouraged the plaintiff to go to school to learn a new trade, promising that the insurance company would “take care of him.” *Kubista*, 87 Wash.2d at 63, 549 P.2d 491. The plaintiff later filed suit against the defendant, alleging general

damages that included reduced earning capacity and lost wages. *Kubista*, 87 Wash.2d at 63, 549 P.2d 491. The defendant moved to exclude testimony concerning the insurance adjuster's statement to the plaintiff, and the plaintiff responded that such evidence was necessary in order to rebut the defendant's anticipated claim of failure to mitigate. *Kubista*, 87 Wash.2d at 64, 549 P.2d 491. The trial court excluded the insurance testimony as irrelevant, and in closing remarks to the jury, the defendant argued that it was not responsible for the Plaintiffs' decision to go to school rather than seek employment. *Kubista*, 87 Wash.2d at 65, 67, 549 P.2d 491. The Supreme Court reversed the trial court's decision, holding that '[t]his evidence on its face is relevant to show defendant was estopped to assert the defense that Plaintiffs' failure to seek employment violated his duty to mitigate damages.' *Kubista*, 87 Wash.2d at 67, 549 P.2d 491."

The preclusion of the registration evidence allowed Lakoda to twist the admitted evidence to the jurors. May 15, 2014 RP 100, l. 10-15. OMH had no basis to object to the Lakoda's closing remarks because, based on the evidence that was allowed, the closing remarks were not untrue. The trial court's failure to allow the evidence to be presented allowed this to occur.

3. The trial court erred by not interpreting the contract and denying Defendants' motion for directed verdict.

The legal effect of a contract is a question of law that appellate courts review de novo. *Keystone Masonry, Inc. v. Garco Const., Inc.*, 135 Wn. App. 927, 932, 147 P.3d 610, 613 (2006). The trial court erred by not interpreting the limitation of liability clause and presenting that issue for the jury to determine. A de novo review will show that this clause does not require extrinsic evidence, is plain on its face and that plaintiff is precluded from damages.

Under Washington law, parties may limit their liability for breach of contract and the interpretation of such clauses is a matter of law. *Valve Corp. v. Sierra Entm't Inc.*, 431 F.Supp.2d 1091, 1100 (W.D. Wash. 2004). Exclusionary clauses in purely commercial transactions are prima facie conscionable. *Am. Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477, 481 (1990). Exculpatory clauses are construed against the drafter if more than one construction of a

term is reasonable. *U.S. v. Seckinger*, 397 U.S. 203, 216, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970).

The no-damage clause in Lakoda's NDA reads:

Neither party shall be liable for special, indirect, or consequential damages, or lost profits, arising out of or in connection with this Agreement, whether based on contract, tort, including negligence, or otherwise. Plaintiffs' Exhibit 5.

The only testimony regarding this clause came from Ames. RP 348, l.4- 350, l. 14. Ames testified that he did not know what the clause meant. *Id.* When asked if the clause excludes a remedy for damages, the court sustained an objection that the question required a legal conclusion. *Id.*

OMH then moved for a directed verdict on Lakoda's damages claims relating to the alleged breach of the NDA. RP 434, 15-11. The trial court found there was conflicting testimony as to what the contract says and what it means and determined that the jury should decide the meaning of the contract. RP 453, l. 3-17.

The trial court should have interpreted the language as a matter of law because it is clear and unambiguous. *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn. App. 334, 339-40, 35 P.3d 383, 385 (2001). The function of a liquidated damages provision is to limit the non-breaching party's recovery of monetary damages. *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wn. App. 507, 518, 94 P.3d 372, 378 (2004). Ames' proclaimed ignorance of the clause's meaning does not create a question of fact as to what the contract says.

Plaintiff sought damages for lost profits. Lost profits were explicitly excluded in the contract. The NDA is the only contract that was signed between the parties it is the only contract that the jury considered when it awarded damages. Other than nominal damages, the only recovery Lakoda made was on its breach of contract claim. Appellants respectfully request this Court to review the no-damage clause and dismiss Plaintiffs' damages.

4. The jury's damage award is not supported by sufficient and accurate evidence in the record.

Appellate courts unquestionably have the authority to reduce jury damage awards. *Bunch v. King Cnty. Dep't of Youth Servs.*, 155 Wn. 2d 165, 171, 116 P.3d 381, 385 (2005). A recovery of speculative or conjectural profits should be denied. *Rathke v. Roberts*, 33 Wn.2d 858, 866, 207 P.2d 716, 721 (1949). A trial court's award of damages is reviewed for abuse of discretion. *Banuelos v. TSA Washington, Inc.*, 134 Wn. App. 607, 613, 141 P.3d 652, 656 (2006). Appellate Courts will reconsider damages when "it is outside the range of substantial evidence in the record, or shocks the conscience, or appears to have been arrived at as the result of passion or prejudice." *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 850, 792 P.2d 142, 146 (1990).

Lost profits are recoverable as damages when (1) they are within the contemplation of the parties at the time the contract was made, (2) they are the proximate result of defendant's

breach, and (3) they are proven with reasonable certainty. *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 15, 390 P.2d 677, 686 (1964) *adhered to*, 65 Wn.2d 1, 396 P.2d 879 (1964).

The proper calculation of damages for a trial court to consider are the net profits representing the difference between the gross sales and the cost thereof and administrative expenses. *Hole v. Unity Petroleum Corp.*, 15 Wn.2d 416, 425, 131 P.2d 150, 154 (1942) *holding modified by Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 390 P.2d 677 (1964); CP 1066. Net profits can also be represented by such profit that is left after all costs of operation have been deducted. *Bracy v. United Retail Merchants*, 189 Wash. 162, 168-69, 63 P.2d 491, 494 (1937).

Without expert witnesses or designated documents providing competent evidence a fact finder is left to "speculation or guesswork" in determining the amount of damages to award. *In re Hanford Nuclear Reservation Litig.*, 894 F. Supp. 1436, 1445 (E.D. Wash. 1995). ER 1006 permits introduction of a "chart, summary or calculation" to summarize

the “contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court.” *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 732, 281 P.3d 693, 710 (2012). “Before a summary is admitted, the proponent must lay a proper foundation as to the admissibility of the material that is summarized and show that the summary is accurate.” *Needham v. White Labs., Inc.*, 639 F.2d 394, 403 (7th Cir. 1981).

Defendants objected to the summaries because they do not accurately portray the invoices. RP 121, l. 15-25. Plaintiffs’ summary exhibits are inaccurate. Particularly, Plaintiffs’ calculations are incorrect on Exhibit 126 because it does not present the full price per unit of the screeners and average prices are not found in the original invoices. RP 121, l. 22- 122, l.1.

During the period of 4/7/2011 – 10/18/2012 OMH streamlined the production and purchase process by generating purchase orders for the generic screen box first and then for the

final product after additional work was completed. (See Plaintiffs' Exhibit 128, Purchase Order 240, Bates OMHINNUSA 00058-00059 for generic screen box with unit number and Purchase Order 240A, Bates OMHINNUSA 00056-00057 for finished unit.) The purchase orders show the unit numbers connecting both the initial generic box with the finished product. *Id.* Plaintiffs' attorney specifically discussed the PVG C120 machines in their closing argument. May 15, 2014 RP 143, l. 15-144, l.4. Looking only at that unit, Plaintiffs summary exhibits fail to include the additional cost of the screener boxes. The exhibit misrepresents the actual price being paid by OMH to Longfei. Each screener box for the PVG C 120 cost either \$1,338 or \$1,250. (See Exhibit 128, Purchase Order 240, Bates OMHINNUSA 00058-00059 and Purchase Order 189, Bates OMHINNUSA 00169). Plaintiffs' exhibit fails to account for 56 screener boxes, at \$1,250 or \$1,338 per unit, representing \$66,390 not accounted for in the cost of the PVG C 120 screeners. (See Exhibit 128, PO 176; 190; 189;

193; 194; 196; 199; 200; 201; 218; 219; 220; 221; 223; 228; 229; 230; 231A; 232A; 239; 240).

Plaintiffs perpetuated this misrepresentation in their closing argument by stating that OMH was only paying \$2,608 per unit based on their inaccurate calculation when OMH was actually paying more than \$3,700 per unit. May 15, 2014 RP 143, l. 21-22.

Plaintiffs' summary exhibits also do not correspond with their profit and loss statements. Plaintiffs' profit and loss, Exhibit 56, shows significantly less profit than what was represented on the summaries. The inclusion of these inaccurate summaries grossly misrepresented Plaintiffs damages and caused the jury to speculate on damages.

Plaintiffs' damages are not supported by the record. There was no evidence that the damages were contemplated by the parties at the time the contract was made and they were not proven with reasonable certainty. It was inappropriate and an error for the trial court to admit the summary exhibits.

5. The trial court erred by precluding relevant portions of the perpetuation deposition and the video.

During the reading of Clancy's deposition Plaintiffs objected to paragraphs 277 through 281 on the basis of relevance. RP 820 I. 4-25. The trial court struck those paragraphs based on lack of relevance and authentication. RP 822 I. 15-19. The court's actions were in error because there was sufficient authentication and because the video and its contents were very relevant to Defendants cross claims and their defense.

A trial court's decision regarding relevancy is discretionary and is reviewed for abuse of discretion. *State v. Suarez-Bravo*, 72 Wn. App. 359, 364, 864 P.2d 426, 430 (1994). In order to be admissible, evidence must be relevant. ER 402. Relevant evidence is any evidence that has "any tendency to make the existence of any fact that is of consequence ... more probable or less probable than it would be without the evidence". ER 401.

The threshold for relevance is extremely low under ER 401. *City of Kennewick v. Day*, 142 Wn. 2d 1, 8, 11 P.3d 304, 308 (2000). ER 401 requires only a showing of minimal logical relevance. *State v. Bebb*, 44 Wn. App. 803, 814, 723 P.2d 512, 518 (1986) *aff'd*, 108 Wn. 2d 515, 740 P.2d 829 (1987). Even a minimal logical relevancy is adequate if there exists a reasonable connection between the evidence and the relevant issues. *State v. Suarez-Bravo*, 72 Wn. App. 359, 364, 864 P.2d 426, 430 (1994).

The relevant issues at stake were whether Lakoda misappropriated a trade secret owned by OMH and was actively facilitating the sale of OMH designed screeners to competitors of OMH. The video is also relevant to show that Lakoda knew Longfei had registered the drawings in China and that OMH was not able to stop the sale of screeners to its competitors.

Clancy testified that he produced the video in discovery. CP at 622, l. 17 - 623 l. 11. Clancy's testimony was necessary and relevant authenticate the video. The purpose of this

testimony was to prove the fact that Clancy received the video. RP 820, 1.19-20. The relevance of the video is to show Peter Geng testing a knock-off screener based on OMH's design and that the video was sent to Gerald Clancy. RP 821, 1.10-13. While Clancy may not have recognized the individual in the video, other witnesses would be able to testify to the person, location, and contents of the video. RP 821, 1.10-13.

Washington does not require photographs and other recordings to be authenticated by a witness present for their creation. *State v. Sapp*, 182 Wn. App. 910, 916, 332 P.3d 1058, 1062 (2014). A witness with prior knowledge of the people and places depicted in the exhibit could still establish when the exhibit was created based on the age of people in the exhibit or things depicted in the background. *Id.* OMH intended to call Brad Hilmoe to testify that the person depicted in the video was Peter Geng.

The video is relevant because it shows that Clancy was contacted by Peter Geng and shown a soil screener to entice

him to purchase the screeners. The relevancy of the video is who the recipient of the video was, so that Hilmoe could later identify Peter in the video. To present the video through any other witness would lack the historical background and significance of the video. Only Clancy can testify that he received the video in an e-mail from Peter Geng.

The trial court originally determined that the video and the e-mails Clancy received were authenticated. RP 796-797. The court stated that “he did authenticate...this is his e-mail address, and they were received by him. I am going to allow them.” RP 797, l. 8-11.

The fact that Clancy received the e-mail and video attachment becomes more relevant once Hilmoe identifies Peter in the video. However, the video must have first been identified by Clancy in order to admit it during Hilmoe’s testimony.

After the video was excluded, Lakoda then called Peter to testify that another factory worker stole his internet password and sent the emails to Clancy in his name. RP 928-930.

Without the video, OMH was unable to impeach this testimony. The fact that Peter was soliciting sales of knock-off screeners to OMH's competitors was highly relevant to OMH's breach of contract and trade secrets claims. It was error for the trial court to preclude this evidence.

6. The Court erred in denying Defendants Motion for Directed verdict on Lakoda's trade secrets claim.

Findings of fact are reviewed under a substantial evidence standard, which requires that there be a sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true. *Pardee v. Jolly*, 163 Wn. 2d 558, 566, 182 P.3d 967, 972 (2008). For trade secrets to exist, they must not be "readily ascertainable by proper means" from some other source. *Boeing Co. v. Sierracin Corp.*, 108 Wn. 2d 38, 49-50, 738 P.2d 665, 674 (1987). A plaintiff cannot establish that a trade secret exists if the information is generally known to or readily ascertainable by other persons who can obtain economic value from its disclosure or use. *Precision*

Moulding & Frame, Inc. v. Simpson Door Co., 77 Wn. App. 20, 26, 888 P.2d 1239, 1243 (1995).

OMH made a motion in limine to exclude Lakoda's trade secrets claims on the basis that all of the pre-trial evidence showed that Lakoda worked exclusively through TPD, a separate entity from Lakoda and Longfei. RP 42, l.15 - 43, l.15. Thus, even if the Longfei factory could be considered a trade-secret, it was not Lakoda's trade secret.

The Court signaled its intentions with regard to Lakoda's trade secret claim before any testimony was taken. First, the court concluded that if Longfei was not a trade secret, there would have been no need for the NDA. RP 44, l. 20-21. Second, the Court concluded that, if factories in China were readily ascertainable, OMH could have found one on its own and not even contacted Lakoda. RP 44, l. 21-23.

At trial, Lakoda presented only two witnesses in their case-in-chief - Dale Ames and Cindy Thompson. These witnesses testified that TPD had located the Longfei factory and

that Lakoda worked exclusively through TPD to manufacture OMH's products. RP 75, l.9; 76, l. 23 - 77, l.2; 102, l. 5-8; 375, l.18; 402, l.19-20; 403, l.1-3. TPD was paid independently of Longfei for these services. RP 405, l. 10-17. Ames also testified that Peter provided Lakoda the procedures, sources and contacts to do its business in China. RP 162, l. 1-2.

In other words, TPD was the middle man between Longfei and Lakoda, just as Lakoda was the middle man between OMH and TPD. Lakoda and TPD had a symbiotic relationship wherein Lakoda would bring a customer to China and TPD, for a fee, would locate an appropriate manufacturing facility.

Nevertheless, the court determined that the trade secret was Lakoda's knowledge of the Longfei factory. The evidence does not support this determination. The only testimony was that TPD had located, trained, and contracted with Longfei. If the Longfei factory was a trade secret, it was TPD's trade secret.

Ames testified that Lakoda was suing OMH for going around Lakoda and working directly with the factory. However, even if the NDA protected Lakoda from OMH contracting directly with the factory, that does not make the factory Lakoda's trade secret.

7. The Court erred in its award of attorney fees to Lakoda.

A. The Court erred in awarding attorney fees for a nominal damages recovery.

An award of attorney fees is discretionary under the trade secrets acts. RCW 19.108.040. Thus, the issue on review is whether the trial court abused its discretion in awarding the fees. *See Progressive Animal Welfare Society v. University of Washington*, 114 Wash.2d 677, 688–89, 790 P.2d 604 (1990). The trial court abuses its discretion when the exercise of its discretion is manifestly unreasonable or based on untenable grounds or reasons. *See Progressive*, 114 Wash.2d at 688–89, 790 P.2d 604.

A party who recovers only nominal damages may be a prevailing party, but not entitled to an award of attorney fees. *Farrar v. Hobby*, 506 U.S. 103, 111–12, 113 S.Ct. 566, 573, 121 L.Ed.2d 494 (1992). When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is no fee at all. *Id.* at 115. *Farrar* was adopted by Washington courts in *Sintra, Inc. v. City of Seattle*, 131 Wash. 2d 640, 664-65, 935 P.2d 555, 567-68 (1997).

Here, Lakoda was awarded \$1 on its trade secrets claim, yet the court awarded \$233,000 in attorney fees and costs. The court was influenced by the fact that Lakoda prevailed on each of its claims. The court also presumed that the jury only awarded nominal damages on the trade secrets claim to avoid a duplication of damages awarded on the breach of contract claims. June 27, 2014 RP 19. Finally the court considered the “tortured history” of the pre-trial discovery (language adopted from Lakoda’s briefing) in its decision to award fees. June 27,

2014 RP 20. None of these issues are relevant to the award of fees for trade secrets claims and, thus the court abused its discretion by considering them.

B. The Court erred by awarding attorney fees for time spent on claims unrelated to the trade secrets claim.

In Washington, attorney fees may be awarded only when authorized by a private agreement, a statute, or a recognized ground of equity. *Mellor v. Chamberlin*, 100 Wash.2d 643, 649, 673 P.2d 610 (1983). When a party recovers both on claims for which attorney fees are authorized and claims for which there is no such authorization, it is proper to limit the fee award to the legal services provided on the former claims. *See Nuttall v. Dowell*, 31 Wash.App. 98, 105, 639 P.2d 832 (1982) (affirming a fee award limited to only that portion of Plaintiffs' action which was cognizable under a statute authorizing attorney fees); *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wash. 2d 826, 849-50, 726 P.2d 8, 22 (1986).

The attorney fee award must reflect a segregation of the time spent on issues for which fees are authorized and time spent on other issues even if the claims overlap or are interrelated. *Loeffeerholz v. Citizens for Leaders with Ethics & Accountability Now*, 119 Wn. App. 665, 82 P.3d 1199 (2004). The only exception to this rule is if “no reasonable segregation can be made. *Id.*; *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wash. 2d 396, 410-11, 759 P.2d 418, 425 (1988).

While a number of fundamental facts are essential to every aspect of the lawsuit, the law pertaining to breach of contract, trade secrets and tortious interference is not the same. Nor were OMH’s counter-claims, which were investigated and litigated extensively, intertwined in any way with Lakoda’s trade secrets claim. Thus, the court must separate the time spent on those theories essential to trade secrets and the time spent on legal theories relating to the other causes of action.

Although the court stated that it had reviewed the billing statements, it made no attempt to segregate those charges related to Lakoda's trade secrets claim. Instead, the court adopted Lakoda's argument that all of the claims were intertwined and concluded that Lakoda's arbitrary 14% reduction, to account for duplicative work, was "very reasonable." June 27, 2014 RP 20-21.

C. The Court erred in awarding attorney fees requested for the first time in Lakoda's reply brief in support of motion for attorney fees.

It is the responsibility of the moving party to raise in its opening brief all of the issues on which it believes it is entitled to relief. *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wash. App. 163, 168, 810 P.2d 4, 8 (1991). Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond. *Id.* It is for this reason that, in the analogous area of appellate review, the rule is well settled that the court will not consider issues raised for the first time in a reply brief. *In re Marriage of Sacco*, 114

Wash.2d 1, 5, 784 P.2d 1266 (1990); *Stevens v. Security Pac. Mortgage Corp.*, 53 Wash.App. 507, 519, 768 P.2d 1007, *review denied*, 112 Wash.2d 1023 (1989); *State v. Manthie*, 39 Wash.App. 815, 826 n. 1, 696 P.2d 33, *review denied*, 103 Wash.2d 1042 (1985); RAP 10.3(c).

Here, Lakoda argued for the first time in its reply brief that it was entitled to \$8600 in fees and costs for time spent preparing its costs bill. It also requested all of its costs for the court reporter's attendance at multiple depositions of Brad Hilmoe which is not a recoverable cost under RCW 4.84.010. Lakoda used only three pages of Hilmoe deposition at trial. RP 566, 573-574.

The court did not address whether the additional fees were recoverable. The court did not address the objection to the claim being first raised in the reply. The court did not attempt to determine how much of the deposition transcripts were actually used and erroneously concluded that they were used "quite a bit." June 27, 2014 RP 21. Finally, the court dismissed OMH's

objections because the additional fees were “very nominal.”

June 27, 2014 RP 21.

VI. CONCLUSION

The court’s multiple errors prohibited a fair trial for OMH. OMH was precluded from presenting testimony that, due to Lakoda’s negligence, Longfei stole OMH’s designs. This fact was highly relevant to all aspects of the trial.

OMH was precluded from presenting evidence that Peter Geng was manufacturing and selling counterfeit screeners to OMH’s competitors, which was again Lakoda’s obligation to prevent.

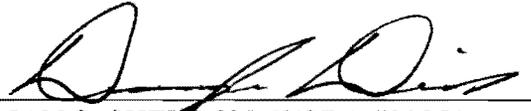
Lakoda was allowed to present inaccurate summaries of its alleged damages that highly inflated the actual profits it would have made.

Finally, the Court awarded a majority of Lakoda’s attorney fees despite a nominal damage award on the trade secrets claim and despite the fact that much of the awarded fees were clearly unrelated to that claim.

For these reasons, OMH requests a new trial.

DATED this 15th day of July, 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "B. S. Sheeldon" and "D. R. Dick", written over a horizontal line.

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