

No. 67650-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DICKINSON EQUIPMENT COMPANY, LLC,

Appellant,

v.

NORTHWEST PUMP & EQUIPMENT CO.,
DONALD MAYFIELD aka DAVE MAYFIELD,
and MARK STEINBERGER,

Respondents.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Northwest Pump & Equipment Company (“Northwest Pump”) raises new issues never argued to the trial court and studiously avoids the repercussions of its decision to destroy vital documents necessary to Dickinson Equipment Company, LLC’s (“Dickinson”) case in a futile bid to distract this Court from the key arguments in Dickinson’s opening brief supporting reversal of the trial court’s order on summary judgment. The Court should not be blinded by Northwest Pump’s artifice.

Northwest Pump entered the air compressor market not by competing legitimately, but by appropriating Dickinson’s trade secrets and Dickinson’s staff. It hired former Dickinson employees Donald Mayfield and Mark Steinberger, who were privy to Dickinson’s trade secrets. Mayfield and Steinberger violated the terms of noncompete, nondisclosure agreements they signed while employed by Dickinson. In short, Northwest Pump gained a foothold in the air compressor market at Dickinson’s expense.

Northwest Pump asserts that Dickinson did not provide sufficient evidence of trade secrets and their misappropriation by the respondents or Mayfield and Steinberger’s breach of their noncompete/nondisclosure agreements. Northwest Pump is wrong. More troubling, however, is that Northwest Pump routinely destroyed all emails over 90 days old despite

being fully aware of the relevance of these emails to this litigation by the terms of the preliminary injunction. *These emails were the precise evidence that would have proved Northwest Pump misappropriated Dickinson trade secrets and that Mayfield/Steinberger violated their noncompete/nondisclosure agreements.* The Court should not permit Northwest Pump to destroy vital evidence of its misconduct, evidence only it controlled, while it simultaneously decries Dickinson's lack of evidence.

B. RESPONSE TO NORTHWEST PUMP'S RESTATEMENT OF THE CASE

Northwest Pump offers an argumentative, self-serving recitation of the facts in its "Restatement of the Case," contrary to the direction of RAP 10.3(a)(5).¹ It undertakes a hypertechnical reading of the facts that ignores all of the evidence submitted to the trial court. Moreover, it misleads this Court concerning the timeline of Dickinson's motion to compel.

If an objective reader were to take Northwest Pump's discussion of the facts in this case at face value, then that reader would assume that Northwest Pump had no interest in the air compressor market in the

¹ The captions used by Northwest Pump in this section of its brief are indicative of the argumentative nature of its statement of the case. Moreover, its oft-repeated claims that certain facts were "undisputed" or "conceded" by Dickinson are simply untrue. *See, e.g.,* Br. of Resp'ts at 9, 10 n.10.

Pacific Northwest and that it got into that market by happenstance. These assumptions are far from the truth.

Northwest Pump does not deny that it hired away key Dickinson employees Dave Mayfield and Steinberger, employees with inside knowledge of Dickinson's marketing plan and customer lists. CP 84, 177, 292-93, 319. It also does not deny that it hired numerous other Dickinson personnel in touch with the air compressor market. CP 395, 441. Northwest Pump's assertion in its brief at 8 that it hired Mayfield because it "recognized Mayfield's extensive knowledge of rotating machinery, including pumps, as well as his skill and experience in selling mechanical equipment (CP 166)" is not well-taken. Northwest Pump articulates its true intent with respect to Mayfield's employment in a later passage on page 8 of its brief: it hired Mayfield in November 2009 "to work in NW Pump's petroleum pump department and *to assist in setting up an air compressor department.*" (emphasis added). Northwest Pump *admits* it hired Mayfield to compete against his employer in the air compressor market.

The rationale that Northwest Pump offers for its decision to compete against Dickinson in the air compressor market is that Dickinson

was "financially troubled." Br. of Resp'ts at 6-10.² If there were any financial difficulties at Dickinson, which Dickinson disputes (br. of appellant at 9), those difficulties were created and exacerbated by Northwest Pump's predatory conduct. A review of the timeline is appropriate.

Northwest Pump entered the air compressor business in the Pacific Northwest in competition with Dickinson in mid-2009. CP 63-64. Dickinson's Ed Tudor and Dave Mayfield developed a business plan in the third quarter of 2009 to retain and nurture Dickinson's relationship with supplier Sullair. CP 400, 442-44. Mayfield, Sullair, and Northwest Pump discussed getting Sullair's business from Dickinson in October 2009. CP 400. Mayfield applied for work with Northwest Pump on October 13, 2009 and started working there on November 23, 2009. CP 400. In late 2009 and early 2010, Mayfield, Steinberger, and John Levitsis of Northwest Pump were having long telephone conversations. CP 401-02. Northwest Pump wanted to recruit Steinberger. CP 445-51. Steinberger actually went to work for Northwest Pump on January 22,

² Northwest Pump's statements in its brief at 6 n.1 regarding Dickinson's financial health border on the comic. *Northwest Pump*, not Dickinson, raised Dickinson's financial status below. CP 181-82, 215, 233. On appeal, Northwest Pump repeats its assertion that it got into the air compressor market because Dickinson was unable to service its customers due to financial problems. Br. of Resp'ts at 6-10. Yet, in this footnote, Northwest Pump *concedes* the issue is not material to summary judgment.

2010, CP 740, because he wanted to rejoin Mayfield. CP 723. In January, 2010, Sullair entered into a distributorship agreement with Northwest Pump. CP 299. Throughout the early part of 2010, despite the trial court's TRO, CP 138-50, Northwest Pump hired at least nine key Dickinson staff besides Mayfield and Steinberger. CP 395, 396, 727. Northwest Pump does not dispute the assertion in Dickinson's opening brief at 15-16 that it unabashedly solicited Dickinson's customers after hiring these Dickinson employees³ despite the trial court's TRO and preliminary injunction. Ultimately, Sullair entered in an exclusive distributorship agreement with Northwest Pump in March 2010. CP 342-44.

This timeline confirms the damaging impact Northwest Pump's predatory conduct had on Dickinson's business. For purposes of summary judgment, there is at least a question of fact as to whether Northwest Pump's conduct damaged Dickinson's business.

With respect to the procedures below, Northwest Pump misleads this Court regarding discovery in its brief at 12-13. First, Northwest Pump objected strenuously to the production of documents, indicating that it intended to seek a protective order regarding any production. CP 556.

³ The failure to respond to factual assertions in a brief by the respondent concedes such facts. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 270, 840 P.2d 860 (1992) (description of plaintiff's injuries).

Second, Dickinson sent interrogatories and requests for production of documents to Northwest Pump on April 11, 2011, CP 543, long before the June 20, 2011 discovery cutoff. CP 854. When Northwest Pump refused to produce the requested documents in its May 11, 2011 response, CP 556, 559-62, counsel for Dickinson convened a LCR 37 conference on June 30, 2011 to demand the production of documents. CP 544. In the meanwhile, Northwest Pump filed its summary judgment motion on June 27, 2011. CP 248. Contrary to Northwest Pump's assertion in its brief at 12, Dickinson's first objection to Northwest Pump's response to the requests for production came on June 30, 2011, not July 15, 2011, in its opposition to the motion for summary judgment. CP 544.

Finally, Northwest Pump asserts that Dickinson first raised the issue of its destruction of emails on July 15, 2011 in opposition to summary judgment. Br. of Resp'ts at 12. This is true, *but only because counsel for Northwest Pump first revealed this fact on June 30, 2011*. CP 545.

Northwest Pump asserts that Dickinson's counsel did not offer specific evidence of misappropriation in response to questions by the trial court. Br. of Resp'ts at 13. This is untrue. Dickinson proffered the extensive declarations of Ed Tudor and Gordon Woodley on this issue. CP 721-26, 779-83. Of course, Dickinson was obviously hamstrung to an

extensive degree by Northwest Pump's intentional destruction of probative evidence on this issue.

C. ARGUMENT

(1) Northwest Pump Misstates the Applicable Standard of Review

Northwest Pump tries to argue in its brief at 14-18 that the usual *de novo* standard of review applicable to summary judgment orders does not apply here and that this Court should disregard the trial court's extensive, and hotly-contested, findings made in connection with the preliminary injunction. Northwest Pump is wrong.

Our Supreme Court has held that summary judgments are reviewed *de novo*. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). This standard of review allows the Court to make its own independent judgment based on the record before it. *In re Disciplinary Proceedings Against Turco*, 137 Wn.2d 227, 245-46, 970 P.2d 731 (1999).⁴

⁴ Northwest Pump asserts in footnote 6 of its brief that Dickinson improperly relies on evidence not submitted to the trial court until after the summary judgment hearing. Not so. During the summary judgment hearing, Dickinson referenced a 2010 Sullair Quarterly Review Comment it received from Northwest Pump the day before the hearing that confirmed former Dickinson employee Dot Thayer was soliciting Dickinson customers for Northwest Pump. RP (7/26/11) 36; CP 780. Northwest Pump should not be heard to complain where it did not disclose the document until the day before the hearing. CP 780. Moreover, Northwest Pump ignores the fact that Dickinson could not provide a copy of Thayer's deposition transcript before the hearing because it was not yet available. CP 781.

Northwest Pump's reliance on *Malletier v. Dooney & Bourke, Inc.*, 561 F.Supp.2d 368 (S.D.N.Y., 2008) for the proposition that findings of fact at the preliminary injunction stage are not relevant under CR 56 is misplaced. Although not binding, a court may consider findings of fact and conclusions of law made in a prior motion for preliminary injunction when deciding a summary judgment motion. *Id.* at 382.

(2) Northwest Pump Cannot Argue for the First Time on Appeal that Dickinson's Customer Lists Were Not Protected Trade Secrets

In its brief at 18-26, Northwest Pump offers an extensive argument that Dickinson's customer lists were not protected trade secrets under RCW 19.108. Northwest Pump is mistaken, as will be discussed *infra*. More troubling, however, is that Northwest Pump *never* raised this issue below. RAP 2.5(a). A careful review of Northwest Pump's motion for summary judgment, CP 278-90, and its reply on summary judgment, CP 328-32, confirm that Northwest Pump *never* argued that Dickinson's lists were not protected trade secrets. In fact, the trial court's preliminary injunction order, CP 206-08, and the findings made in connection with it, CP 249-53, describe the trade secrets at issue here. *Nowhere* in Northwest Pump's extensive objections to the preliminary injunction findings, CP 195-205, 240-45, did it claim that Dickinson's customer lists were not trade secrets under RCW 19.108. The Court should reject Northwest

Pump's tardy assertion. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995) (noting the court generally do not consider issues raised for the first time on appeal). Even if it does not, Dickinson's customer lists are protected trade secrets.

The Uniform Trade Secrets Act provides a statutory cause of action for misappropriation of a trade secret. RCW 19.108.010 *et seq.* Its purpose is to "maintain and promote standards of commercial ethics and fair dealing in protecting [trade] secrets." *Ed Nowogroski Ins. v. Rucker*, 137 Wn.2d 427, 436, 971 P.2d 936 (1999). Misappropriation is "disclosure or use of a trade secret of another without express or implied consent by a person who . . . acquired [information] under circumstances giving rise to a duty to maintain its secrecy or limit its use." *Id.*; RCW 19.108.010(2). A trade secret is reasonably protected information that derives independent economic value from not being generally known to another who could use it for his own economic value. RCW 19.108.010(4).

Whether a customer list is a protected trade secret depends on three factors: (1) whether the list is a compilation of information; (2) whether it is valuable because unknown to others; and (3) whether the owner has made reasonable attempts to keep the information secret. *Nowogroski*, 137 Wn.2d at 442.

Dickinson's customer lists qualify as a trade secret. Element one is met because the customer lists are a compilation of information about Dickinson's customers. As Ed Tudor testified,⁵ Dickinson's customer lists include contact information for each customer, whether the contact was a sales prospect or business inquiry, information on the make and model of equipment, maintenance and frequency of repairs, and other proprietary data. CP 62-63. This information was used to prepare sales plans, business plans, and to represent Dickinson's product line to potential customers. CP 63. It was the key to Dickinson's economic success. CP 57.

Element two is met because the information's value is at least slightly derived from its unavailability to others. Nowhere does Northwest Pump explain how Dickinson's customer lists were in the public domain. On the contrary, the record reflects Dickinson's ongoing efforts to maintain the secrecy of its customer lists. CP 55. Knowing of potential Dickinson customers who may be in the market for an air compressor would likely increase sales of Northwest Pump's air compressors. As the *Nowogroski* court noted, "customer identities and related customer information can be a company's most valuable asset and

⁵ Tudor's July 2011 declaration in support of Dickinson's response opposing summary judgment supplemented and incorporated by reference his earlier declarations. CP 394-95.

may represent a considerable investment of resources.” 137 Wn.2d at 442-43.

Finally, element three is met by Dickinson’s requirement that all employees sign nondisclosure agreements and by its password-protected computerized databases. CP 12, 55. The general public is not given access to this information or to Dickinson’s computers. If a vendor or customer needs to move beyond the reception area or the parts counter when visiting Dickinson, that person is accompanied by a Dickinson employee. CP 55. Dickinson carefully guards the confidentiality of its customer lists such that the lists are not readily ascertainable by proper means. CP 55. With all three elements satisfied, Dickinson’s customer lists are protected trade secrets.

(3) The Trial Court Erred in Finding Northwest Pump Did Not Misappropriate Dickinson’s Trade Secrets

Northwest Pump does not dispute the assertion in Dickinson’s brief at 22-23 that the question of whether a trade secret has been misappropriated is a fact-intensive inquiry not susceptible to resolution on summary judgment. Nevertheless, it essentially argues that Dickinson presented no admissible evidence that it misappropriated Dickinson’s

trade secrets. Br. of Resp'ts at 26-31.⁶ Northwest Pump is again mistaken.

Northwest Pump's entire argument seems to be that Dickinson failed to identify which particular trade secrets Northwest Pump misappropriated. Br. of Resp'ts at 18, 26. Not so. Ed Tudor specifically testified that in addition to Dickinson's customer lists, its confidential trade secret information included sales data and projections, future plans, strategic plans, quote forms, pricing, markups, margin data and structures, vendors, suppliers, customers, and prospective customers. CP 55, 57. He also discussed in great detail the measures Dickinson undertook to protect these trade secrets. CP 55, 58. Nowhere does Northwest Pump explain how information like Dickinson's margin data, profit margins, or strategic plan is in the public domain. Although Northwest Pump asserts that this confidential information is public knowledge, it fails to describe what proper means could be used to discover that information. Moreover,

⁶ Northwest Pump raises yet another argument not presented to the trial court in its brief at 32. It claims Dickinson failed to prove "damages." The issue of "damages" is obviously premature because that question is one for the trier of fact. *Baltzelle v. Doces Sixth Ave., Inc.*, 5 Wn. App. 771, 778, 490 P.2d 1331 (1971) (noting existence, nature and extent of monetary damages raises questions of fact for the trier of fact). That Dickinson experienced damages or harm, an element of a prima facie case, is clear from the record here. Northwest Pump has gained a commercial advantage over Dickinson by misappropriating Dickinson's trade secrets. It undermined Dickinson's business relationships, cost it customer goodwill, and sharply devalued Tudor's investment in developing and maintaining Dickinson's trade secrets. CP 59, 409-10.

nowhere below did Northwest Pump argue this information was not a protected trade secret. CP 285-86.

Northwest Pump also argues that Dickinson failed to demonstrate misappropriation under the Act.⁷ Br. of Resp'ts at 26. What it fails to recognize is that its deliberate destruction of evidence, as discussed below, inhibited Dickinson's ability to prove its case. But, as Northwest later grudgingly acknowledges, Dickinson presented testimony from Ed Tudor and Chris Tudor demonstrating how Northwest Pump misappropriated Dickinson's confidential trade secrets and how it used that information to gain an economic advantage in the market based on the evidence then-available.⁸ CP 394-533. That Northwest believes the Tudors' testimony is conclusory or replete with hearsay and thus inadmissible is nothing more than a self-serving weighing of the evidence, which is inappropriate on summary judgment. More importantly, the trial court did not strike the

⁷ Northwest Pumps' argument in footnote 13 of its brief that Dickinson cited no evidence to suggest that Mayfield and Steinberger took confidential information with them is ludicrous. It defies logic to believe that neither one would use their extensive knowledge of Dickinson to benefit their new employer or themselves.

⁸ Northwest Pump continues to argue in footnote 14 of its brief that Dickinson relies on post-summary judgment evidence to make its case. Not so. All of the contentions raised in the footnote are belied by Ed Tudor's July 2011 declaration opposing summary judgment. For example, Tudor alleged that Mayfield downloaded confidential information on his home computer. CP 401. Chris Tudor agreed with his dad. CP 523. Ed also alleged that Dot Thayer was actively soliciting Dickinson. CP 400. The extent of Thayer's solicitation of Dickinson customers was not known until much later. Finally, Ed alleged that Northwest Pump hired John Vasant to service Dickinson customers. CP 396.

Tudors' declarations. The Tudors presented sufficient evidence raising a material issue of fact over whether Dickinson's trade secrets were misappropriated. Summary judgment should not have been granted.

(4) The Trial Court Erred in Dismissing Dickinson's Contract Claims for Breach of the Noncompete/Nondisclosure Agreements by Mayfield and Steinberger

The trial court here did not explain anywhere on the record why it dismissed Dickinson's claims involving the noncompete/nondisclosure provisions signed by Mayfield and Steinberger, *after having ruled those provisions were enforceable*. CP 251. Northwest Pump now offers this Court an elaborate justification for the trial court's decision in its brief at 32-44. Unfortunately for Northwest Pump, *it never made these arguments anywhere in the summary judgment pleadings it submitted to the trial court*. RAP 2.5(a). It should not be permitted to raise them now.

Northwest Pump argues the noncompete/nondisclosure agreements that Mayfield and Steinberger signed when Ed Tudor employed them are void and unenforceable as unlawful restraints of trade.⁹ Br. of Resp'ts at 33. In doing so, it ignores two important points. First, for more than 85 years, Washington courts have upheld reasonable noncompete agreements, despite the fact that they restrain trade. *Racine v. Bender*,

⁹ Northwest persists in raising new arguments never raised in the trial court. Br. of Resp'ts at 33, 35, 37, 39. The Court should reject Northwest Pump's continued attempts to transform the case it made below.

141 Wash. 606, 611-12, 252 P. 115 (1927). Second, the trial court did not find either agreement unenforceable. The trial court specifically held that the nondisclosure agreement was enforceable and that the noncompete agreement, though overbroad, was also valid and enforceable. CP 251, 287. The trial court concluded the noncompete was overbroad because it would prevent any former Dickinson employee from employment where the employee would not use or disclose Dickinson's protected trade secrets and would not solicit customers. CP 251. Thus, the trial court limited the agreements to allow Mayfield and Steinberger to work for Northwest Pump so long as they did not disclose protected trade secrets and did not solicit any customers they serviced during their employment with Dickinson. CP 192-94, 207. The agreements, as limited by the trial court, are reasonable and impose no greater restraint on Mayfield and Steinberger than is reasonably necessary to secure Dickinson's business or goodwill. Clearly, the purpose of the agreements was to prevent key employees with insider knowledge of the company from deserting and joining a big competitor. Despite Dickinson's best efforts to protect itself should key employees leave its employ, it was unable to do so.

Northwest Pump also argues that it cannot compete with Dickinson because Dickinson is no longer in business. Northwest Pump is mistaken. As Ed Tudor testified, Dickinson is still in business and plans to stay in

business despite Northwest Pumps ongoing efforts to drive it out of the air compressor market. CP 217, 403. The company is taking calls, meeting with customers, servicing equipment, and filling parts requests through its licensee, DEC Services Co. LLC. CP 217. It sold a record 85 new service agreements in the first six months of 2009 and is rebuilding its revenues back to its 2007 levels. CP 403, 443. Dickinson reorganized; it did not go out of business. CP 313, 404.

(5) The Trial Court Erred in Denying Dickinson's CR 56(f) Motion

In response to Dickinson's argument that the trial court erred in denying its motion for a continuance under CR 56(f), Northwest Pump asserts in its brief at 47-50 that the trial court did not abuse its discretion in denying the motion because the continuance request was not contained in Dickinson's opposition to Northwest Pump's motion for summary judgment and Dickinson did not identify with sufficient particularity the evidence that it would have generated in the added time afforded to it. Northwest Pump's arguments are meritless, particularly in light of its *deliberate destruction* of potentially relevant evidence.

Northwest Pump cites *Building Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 218 P.3d 196 (2009) for the proposition that a party must make its CR 56(f) continuance request at the time it files its

opposition to the summary judgment motion. A careful reading of that case, however, does not reveal where Division II actually held that the request must be made in the opposition to summary judgment. *McCarthy* case involved the Public Records Act. The plaintiff there *never* clearly made a motion for a CR 56(f) continuance and never made a showing regarding the discovery it intended to conduct. Here, Dickinson referenced CR 56(f) in its response on summary judgment. CP 349. Dickinson expressed a very clear desire to have Northwest Pump's response to its interrogatories/requests for production, CP 541-55, and clearly articulated a desire to get to the bottom of Northwest Pump's deliberate document destruction. CP 349-50, 362, 545, 547.

Northwest Pump also appears to claim that a trial court may deny a CR 56(f) motion if a party's request is past the discovery cutoff for the case, citing *Apostolis v. City of Seattle*, 101 Wn. App. 300, 3 P.3d 198 (2000). That case did not even involve CR 56(f). In a petition for review from a Public Employees Relations Commission decision, the trial court dismissed the petition under CR 41(b) as a sanction for the petitioner's flagrant failure to comply with the case schedule. This Court affirmed.¹⁰

¹⁰ This Court in *Johnson v. Horizon Fisheries LLC*, 148 Wn. App. 628, 638-39, 201 P.3d 346 (2009) subsequently clarified its *Apostolis* decision, noting that the trial court must consider less drastic sanctions than dismissal on the record.

Simply stated, Northwest Pump's assertion that there is a requirement that any CR 56(f) motion included in a party's opposition to summary judgment or that such a motion cannot be filed after the discovery cutoff is entirely unsupported by the authority it cites.

On the grounds for a CR 56(f) continuance, Northwest Pump apparently agrees with the authorities set out in Dickinson's brief at 29-30. The central policy basis for a CR 56(f) continuance is to ensure that the complete record is before the Court before the drastic remedy of summary judgment may be imposed.

Even though there is *no* deadline for a CR 56(f) motion established in the rule, Dickinson's motion for a CR 56(f) was part of a motion to compel production¹¹ filed prior to the hearing on the motion for summary judgment set for July 28, 2011, albeit on shortened notice. CP 537-42. It was accompanied by an extensive declaration from Gordon Woodley detailing the items needed by Dickinson. CP 543-641. Woodley's declaration was clear as to its limited request that Northwest Pump produce the documents that it had requested on April 11, 2011:

¹¹ The discovery cutoff date in this case was June 20, 2011. CP 854. The deadline for dispositive motions was July 25, 2011. *Id.* Nothing in the case schedule stated that a motion to compel must be filed before the discovery cutoff. CP 852-58. Similarly, nothing in LCR 37(g) so requires, nor does Northwest Pump cite authority requiring such a filing. Dickinson submitted its request for production of documents to Northwest Pump on April 11, 2011, long before the discovery cutoff. CP 543. Dickinson did not learn of Northwest Pump's destruction of documents until June 30,

8. The Court is requested to order NWP, Mayfield, and Steinberger to fully product the above documentation within seven days of the Court's Order.

9. The Court is further requested to stay or refuse defendants' pending application for judgment until this discovery is fully provided and plaintiff's counsel is given the opportunity to respond, consistent with the spirit of Civil Rule 56(f).

CP 547. Northwest Pump's counsel promised that the documents would be produced. CP 544, 560, 561, 562, 563. Northwest Pump actually produced documents responsive to its counsel's promise up to July 25, 2011. CP 547.

Under the CR 56(f) case law, a limited continuance of perhaps a week to afford Dickinson the opportunity to receive documents promised by Northwest Pump and to explore what documents Northwest Pump had deliberately destroyed would have been reasonable under the circumstances where Dickinson first learned of Northwest Pump's document destruction policy on June 30, 2011, CP 545, essentially contemporaneously with Northwest Pump's motion for summary judgment. The trial court abused its discretion in denying the motion.

(6) Northwest Pump's Spoliation of Evidence Created Factual Disputes Barring Summary Judgment

2011, *after* the discovery cutoff. CP 545. Dickinson should not be penalized for Northwest Pump's late disclosure of its deliberate destruction of documents.

Northwest Pump's treatment of the spoliation issue in its brief at 44-47 is noteworthy for its half-hearted effort to deny that it had a policy of routinely destroying emails more than 90 days old and that it took a "blame the victim" approach to the issue. It also contends that Dickinson did not timely assert the issue. *But nowhere in Northwest Pump's brief does it actually deny the existence of a policy that called for the routine destruction of emails more than 90 days old.* This Court should reject Northwest Pump's weak rationale for its misconduct.

Northwest Pump does not take issue with the spoliation authorities set forth in Dickinson's opening brief at 32-35. No time deadlines attached to raising the spoliation issue in any of those cases.

Although Northwest Pump contends that Dickinson's assertion was "untimely," it does not articulate how that is true where Dickinson raised the issue in its summary judgment response, CP 349-50, 362, and before the hearing on the summary judgment motion. CP 545, 547. In fact, Dickinson's counsel first learned of Northwest Pump's destruction policy *on June 30, 2011*. CP 545. Dickinson certainly acted on a timely basis to address the issue, raising it a mere two weeks later in its summary judgment response. CP 349-50, 362.

The only authority Northwest Pump offers for its timeliness argument is *Morse Diesel Int'l, Inc. v. United States*, 81 Fed. Cl. 220

(2008). Northwest Pump misstates the actual holding in that case. The Court of Claims declined to exercise its inherent authority to impose spoliation sanctions where the plaintiff failed to demonstrate any relevant evidence was destroyed *and* the plaintiff waited *months* after learning of the alleged destruction of evidence until the district court had granted summary judgment to the Government to raise the issue.¹²

Finally, Northwest Pump's unapologetic assertion in its brief at 46 that no court order required it to preserve its emails is breathtaking in its audacity. Where a party is on notice as to the subject matter of the litigation and is specifically put on notice by an earlier court order that certain documents will be relevant to that litigation, to have a deliberate policy of document destruction in place, and to destroy document relevant to the litigation *invites* a spoliation finding. Parties have a duty to preserve material evidence relevant to litigation. *See, e.g., Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001). A party has a further duty to suspend any routine document destruction policy once it reasonably anticipates litigation; it must implement a "litigation hold." *Thompson v. U.S. Dep't of Housing & Urban Dev.*, 219 F.R.D. 93, 100 (D. Md. 2003); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D. N.Y. 2003). For this Court to approve of Northwest Pump's

¹² *See Shamis v. Ambassador Factors Corp.*, 34 F.Supp.2d 879, 886 (S.D. N.Y.

behavior would condone the routine destruction of corporate documents to evade their production in litigation. Here, Northwest Pump's destruction policy is particularly pernicious where Northwest Pump contends that Dickinson cannot produce sufficient evidence to support its trade secrets misappropriation and breach of contract claims and the necessary evidence was under Northwest Pump's exclusive control. This Court should not permit Northwest Pump to benefit from its studied misconduct. The trial court abused its discretion in failing to infer that the documents Northwest Pump destroyed were probative on Dickinson's claims.

(7) Dickinson Is Entitled to Its Fees on Appeal

In its brief, Northwest Pump does not address Dickinson's argument that it is entitled to its fees on appeal pursuant to RAP 18.1(a). It thereby effectively *concedes* the argument. *Adams v. Dep't of Labor & Indus.*, 128 Wn.2d 224, 229, 905 P.2d 1220 (1995).

D. CONCLUSION

Nothing presented in Northwest Pump's brief detracts from the fact that the trial court erred in granting summary judgment to Northwest Pump. Northwest Pump did not seriously argue below that Dickinson's information was not, in fact, a trade secret covered by RCW 19.08 or that the noncompete/nondisclosure agreements signed by Mayfield/Steinberger

1999) (motion for spoliation filed two months after conclusion of discovery was timely).

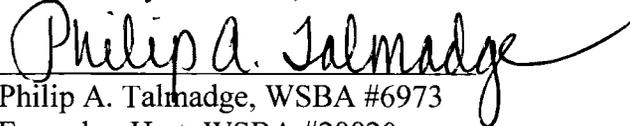
were unenforceable. It only does so belatedly on appeal. There are genuine issues of material fact here as to Northwest Pump's misappropriation of Dickinson's trade secrets and Mayfield and Steinberger's contractual breaches.

Northwest Pump nowhere denies that it destroyed a large volume of emails relevant to these issues. It would be the height of unfairness for this Court to condone the trial court's denial of Dickinson's CR 56(f) motion, which would have permitted an actual assessment of the scope of Northwest Pump's spoliation of evidence before ruling on summary judgment.

This Court should reverse the summary judgment in Northwest Pump's, Mayfield's, and Steinberger's favor, and remand the case for trial on the merits. Costs on appeal, including reasonable attorney fees, should be awarded to Dickinson.

DATED this 5th day of April, 2012.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of the following document: Reply Brief of Appellant in Court of Appeals Cause No. 67650-4-I to the following:

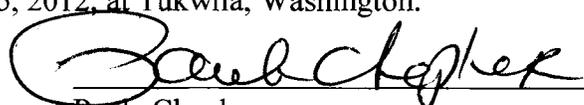
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 5, 2012, at Tukwila, Washington.



Paula Chapler
Talmadge/Fitzpatrick