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NO. 70047-2-I

IN THE COURT OF APPEALS
DIVISION ONE
OF THE STATE OF WASHINGTON

ADA MOTORS, INC., dba BURIEN TOYOTA, a Washington
Corporation,

Appellant/Cross-Respondent

vs.

DAVID L. BUTLER and ELIZABETH BUTLER, and their marital
community, and THE ROBERT LARSON AUTOMOTIVE GROUP,
INC., a Washington corporation, dba LARSON TOYOTA,

Respondents/Cross-Appellants

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BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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I. INTRODUCTION

When Respondent David Butler, began his employment with Burien Toyota, he brought with him a list of almost 5,000 customer names he compiled over his 32-year career as a shoe salesman at Nordstrom. Mr. Butler turned his list over to a company Burien Toyota used to maintain customer lists, but received no consideration for his contribution of almost 5,000 potential customers to Burien Toyota's business. Even though Burien Toyota never instructed Mr. Butler to keep his list confidential, and even though Burien Toyota shared its customer lists with third parties, Burien Toyota claimed that Mr. Butler's customer list constituted its own trade secret and sued Mr. Butler for misappropriation when he left Burien Toyota and went to work for Robert Larson Automotive Group.

Burien Toyota asserts that it "established" that Mr. Butler and Robert Larson sold 207 cars to Burien Toyota's customers. This is a gross distortion of the evidence. Burien Toyota did not in fact even come close to "establishing" that it was damaged by any acts of Mr. Butler or Robert Larson Automotive Group. This explains the jury's finding of no financial harm. In so finding, the jury followed the court's instructions and declined to base a damage award on conjecture or speculation. On appeal, Burien Toyota points to a jury instruction, rather than its own failure to produce evidence of damages, as the reason for the jury's unfavorable

verdict. Burien Toyota is wrong. The jury instruction about which Burien Toyota complains tracks the language of the pattern instruction and this Court's opinion in *Petters v. Williamson*, 151 Wn. App. 154, 210 P.2d 1048 (2009), and is a correct statement of the law. There is no error in the instruction and the jury's verdict should not be disturbed.

II. COUNTERSTATEMENT OF THE ISSUES

Where the court's instruction to the jury on the burden of proof in a trade secrets case in which the plaintiff claims both damages and unjust enrichment is a correct statement of the law, should this court find no error in the instruction, even though it might have been more artfully worded? And, where the jury found that Burien Toyota suffered no damages, and where Burien Toyota failed to produce evidence of damages, is any error in a jury instruction related to damages harmless and therefore not grounds for reversal?

III. ASSIGNMENTS OF ERROR ON CONDITIONAL CROSS-APPEAL

1. The trial court erred in denying Respondents' motion for summary judgment dismissal of Burien Toyota's claim under the Uniform Trade Secrets Act.

2. The trial court erred in denying Respondents' motion for a directed verdict.

3. The trial court erred by denying Respondents' motion in limine to exclude any evidence or testimony related to Burien Toyota's policies or other handbook provisions that were created or implemented by Burien Toyota after Mr. Butler's employment with Burien Toyota began.

4. The trial court erred by giving Instruction No. 17 and by refusing to give Respondents' Proposed Instructions 3 and 5.

5. The trial court erred by refusing to give Respondents' Proposed Instruction 12.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in denying Respondents' motion for summary judgment dismissal of Burien Toyota's claim against Mr. Butler under the Uniform Trade Secrets Act where the alleged "trade secret" was Mr. Butler's own customer list and Burien Toyota did not undertake efforts to ensure the secrecy of any of its customer information? (Assignment of Error No. 1.)

2. Did the trial court err in denying Respondents' motion for a directed verdict where Burien Toyota failed to produce any evidence of damages to support its claim against Mr. Butler under the Uniform Trade Secrets Act? (Assignment of Error No. 2.)

3. Should evidence of Burien Toyota's policies or other handbook provisions that were created or implemented after Mr. Butler

began working at Burien Toyota be excluded because the evidence is not relevant to the sole claim that went to the jury and because Burien Toyota created the documents solely to comply with federal customer privacy laws and not to protect any trade secret? (Assignment of Error No. 3.)

4. Did the trial court err in giving a jury instruction that confusingly combined all of the parties' burdens of proof and unduly emphasized Respondents' burden of proof? (Assignment of Error No. 4.)

5. Did the trial court err by refusing to give Respondents' proposed instruction on an employer's inability to privately enforce federal privacy laws by suing an employee or former employee, where the failure to give the instruction prevented Respondents from arguing a theory of their case? (Assignment of Error No. 5.)

V. STATEMENT OF THE CASE

A. Mr. Butler Develops a Customer List While Working at Nordstrom and Takes It with Him When He Leaves His Employment

Prior to his employment with Burien Toyota, Respondent David Butler worked as a shoe salesman at Nordstrom for 32 years. CP 57. During his lengthy career at Nordstrom, Mr. Butler developed a large number of loyal clients and contacts. CP 58. To manage the many clients and contacts he amassed over the years, Mr. Butler kept a customer list. CP 59. He used this list to keep in touch with his clients and contacts via

promotional postcards and Christmas cards. CP 58-59. Over time, Mr. Butler's customer list grew to include almost 5,000 customer names and contacts. CP 62. Mr. Butler took his customer list with him when he left his employment with Nordstrom. CP 62.

B. Mr. Butler Brings His Customer List to Burien Toyota and Gives It to Sobel & Associates With Burien Toyota's Knowledge, Consent, and Encouragement

In February 2003, Mr. Butler accepted a job offer from Burien Toyota to sell vehicles at the Burien dealership. CP 68. In order to assist Mr. Butler with the continued use of the customer list he developed while working at Nordstrom, Burien Toyota put him in contact with Sobel & Associates, an independent company that provided services such as maintaining client lists, disseminating promotional material to persons on client lists, and keeping the information on the lists updated and current. Burien Toyota used Sobel's services in connection with its marketing efforts. CP 45, 46, 60. Because Mr. Butler's list did not belong to Burien Toyota, Sobel insisted that Burien Toyota sign a liability release acknowledging that it would not hold Sobel responsible for any potential liability associated with Mr. Butler using his list of non-Burien Toyota customers and contacts while employed at Burien Toyota. CP 47. An authorized representative of Burien Toyota signed the release, effectively acknowledging that the list of customers and contacts Mr. Butler was

about to turn over to Sobel belonged to Mr. Butler, not Burien Toyota. CP 47. Once Burien Toyota signed the release, Mr. Butler gave his list to Sobel employee Kathy Orlando, and Sobel transferred Mr. Butler's list into its computer database. CP 47. The information maintained by Sobel on behalf of Mr. Butler became known as the "Sobel list," and it is now the subject of this appeal.¹

When Mr. Butler signed up to use Sobel's services, he received no payment or other consideration from either Burien Toyota or Sobel in exchange for handing over his Nordstrom customer list. CP 45. In fact, Burien Toyota deducted approximately \$200 per month out of Mr. Butler's paycheck to pay part of the cost for Sobel to maintain his customer list. CP 60. Every month, Sobel prepared and distributed a marketing newsletter for Mr. Butler to send to his customers and contacts on the Sobel list. CP 60. And every month, pursuant to its standard operating procedure, Sobel also sent Mr. Butler a copy of his customer list with names and phone numbers so Mr. Butler could place follow-up calls to his contacts. CP 47. Burien Toyota never prohibited Mr. Butler from

¹ In an attempt to argue that the customer list Mr. Butler compiled over 32 years as a Nordstrom shoe salesman does not exist, Burien Toyota claims that Mr. Butler's list was never entered into "Burien Toyota's database." Br. of Appellant at 4-5. Burien Toyota does not, however, contend that Mr. Butler's list was never entered into *Sobel's* database. Kathy Orlando, a Sobel employee, testified that Mr. Butler's list was in fact transferred into Sobel's database. CP 47.

sharing its customer information with Sobel and never directed Mr. Butler to take any steps to ensure that Sobel kept the information confidential. CP 45. Burien Toyota has never produced, and there is no evidence in the record, of any signed agreement between Burien Toyota and Sobel in which Sobel agreed to protect and preserve the confidentiality of Burien Toyota's customer information. It does not exist.

Although Mr. Butler signed an employee handbook acknowledgment form with Burien Toyota and also signed forms acknowledging various new and updated company policies, Burien Toyota never required Mr. Butler to sign a noncompetition agreement or a nonsolicitation agreement as a condition of his employment. CP 82-97. The only policy Mr. Butler ever signed that was even tangentially related to his customer management was a form acknowledging federal requirements related to accessing car dealership customer information. CP 84. This form did not, however, prohibit employees from sharing customer information with Sobel, nor did it in any way relate to the list of customers and contacts Mr. Butler developed prior to his employment with Burien Toyota.

C. **Burien Toyota Does Not Keep Its Own Internal Customer Information Confidential**

Burien Toyota maintained its own database of customers through a company called Reynolds and Reynolds that included all of the people who visited Burien Toyota to purchase a car. CP 149. In addition to giving Reynolds and Reynolds access to that list, Burien Toyota also gave access to its customer list to a database marketing company called Visible Customer, which provided marketing services for Burien Toyota. CP 101, 151. Additionally, Burien Toyota gave access to its customer list to Ayers Advertising, the company that placed all of Burien Toyota's advertising. CP 101, 151. Burien Toyota failed to produce evidence that it required any or all of these companies to sign any forms or confidentiality or nondisclosure agreements that would have required the companies to keep this customer information secret or confidential. No such evidence exists.

D. Mr. Butler Resigns from Burien Toyota and Begins Working for Robert Larson

On March 17, 2011, Mr. Butler resigned from his employment with Burien Toyota and took a copy of his 2009 Sobel list with him. CP 72. Thereafter, he began working for The Robert Larson Automotive Group (hereafter "Robert Larson"), specifically at Larson Toyota.

Even though Burien Toyota never required Mr. Butler to sign a noncompetition agreement or nonsolicitation agreement or took any other measures to maintain the confidentiality of Mr. Butler's Sobel list, Burien

Toyota, on April 4, 2011, sent Mr. Butler a cease and desist letter. CP 65-66. In this letter, Burien Toyota – for the first time – claimed that Mr. Butler’s customer list that he brought with him from his employment at Nordstrom’s was actually Burien Toyota’s trade secret. CP 65-66.

E. Burien Toyota Files Suit Against Mr. Butler and Robert Larson

In April 2011, Burien Toyota filed a complaint against Mr. Butler and Robert Larson, alleging breach of contract; unfair competition; violation of the Uniform Trade Secrets Act (UTSA), 19.108 RCW; tortious interference with a business relationship; breach of the duty of loyalty; injunctive relief; and damages. CP 1-9. Respondents moved for summary judgment dismissal of all of Burien Toyota’s claims. CP 19-43. The trial court (Hon. Mariane Spearman) granted Respondents’ motion in part and summarily dismissed Burien Toyota’s breach of contract claim. The court denied Respondents’ motion to dismiss Burien Toyota’s UTSA claim, and reserved ruling on the remaining claims. CP 333-334. By subsequent order, the court denied Respondents’ motion for summary judgment as to Burien Toyota’s unjust enrichment claim and claim for injunctive relief on the ground that they are not preempted by the UTSA, and ruled that, to the extent Burien Toyota’s remaining tort claims are based on the same allegations on which its claim of misappropriation is

based, those claims are preempted by the UTSA. CP 405-408. At the close of evidence, the trial court (Hon. Dean Lum) dismissed Burien Toyota's tortious interference with business relations claim and breach of the duty of loyalty claim. RP Jan. 30, 2013 at 43-45. Only Burien Toyota's UTSA claim went to the jury. CP 545-569, 906-909.

F. Burien Toyota Fails to Produce Admissible Evidence of Damages in Discovery or at Trial

Initially, Burien Toyota refused to provide any information in response to Respondents' discovery requests in support of the fact or amount of damages it claimed. CP 374-375 (answer to Interrogatory No. 19, failing to provide any calculation of damages). Because of Burien Toyota's deficient response to this and other discovery requests, Respondents were forced to request that Burien Toyota supplement its responses. CP 382. In response, Burien Toyota claimed that its damages were "no less than \$3,000 per sale by Butler to Burien Toyota's customers," but did not provide any evidence to support that figure, or any proof of the number of alleged sales it was claiming. CP 384.

In compliance with Burien Toyota's discovery requests, Robert Larson produced a list of all sales at all of its dealerships (not just Larson Toyota) since Mr. Butler began working at Larson Toyota. Burien Toyota claims to have taken Robert Larson's list and compared it against a

database and found 207 “hits” (meaning sales by Robert Larson to persons in Burien Toyota’s database). Burien Toyota then used this list of 207 “hits” as proof of its alleged “damages” at trial. There are, however, several fatal flaws with this analysis.

First, Burien Toyota never produced, in discovery or at trial, the list of alleged Burien Toyota customers it used to compare to Robert Larson’s list. CP 849. Notably, in Burien Toyota’s brief, among its citations to “evidence” in the record in support of its allegation as to the comparison of Robert Larson’s list with its database, Burien Toyota cites to two of *Respondents’ pleadings* in which Respondents argue that this “phantom” database does not exist given that Burien Toyota has never produced it. Br. of Appellant at 7 (citing CP 343, 849).

In addition, the only supposed *evidence* Burien Toyota cites on appeal in support of the existence of its alleged “hits” is a declaration of Patrick Dillon, Burien Toyota’s Customer Service Manager, in which he conclusorily states, again with no supporting evidence, that Burien Toyota was “damaged as a result of losing profit from the over 200 sales of vehicles by David Butler to Burien Toyota customers, future, service, parts and accessory sales as well as potential future vehicle sales to those customers.” Br. of Appellant at 7 (citing CP 584). Not only did Burien Toyota fail to produce its alleged customer database on which the “hits”

were supposedly based, but it also failed to produce any evidence that the claimed 200+ sales were, as Mr. Dillon claims, made by Mr. Butler as a result of his taking the Sobel list to Robert Larson.

Further, Burien Toyota never produced any evidence whatsoever that any of these 207 individuals actually purchased cars from Burien Toyota. Burien Toyota's database included not only persons who actually purchased cars from the dealership, but also persons who contacted Burien Toyota, however nominally, about the purchase of a car, and never ended up buying a car from the dealership. CP 572 at ¶ 13. Without evidence of individuals who actually *purchased* cars from Burien Toyota, its alleged list of "hits" is meaningless as to damages.

In short, Burien Toyota failed to produce any evidence that *any* of the claimed 207 sales is related in any way to Mr. Butler's taking his customer list with him to Larson Toyota. CP 850.

G. The Jury Finds No Damages

The matter went to trial before a jury on Burien Toyota's UTSA claim. The jury found that Burien Toyota suffered no damage proximately caused by any action of Mr. Butler or Robert Larson. CP 907. Burien Toyota appealed. CP 970. Respondents cross-appealed, preserving certain issues for review should this Court grant Burien Toyota's request for relief or Burien Toyota seek review in the Supreme Court. CP 1016.

VI. ARGUMENT IN RESPONSE

A. The Trial Court Did Not Err In Giving Instructions Nos. 8 and 18

1. Standard of Review

The precise wording of a jury instruction is a matter within the broad discretion of the trial court. *Housel v. James*, 141 Wn. App. 748, 758, 172 P.3d 712 (2007); *see also Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 809, 872 P.2d 507 (1994) (“The number and specific language of the instructions are matters left to the trial court’s discretion.”). Here, Burien Toyota’s argument on appeal is that Instruction No. 8 should read “sales” rather than “damages from sales” and that Instruction No. 18 is also improperly worded.² Because the choice of language in a particular instruction is a matter within the trial court’s broad discretion, this Court’s review of the language of the instructions should be under the abuse of discretion standard. Under that standard, the trial court’s decision should be changed only if it is manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *Raven v. Dep't of Soc. & Health Servs.*, 177 Wn.2d 804, 832, 306 P.3d 920 (2013).

² Both Instructions Nos. 8 and 18 are set out in full in Appendix A.

Also within the trial court's broad discretion is the decision as to what specific instructions to give. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 165, 876 P.2d 435 (1994). There is no abuse of discretion where the instructions the court decides to give allow each party to argue its theory of the case. *Jaeger v. Cleaver Const., Inc.*, 148 Wn. App. 698, 716, 201 P.3d 1028 (2009).

Here, as explained more fully below, both sides proposed an instruction on the burden of proof. The trial court, dissatisfied with both proposed instructions, drafted its own instruction on the burden of proof and gave its instruction rather than either of the proposed instructions. Burien Toyota takes issue with the court's decision to give the court's own instruction. Review of the trial court's decision as to what instruction on the burden of proof to give should be reviewed for abuse of discretion.³

2. There is No Error in Instruction No. 8

Under Washington's Uniform Trade Secrets Act (UTSA), a successful plaintiff may recover for the actual loss caused by the misappropriation of a trade secret as well as for the unjust enrichment caused by the misappropriation that is not taken into account in computing

³ Burien Toyota argues that review of its issue should be de novo. Respondents disagree for the reasons stated above. However, even under the de novo standard of review, this Court should affirm.

damages for actual loss. RCW 19.108.030(1).⁴ Burien Toyota does not argue that Instruction No. 8 is in any way erroneous with respect to its instruction on actual damages. Its argument is confined to the portion of the jury instruction regarding unjust enrichment.⁵ And, its argument is confined to two paragraphs of this Court’s opinion in *Petters v. Williamson & Associates, Inc.*, 151 Wn. App. 154, 210 P.3d 1048 (2009), and consists solely of the argument that Instruction No. 8 should track the court’s language in *Petters*. But Washington courts have long held that “[t]he fact that certain language is used in an appellate court decision does not mean that it must necessarily be incorporated into a jury instruction.” *State v. Williams*, 28 Wn. App. 209, 212, 622 P.2d 885 (1981); *see also Turner v. Tacoma*, 72 Wn.2d 1029, 1034, 435 P.2d 927 (1967); *State v. Alexander*, 7 Wn. App. 329, 335, 499 P.2d 263 (1972); *State v. Summers*, 107 Wn. App. 373, 387, 28 P.3d 780 (2001), *review granted, cause*

⁴ The statute provides: “In addition to or in lieu of injunctive relief, a complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.” RCW 19.108.030(1).

⁵ Burien Toyota appears to argue that Respondents agree with its argument that Instruction No. 8 is objectionable for the reasons Burien Toyota argues. This is incorrect. While counsel for Respondents did object to the trial court’s Instruction No. 8, the nature and specific grounds for the objection are not evident from the record before the Court, *see* RP Jan. 31 at 14. Respondents do not assign error to the instruction on appeal. Respondents do not agree with or join in Burien Toyota’s arguments on appeal that Instruction No. 8 is erroneous. *See* Supp. CP ____ (Supplemental Designation filed herewith). [Defendants’ Supplemental Brief re: *Petters* Case].

remanded on other grounds, 145 Wn.2d 1015, 37 P.3d 289, and *opinion modified on other grounds on reconsideration*, 43 P.3d 526 (Wn. App. 2002). In any event, Instruction No. 8 is in fact in harmony with the language cited by the court in *Petters*.

Petters is a trade secrets case involving seafloor drilling technology called remote rod-core drilling. The opinion on which Burien Toyota relies is the opinion this Court issued the second time the case was before it. At issue in the second appeal was the trial court's ruling that dissolved an earlier injunction based on the court's conclusion that remote rod-core seafloor drilling no longer constituted a trade secret and the court's award of unjust enrichment damages to *Petters*.

On appeal, *Petters*, the design engineer, claimed that the trial court applied an incorrect burden of proof to determine the degree to which the drill manufacturer's license of the drill technology damaged him. *Petters* argued that once misappropriation was found, the burden is on the misappropriating party to prove that any portion of the wrongfully obtained revenue is not attributable to the misappropriation. This Court held that *Petters* was correct regarding the burden of proof, but incorrect in arguing that the trial court misapplied it. The court agreed with the following statement from the Restatement of Unfair Competition:

“The traditional form of restitutionary relief in an action for the appropriation of a trade secret is an accounting of the defendant’s profits on sales attributable to the use of the trade secrets. . . . The plaintiff has the burden of establishing the defendant’s sales; the defendant has the burden of establishing any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits.”

Petters, 151 Wn. App. at 165 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 45 cmt. f. at 516-17 (1995)). The *Petters* court approved of the foregoing statement because it placed on the defendant – the party who possessed the relevant information – the burden of demonstrating which portion, if any, of the revenue obtained through the transfer of a trade secret was not, in fact, attributable to the transfer. *Petters*, 151 Wn. App. at 165.

The instruction on the burden of proof that the trial court drafted in this case, Instruction No. 8, closely tracks the foregoing language. And, importantly, the court’s instruction also closely tracks the language of WPI 351.01. The trial court did not approve of either party’s instruction on the burden of proof on Burien Toyota’s UTSA claim. Accordingly, the trial court drafted its own instruction on this matter. The court took pains to draft an appropriate instruction and relied on WPI 351.01 and the comments thereto in drafting its instruction. *See* RP Jan. 31, 2013 at 4-7.

WPI 351.01 provides that on a claim of misappropriation, the plaintiff has the burden of proving that (1) the plaintiff had a trade secret and (2) the defendant misappropriated the plaintiff's trade secret. The instruction provides two alternative versions of a third element the plaintiff also has the burden of proving, depending on whether the plaintiff claims actual damages or unjust enrichment. If the plaintiff claims actual damages, the plaintiff has the burden of proving, as the third element, that the defendant's misappropriation was a proximate cause of damages to the plaintiff. If the plaintiff claims unjust enrichment, the plaintiff has the burden of proving, as the third element, that as a result of the misappropriation, the defendant received money or benefits that in justice and fairness belong to the plaintiff. Where, as here, the plaintiff is claiming both actual damages and unjust enrichment, WPI 351.01 directs that the instruction must be modified so that any award for unjust enrichment does not duplicate the recovery of actual damages. WPI 351.01. The comments to WPI 351.01 note the Restatement's burden-shifting approach discussed in *Petters*.

Here, the trial court's Instruction No. 8 comports with both WPI 351.01 and the Restatement. *See* Appendix A. The *only* variation between the court's instruction and WPI 351.01/Restatement version of the instruction is that the court's instruction provides that the plaintiff has

the initial burden of proving “damages from sales attributable to a trade secret,” while the WPI 351.01/Restatement instruction states that the plaintiff has the initial burden of proving “sales attributable to the use of a trade secret.” This variation does not, as Burien Toyota argues, shift the burden of proof or misstate the law. At most, the variation constitutes a fair but inartful wording of the instruction by the trial court in its attempt to draft an instruction that encompasses both actual damages and unjust enrichment damages. Inartful wording does not render a jury instruction erroneous. *Cox v. Spangler*, 141 Wn.2d 431, 442-43, 5 P.3d 1265 (2000).

If a plaintiff in a trade secret misappropriation case can prove sales by the defendant attributable to the use of the plaintiff’s trade secret, then the plaintiff has, by so proving, also proved *damages* from sales by the defendant attributable to the use of the plaintiff’s trade secret. The “damages” are the “sales” that were made because the defendant misappropriated the plaintiff’s trade secret and used that trade secret to make a sale. Had it not been for the misappropriation, those sales by the defendant would have been sales by the plaintiff. Once the plaintiff meets its initial burden, then the burden shifts to the defendant to reduce this amount of damages the plaintiff has shown by any amount attributable to sales the defendant made by means other than by use of the plaintiff’s trade secret and any expenses the defendant incurred that reduce its net

profits. The resulting figure is “the defendant’s ill-gotten profits,” or the defendant’s unjust enrichment. WPI 351.01, cmt.

A plaintiff’s burden is the same whether the plaintiff has to prove sales attributable to the use of a trade secret or damages from sales attributable to the use of a trade secret because a defendant’s sales attributable to the use of the plaintiff’s trade secret by definition constitutes damage to the plaintiff. Here, the trial court’s insertion of “damages from” in its instruction amounts to nothing more than the insertion of mere surplusage. A more artful way for the court to have altered the Restatement language might have been “damages *in the form of* sales attributable to the use of the trade secret.” But inartful language is not enough to declare a jury instruction erroneous where, as here, it accurately states the law.

The court’s brief discussion in *Petters* supports the conclusion that the trial court’s version of the Restatement language is not error. Specifically, in approving of the Restatement’s burden-shifting approach, the court stated that the Restatement “requires the defendant to explain why any particular portion of the money that it received as a result of the misappropriating transaction should *not* be considered an ‘actual loss’ suffered by the plaintiff under RCW 19.108.030(1).” *Petters*, 151 Wn. App. at 165 (emphasis in original). Implicit in the requirement that the

defendant show what portion of the money it received should *not* be considered an actual loss has to be the requirement that, before this burden befalls the defendant, the plaintiff has the burden of showing an actual loss, *i.e.*, damages. By its statement, it is apparent that the court in *Petters* viewed the Restatement’s burden on the plaintiff to prove “sales attributable to the use of the trade secret” as the burden to prove “actual loss” – that is, “damages” – attributable to the use of the trade secret.⁶

The *Petters* court’s interpretation of the Restatement provision makes sense. In order for the burden to shift to a defendant, the plaintiff must first prove some sort of damage or loss. If the plaintiff fails to prove any loss, then the case is over at that point. One is hard-pressed to conceive of any cause of action that would allow a plaintiff to escape the burden of proving damages. The trial court’s Instruction No. 8 is a correct, although perhaps inartful, statement of the law. There is no error

⁶ The out-of-state cases *Burien Toyota* cites do not compel a contrary interpretation of the burden-shifting analysis. For example, the court in *Jet Spray Cooler, Inc. v. Crampton*, 377 Mass. 159, 385 N.E.2d 1349 (1979), stated: “Once the plaintiffs demonstrate that the defendants have made profits from sales of products incorporating the misappropriated trade secrets, the burden shifts to the defendants to demonstrate the portion of their profits which is not attributable to the trade secrets.” *Jet Spray Cooler*, 377 Mass. at 174, n.14. Again, by proving that the defendants made profits from sales of products incorporating trade secrets misappropriated from the plaintiff, the plaintiff has thereby also proved damages in the form of sales that the plaintiff would have made but for the misappropriation.

Burien Toyota’s discussion of federal copyright law is of no relevance to the issue raised in this appeal, which is governed by Washington trade secret law. This Court need not engage in any analysis by analogy to federal copyright law.

in the instruction, under either the abuse of discretion standard or de novo review.

3. There is No Error in Instruction No. 18

Burien Toyota argues that Instruction No. 18, the damages instruction, is error for the same reason it claims Instruction No. 8 is error.⁷ Burien Toyota is incorrect; Instruction No. 18 read in conjunction with Instruction No. 8 does not improperly shift the burden of proof. Instruction No. 8 plainly refers to Burien Toyota's "initial burden." Instruction No. 18, by contrast, instructs the jury as to what it must do if it finds for Burien Toyota on its claim and instructs the jury as to Burien Toyota's ultimate burden as to damages.

Further, Instruction No. 18 is a correct statement of the law: a plaintiff in a tort action has the ultimate burden of proof as to damages proximately caused by injury caused by the defendant; a plaintiff in a misappropriation of trade secrets action may recover either actual damages (lost profits) or restitution for unjust enrichment (defendant's gain), but may not recover twice for the same damages. *See Olympia Oyster Co. v. Rayonier, Inc.*, 229 F. Supp. 855, 861 (W.D. Wash. (1964)) ("every plaintiff claiming damages has the burden of proof to present sufficient

⁷ Respondents objected to Instruction No. 18, but not for the reasons Burien Toyota objected at trial and argues on appeal. *See* RP Jan. 31, 2013 at 15. Respondents have not assigned error to the giving of Instruction No. 18.

evidence from which damages can be determined on some rational basis”) (applying Washington law); RCW 19.108.030; WPIC 351.01 cmt. There is no error in the court’s Instruction No. 18.⁸

B. Even if the Instructions Were Erroneous, Any Error Would Be Harmless Because Burien Toyota Failed to Prove Damages

As discussed above, there is no error in either Instruction No. 8 or Instruction No. 18 or in the two instructions read together. Even if, however, an error exists, any error is harmless. The instructional errors Burien Toyota alleges relate to its burden of proof as to damages. Because Burien Toyota failed to prove damages, even if there were error in the instructions, the error would be harmless and, therefore, not grounds for reversal. *Ezell v. Hutson*, 105 Wn. App. 485, 492, 20 P.3d 975 (2001); *see also RWR Management, Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 278, 135 P.3d 955 (2006) (reversal is not required where a jury instruction is erroneous but does not substantially affect the outcome of the case).

Damages must be proved with reasonable certainty. *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 16, 390 P.2d 677 (1964). Damages cannot be left to conjecture, guess, or speculation. *Gilmartin v. Stevens Inv. Co.*, 43 Wn.2d 289, 302, 261 P.2d 73 (1953); *see also Holt v. School*

⁸ Burien Toyota’s proposed instruction is substantially identical to the instruction the court gave and contains the same language Burien Toyota cites as objectionable. *Compare* CP 565 and CP 772. Accordingly, even if there was any error, which there was not, such error was invited by Burien Toyota.

Dist. No. 71 of King County, 102 Wash. 442, 450, 173 P. 335 (1918) (“it would be error for the court to allow the jury to award damages for matters purely speculative”). “[D]amages will not be allowed for loss of expected profits unless the loss be shown with reasonable certainty and a reasonable degree of accuracy, and . . . the testimony establishing the loss must be free of speculation and conjecture.” *Sposari v. Matt Malaspina & Co.*, 63 Wn.2d 679, 688, 388 P.2d 970 (1964). A claim for lost profits is properly denied “when the alleged loss cannot be proved adequately and remains speculative.” *Golf Landscaping, Inc. v. Century Const. Co., A Div. of Orvco, Inc.*, 39 Wn. App. 895, 903, 696 P.2d 590 (1984) (quoting *United States of America for the Use and Benefit of A.V. DeBlasio Constr., Inc. v. Mountain States Constr. Co.*, 588 F.2d 259, 263 (9th Cir. 1978) (applying Washington law)).

As discussed above, after initially refusing to provide any evidence in support of its allegation of damages, the “evidence” Burien Toyota eventually produced to support its damages claim consisted of a baseless allegation – with no supporting evidence – that its damages were “no less than \$3,000 per sale by Butler to Burien Toyota’s customers,” CP 384, and an allegation that it compared Robert Larson’s list of sales at its entire universe of dealerships since Mr. Butler began working at Larson Toyota with Burien Toyota’s entire database of contacts (without any limitation as

to time period) and found 207 “hits” with persons in Burien Toyota’s database. This allegation, too, was unsupported by any evidence, as Burien Toyota never produced—either to Robert Larson or to the jury—its alleged database it claims to have used in its alleged comparison. CP 849. Nor did Burien Toyota ever produce any evidence that any of these 207 individuals ever actually purchased even a single car from Burien Toyota. Nor did Burien Toyota ever verify that any of the alleged 207 hits are the same individuals in Burien Toyota’s database that are in Robert Larson’s. Importantly, Burien Toyota failed to produce any evidence supporting the final and necessary leap that *any* of the claimed 207 hits in Robert Larson’s database is related in any way to Mr. Butler’s taking his customer list with him to Larson Toyota. CP 850.

At trial, the only potential evidence Burien Toyota produced as to its alleged damages on its UTSA claim was (1) testimony that Burien Toyota made more money in 2011 than it did in 2012, after Mr. Butler left his employment with the dealership, and (2) evidence that some customers whose names appeared in Burien Toyota’s database (because they were identified as “Internet leads” by certain websites, because they had maintenance performed on their vehicle at Burien Toyota, or because of any number of other reasons not necessarily related to their actual purchase of a vehicle at Burien Toyota) bought cars from someone – not

necessarily Mr. Butler – at Larson Toyota. None of this evidence bears any connection to Mr. Butler, nor does it support Burien Toyota’s allegation of damages in its UTSA claim. It is not surprising that the jury returned a verdict finding that Burien Toyota has suffered no damages.

Here, the evidence Burien Toyota offered to support its claims of damages, described above, did not prove that it suffered any damage as a result of Mr. Butler’s use of his Sobel list while working at Larson Toyota. Burien Toyota provided no evidence of even *a single sale* at Larson Toyota that occurred as a result of Mr. Butler’s use of his list. In order to award Burien Toyota any damages on its UTSA claim, the jury would have had to engage in speculation and conjecture. Correctly following the trial court’s instruction that any damage award “must be based upon evidence and not upon speculation, guesswork or conjecture,” CP 565, the jury rightly returned a verdict finding that Burien Toyota suffered no damage. Because Burien Toyota failed to meet its burden of proving damages, any error in any instruction relating to damages is harmless and not grounds for reversal. Further, because Burien Toyota cannot show misappropriation of a trade secret, or, as shown above, damages, remand of this matter for retrial would be futile, as Respondents would be entitled on remand to judgment as a matter of law. This Court can, however, remand and direct the trial court to enter judgment for Respondents. *See*

Estate of Spahi v. Hughes-NW, Inc., 107 Wn. App. 763, 776-77, 27 P.3d 1233 (2001).

C. Burien Toyota Is Not Entitled to an Award of Attorney Fees “Pending Remand”

Burien Toyota improperly asks this Court to award it attorney fees pursuant to RCW 19.18.040 “pending remand” based upon Burien Toyota’s unsupported and self-serving speculation that if this matter is remanded, “the jury could and most likely would conclude that the misappropriation was wilful and malicious.” Br. of Appellant at 23.

RCW 19.108.040 provides: “If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney’s fees to the prevailing party.” Burien Toyota’s request for an award of attorney fees under this statute is entirely premature. Burien Toyota asks this Court to award it attorney fees conditioned on (1) this matter being remanded; (2) this matter being retried; (3) Burien Toyota prevailing on retrial, and (4) the jury finding willful and malicious misappropriation.⁹ First, because, for the reasons

⁹ Burien Toyota notes that the jury did not reach the question of willfulness or maliciousness and makes an enormous leap and asserts that on remand the jury will likely find willfulness and maliciousness. By the same token, the jury also did not reach the questions of whether equitable estoppel or the doctrine of unclean hands prohibits Burien Toyota from bringing its claims. *See* CP 908. Respondents could make as a large a leap as Burien Toyota made

stated above, this Court should affirm and not remand, a retrial is not likely to occur. Second, this Court need not and should not engage in rank speculation even should it decide to remand. *See Perkins Coie v. Williams*, 84 Wn. App. 733, 743-44, 929 P.2d 1215 (1997) (where an appeal results in remand for trial, the better result is that the prevailing party is determined at trial, not on appeal). Burien Toyota's request for a "conditional award of attorney fees pending remand" should be denied.

VII. ARGUMENT ON CROSS-APPEAL

A. Introduction

Respondents have filed a cross-appeal in this matter in order to preserve certain issues for review should this Court grant Burien Toyota's request for relief and remand and to preserve these issues should Burien Toyota seek further review in the Supreme Court. This Court need not address these issues if it rejects Burien Toyota's argument and affirms. Respondents' argument on cross-appeal also, however, establishes that a remand in this matter would be a futile undertaking because Burien Toyota failed to meet its burden to produce evidence to support its UTSA claim.

and assert that on remand the jury would likely find equitable estoppel and unclean hands. Burien Toyota's request for attorney fees is inappropriate and premature and amounts to a request that this Court engage in an imaginary trial and predict its imaginary outcome. This Court does not, and should not, engage in such useless activities.

B. The Trial Court Erred in Denying Respondents’ Motion for Summary Judgment Dismissal of Burien Toyota’s UTSA Claim

1. This Issue is Reviewable

“[D]enial of a summary judgment motion may be reviewed after entry of final judgment.” *McGovern v. Smith*, 59 Wn. App. 721, 734-35, 801 P.2d 250 (1990); *see also Bullo v. City of Fife*, 50 Wn. App. 602, 603 n.1, 749 P.2d 749 (1988) (stating that, although generally, a denial of a motion for summary judgment is not appealable, a “denial of a motion for summary judgment may be reviewed, however, after a final judgment has been entered.”). Review is also appropriate under RAP 2.4(a), which provides that the appellate court will, “at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent” and will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review if, as here, the respondent timely files a notice of appeal or “if demanded by the necessities of the case.”

2. Burien Toyota Cannot Show “Misappropriation” of a “Trade Secret”

In addition to proving damages, which as shown above Burien Toyota has not done and cannot do, in order to recover on its UTSA claim Burien Toyota must establish that Respondents “misappropriated” a “trade

secret.” The evidence shows neither misappropriation nor the existence of a trade secret. The trial court erred in denying Respondents’ motion for summary judgment dismissal of Burien Toyota’s UTSA claim. Accordingly, remand is unnecessary and would be inappropriate not only because, as discussed above, Burien Toyota cannot produce any evidence of damages, but also because it has failed to show misappropriation nor the existence of a trade secret.¹⁰

a. Misappropriation

Under the UTSA, “misappropriation” means:

(a) Acquisition of a trade secret *of another* by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(b) Disclosure or use of a trade secret *of another* without express or implied consent by a person who:

(i) Used improper means to acquire knowledge of the trade secret; or

(ii) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret

¹⁰ Burien Toyota may argue that this Court cannot review the jury’s verdict finding misappropriation and the existence of a trade secret because Respondents did not assign error to this or to the final judgment, but rather assigned error to the denial of its motion for summary judgment on the UTSA claim. However, as this Court is well aware, the Rules of Appellate Procedure are to be “liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances”. RAP 1.2(a). Where, as here, the nature of a party’s challenge is clear, this Court will consider the merits of the challenge. *McGovern v. Smith*, 59 Wn. App. 721, 735, 801 P.2d 250 (1990).

was (A) derived from or through a person who had utilized improper means to acquire it; (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limits its use; or

(iii) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

RCW 19.108.010(2) (emphasis added). By definition, there can be no misappropriation where the alleged misappropriator does not misappropriate a trade secret “of another.”

Here, the customer list at issue belongs to Mr. Butler, not Burien Toyota. Mr. Butler compiled this list during his lengthy career as a shoe salesman at Nordstrom. Mr. Butler never sold his list to Burien Toyota or received any consideration from Burien Toyota for the use of his list. In fact, Burien Toyota required Mr. Butler to pay a substantial portion of the fees charged by Sobel to maintain his customer list. Mr. Butler delivered his customer list directly to Sobel when he started working at Burien Toyota. The list was entered into Sobel’s database, but not Burien Toyota’s. Burien Toyota cannot show that Mr. Butler misappropriated anything because the customer list he used while employed at Larson Toyota was *his own* customer list that he developed over 32 years while working at Nordstrom. *See Structural Dynamics Research Corp. v. Eng’g*

Mechanics Research Corp., 401 F. Supp. 1102, 1112 (E.D. Mich. 1975)
(“When . . . the developments are the product of the application of the employee’s own skill, ‘without any appreciable assistance by way of information or great expense or supervision [by the employer], outside of the normal expenses of his job,’ . . . he has ‘an unqualified privilege’ to use and disclose the trade secrets so developed.”).

b. Trade Secret

Under the UTSA, “trade secret” means:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) *Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.*

RCW 19.108.010(4) (emphasis added).

In addition to being unable to prove that Mr. Butler’s action of taking his customer list when he left Burien Toyota constituted misappropriation, Burien Toyota cannot prove that Mr. Butler’s customer list or its own customer list were trade secrets because it cannot prove that it took any reasonable efforts to maintain their secrecy.

The efforts required to maintain secrecy are those “reasonable under the circumstances.” *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 327, 828 P.2d 73 (1992) (quotation omitted), *review denied*, 120 Wn.2d 1007 (1992), *overruled on other grounds by Waterjet Tech., Inc. v. Flow Int’l Corp.*, 140 Wn.2d 313 (2000). Reasonable efforts to maintain secrecy include advising employees of the existence of a trade secret and limiting access to a trade secret on a “need to know” basis. *Machen*, 65 Wn. App. at 327. On the other hand, public disclosure of information, including through carelessness, can preclude protection. *Machen*, 65 Wn. App. 319 (holding that the plaintiff’s disclosure of an alleged trade secret to a third party manufacturer, without taking any affirmative steps to ensure that the trade secret would be treated as confidential, destroyed any possible trade secret protection of the information).

Here, Burien Toyota knew that Mr. Butler and other salespersons at the dealership used Sobel to maintain their customer lists, but Burien Toyota failed to make any attempts to protect that information. *See Buffets, Inc. v. Klinke*, 73 F.3d 965, 969 (9th Cir. 1996) (“a company which allows its employees to keep [allegedly protected information] cannot be heard to complain when [the information] fall[s] into the hands of its rivals.”). It is undisputed that Burien Toyota encouraged Mr. Butler

to share his customer information with Sobel and that Burien Toyota never asked Sobel to sign a confidentiality or nondisclosure agreement related to customer information. CP 82-97. In fact, Burien Toyota gave other customer lists to other third-party vendors without obtaining confidentiality agreements from them either. CP 101, 149, 151.

In an attempt to belatedly show some effort to keep the information in Mr. Butler's customer list secret, Burien Toyota pointed to documents it required its employees to sign after Mr. Butler began his employment acknowledging Burien Toyota's implementation of measures to safeguard its customers' nonpublic personal information. But these documents were merely part of Burien Toyota's efforts to comply with the mandates of the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. §§ 6801 et seq., and the Federal Trade Commission's Safeguards Rule, 16 C.F.R. §§ 314.1-314.5, enacted to implement the GLBA. Clearly, they were designed to protect customer privacy, and did not have anything to do with trade secrets or the Sobel list. *See* CP 445-494 (National Automobile Dealers Association (NADA) publication regarding the GLBA); *compare* CP 487 and CP 496 (Burien Toyota's form is identical to NADA sample form). The documents do not demonstrate reasonable efforts to maintain the secrecy of Mr. Butler's list.

The GLBA and the Safeguards Rule are discussed more fully below, in connection with Respondents' argument that these documents should not have been admitted at trial. Briefly, the GBLA and the Safeguards Rule are federal requirements imposed on automobile dealers to protect the confidentiality of their customers' nonpublic financial information. The confidentiality provisions in the documents Burien Toyota required its employees to sign were intended solely to comply with the federal law, not to protect any alleged trade secret. In other words, Burien Toyota (and all other car dealerships, including Robert Larson) was *required* to implement these basic safeguards in order to comply with their obligations under federal law. Accordingly, the documents cannot be deemed evidence of any efforts on Burien Toyota's part to keep the information secret for purposes of a UTSA claim. *See MP Med. Inc. v. Wegman*, 151 Wn. App. 409, 423, 213 P.3d 931 (2009) (holding that no trade secret existed when the record showed that confidentiality provisions applicable to the employer's customer list related merely to the protection of patients' identities under state and federal privacy laws such as HIPAA, and not to the value of the list as a trade secret). Further, as discussed more fully below, every court that has addressed the issue has held that an employer such as Burien Toyota who is subject to the GBLA and the

Safeguards Rule cannot use that statute and regulation as a sword against its employee to its own advantage.

C. The Trial Court Erred in Denying Respondents' Motion for a Directed Verdict

On review of a ruling on a motion for a directed verdict, this Court applies the same standard as the trial court. *Chaney v. Providence Health Care*, 176 Wn.2d 727, 732, 295 P.3d 728 (2013). Under that standard, a motion for directed verdict should be granted when it is clear that the evidence and reasonable inferences are insufficient to support the jury's verdict. *Hizey v. Carpenter*, 119 Wn.2d 251, 272, 830 P.2d 646 (1992).

Here, the trial court denied Respondents' motion for a directed verdict. The evidence Burien Toyota introduced, and the reasonable inferences from that evidence, were insufficient to support a verdict in its favor on the issues of whether Burien Toyota met its burden of proving "misappropriation" of a "trade secret." The trial court erred in denying Respondents' motion for a directed verdict. Respondents' argument on this issue is the same argument it set forth above with regard to the trial court's denial of its motion for summary judgment. *See* Section VII(B).

Respondents will not duplicate that argument here, but rather refer the Court to the cited section of this brief.¹¹

D. The Trial Court Erred in Denying Respondents' Motion in Limine to Exclude Policies or Handbook Provisions Created or Implemented by Burien Toyota After Mr. Butler's Employment with Burien Toyota Began

Respondents moved in limine for an order excluding evidence and testimony relating to the employee handbook and other documents it required Mr. Butler to sign after he started his employment. CP 340. The trial court denied Respondents' motion in limine. RP Jan 16, 2013 at 9. The trial court erred in denying Respondents' motion to exclude this evidence. Should this Court remand the matter for further proceedings, it should also order that such improperly admitted evidence be excluded.

1. Standard of Review

This Court reviews a trial court's denial of a motion in limine for abuse of discretion. *Clark v. Gunter*, 112 Wn. App. 805, 808, 51 P.3d 135 (2002). The portion of the trial at which evidence of the policies and handbook provisions that Respondents sought to exclude is not part of the record. Where, as here, the trial court's ruling in limine excluding the evidence was final and definitive, "[n]o objection to trial testimony is

¹¹ As explained in Section VI(B) of this brief, the evidence was also insufficient to show that Burien Toyota suffered any damages because of any actions of Respondents.

needed to preserve the right to review a ruling denying a motion in limine”. *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 557 n.9, 815 P.2d 798 (1991).

2. **The Documents Are Not Relevant to the UTSA Claim and Lack Consideration**

In support of its breach of contract claim, Burien Toyota relied on evidence of the employee handbook and other documents Burien Toyota required Mr. Butler to sign after he began his employment. CP 340. But the trial court dismissed Burien Toyota’s breach of contract claim on Respondents’ motion for summary judgment. CP 333-335. Upon the summary dismissal of Burien Toyota’s breach of contract claim, the employee handbook and other documents were no longer relevant.

Further, the documents lack consideration and should have been excluded on that basis as well. Mr. Butler’s employment with Burien Toyota was at-will. CP 356. “Employment contracts are governed by the same rules as other contracts.” *Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 27, 111 P.3d 1192 (2005). Once an initial at-will employment contract is formed, an additional purported contractual obligation set out in an employee acknowledgement form is not an enforceable contract unless it is supported by valid consideration. *Flower*, 127 Wn. App. at 28. If the acknowledgement form purports to impose additional obligations on

the employee, without changing the employee's promise to work for the employer, then the change in obligation is not mutual, and no enforceable contract is formed. *Id.*

Here, Mr. Butler received no consideration for any of the forms Burien Toyota required him to sign after his employment began. The forms are not enforceable against Mr. Butler, did not bind him in any agreement with respect to keeping any information confidential, and have no evidentiary value in this case. Evidence of these documents should have been excluded at trial.

3. The Documents Mr. Butler Signed After His Employment Began Are Not Admissible as Evidence of Any Promise of Mr. Butler to Burien Toyota Regarding Customer Names or As Evidence of Burien Toyota's Entitlement to Damages

As discussed above, aside from non-contractual handbook provisions, the documents on which Burien Toyota relies to argue that Mr. Butler promised not to take his customer list with him were documents Burien Toyota was required to have its employees sign in response to developments in the GLBA and related rules. The documents did not prohibit Mr. Butler from sharing customer information with Sobel, nor did they relate in any way to Mr. Butler's list of non-Burien Toyota customers and contacts he developed prior to his employment with Burien Toyota. Rather, they were created by Burien Toyota solely to comply with the

requirements of federal customer privacy laws. The documents are not evidence of any promise by Mr. Butler to Burien Toyota, are not relevant to Burien Toyota's UTSA claim, should have been excluded at trial, and should be excluded from any further proceedings should this Court order such further proceedings to be had.

By way of background, the GLBA imposes an obligation on financial institutions to respect the privacy of its customers and protect the security and confidentiality of those customers' nonpublic personal information. 15 U.S.C. § 6801(a). An automobile dealer such as Burien Toyota is a "financial institution" for purposes of the GLBA. 16 C.F.R. § 314.2(a) (incorporating the definition of "financial institution" in 16 C.F.R. § 314.2(k)(2)(iii)). The authority to enforce the GLBA's requirements imposed on automobile dealers is vested exclusively in the Federal Trade Commission (FTC). 15 U.S.C. § 6805(a)(7).

In fulfillment of its mandate to enact regulations to implement the GBLA, the FTC enacted the Safeguards Rule, 16 C.F.R. §§ 314.1-314.5. The purpose of the Safeguards Rule is to set forth standards for use by "financial institutions" including automobile dealers of customers' nonpublic personal information. 16 C.F.R. § 314.1(a). The Safeguards Rule requires all covered institutions to develop, implement, and maintain an information security program involving four steps: (1) designation of

an employee(s) to coordinate the information security program; (2) identification of security risks to the integrity of customer information, including employee training, network design, and detecting, preventing, and responding to intrusions; (3) design and implementation of information safeguards; and (4) oversight of service providers to ensure compliance with safeguards. 16 C.F.R. § 314.4.

In response to the Safeguards Rule, the National Automobile Dealers Association (NADA) published “A Dealer Guide to Safeguarding Customer Information,” which explains the background and obligations of the Safeguards Rule as they relate to automobile dealers. CP 445-493. The NADA Guide contains recommendations on policies and procedures an automobile dealer could implement to comply with the Safeguards Rule. CP 479-480. Burien Toyota’s Customer Safeguarding Information Policy and Procedures adopts nearly verbatim many of NADA’s recommended policies and procedures. CP 498. The NADA Guide also contains a sample form for an employee acknowledgment of information safeguarding obligations. CP 487. The acknowledgement form Mr. Butler signed (on the Safeguards Rule’s effective date) is an exact copy of the NADA Guide’s form. CP 496.

Prior to promulgation of the Safeguards Rule, implementation of the GLBA was facilitated by the Privacy Rule, 16 C.F.R. § 313. The

Privacy Rule obligates automobile dealers to disclose to their finance, lease, and insurance customers the way in which they use and share customer information. CP 448. In 2005, after Mr. Butler's employment at Burien Toyota had already commenced, and without supplying any consideration, Burien Toyota required Mr. Butler to sign an addendum to its employee handbook acknowledging the requirements imposed by the new federal regulations, specifically stating that he was receiving such notice "because of the Privacy Act," as opposed to any trade secret purposes. CP 500.

Finally, in 2007, the FTC promulgated the Red Flags Rule, 16 C.F.R. § 681. The rule requires automobile dealers that offer financing for personal or household vehicles to create a program to detect, prevent, and mitigate identity theft in covered accounts. Again, Burien Toyota developed a policy in response to this federal mandate and required Mr. Butler to acknowledge the policies regarding their Red Flag obligations. CP 504.

After comparing the federal requirements described above to the documents relied on by Burien Toyota for purposes of its UTSA claim, it becomes apparent that Burien Toyota's alleged attempts to "protect its trade secrets" were actually merely federally-mandated actions with which all car dealerships, including Robert Larson, were obligated to comply.

None of the provisions was implemented for purposes of UTSA protection. The policies had nothing to do with any effort by Burién Toyota to protect any trade secrets. For this reason alone, evidence of these policies and of Mr. Butler's acknowledgment of them should have been excluded.

Further, without exception, every court that has addressed the issue has held that the authority to enforce the GBLA and the regulations promulgated in implementation of it is vested exclusively in the designated federal agencies, in this case, the FTC, and that the GBLA does not create either an express or an implied private right of action. *See e.g., Dunmire v. Morgan Stanley DW, Inc.*, 475 F.3d 956, 960 (9th Cir. 2007); *Enriquez v. Countrywide Home Loans, FSB*, 814 F. Supp. 2d 1042, 1061 (D. Haw. 2011); *Cannon v. Zurich N. Am.*, 2007 WL 2875500 (D. Ariz. 2007); *Rowland v. Prudential Fin., Inc.*, 2007 WL 1893630 (D. Ariz. 2007); *Wood v. Greenberry Fin. Services, Inc.*, 2012 WL 5381817 (D. Haw. 2012); *Lacerte Software Cor. v. Professional Tax Servs., L.L.C.*, 2004 WL 180321 (N.D. Tex. 2004); *Menton v. Experian Corp.*, 2003 WL 21692820 (S.D.N.Y. 2003); *Borlinski v. Williamson*, 2004 WL 433746 (N.D. Tex. 2004). The basis for the courts' unanimous conclusion that there is no private right of action to enforce the GBLA is the provision in the Act stating that it and the implementing regulations are to be enforced

“by the Federal functional regulator, the State insurance authorities, and the Federal Trade Commission with respect to financial institutions and other persons subject to their jurisdiction under applicable law.” 15 U.S.C. § 6805(a). Because there is no private right of action to enforce the GBLA, Burien Toyota cannot use the federal statute and regulations as a sword against its former employee. Accordingly, it cannot be allowed to introduce the documents it required Mr. Butler to sign acknowledging Burien Toyota’s implementation of the federal provisions as evidence of Mr. Butler’s failure to comply with these provisions.

Nor can Burien Toyota offer these documents as evidence of any promise by Mr. Butler not to take his Sobel list with him when he left Burien Toyota. To allow it to introduce the documents for this purpose would allow Burien Toyota to use the GLBA and its regulations to its own advantage, when in fact, Burien Toyota is merely one of many entities subject to the burdens and responsibilities of the federal provisions. The court in *American Family Mut. Ins. Co. v. Roth*, 2005 WL 3700232 (N.D. Ill. 2005), rejected this exact attempt by a former employer.¹² *Roth* involved an insurance company’s claim that an insurance agency used and disclosed customer lists in violation of the GBLA. The court flatly

¹² The District Court in *Roth* adopted the magistrate’s report and recommendation in full. *American Family Ins. Co. v. Roth*, 2006 WL 2192004 (N.D. Ill. 2006).

rejected the insurance company's attempt to use the GBLA to its own advantage. Joining every other court that addressed the issue, the court in

Roth stated:

The Act does not provide for private enforcement or even hint at any private right of action. The specificity and exclusivity of the rule-making authority and enforcement mechanism in federal and state regulatory agencies is a persuasive datum that there can be no private enforcement under the Act.

Id. at * 6.

The court in *Roth* considered the factors set out by the Supreme Court in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L.Ed.2d 560 (1979), relevant to a determination of whether a statute has created a private right of action and concluded:

Consideration of these factors leads ineluctably to the conclusion that in enacting the GLBA, Congress did not create an implied private cause of action on behalf of [the insurance company's] customer. *And it most assuredly did not create such a right on behalf of financial institutions. The statute was not enacted to benefit financial institutions. Rather, they are entities on which are imposed special burdens and responsibilities. It is a contradiction in terms to say that those against whom a statute is to be enforced are the recipients of Congress's special favor.*

Roth, 2005 WL 3700232 *7 (emphasis added).

Burien Toyota does not have the right to use the GBLA and the Safeguards Rule to its own benefit. It cannot rely on the documents it required Mr. Butler signed with regard to safeguarding customer

information, documents created solely in furtherance of Burien Toyota's effort to comply with obligations imposed on it by federal law, and argue that these documents constitute instead efforts on its part to safeguard a claimed trade secret. Accordingly, the documents have no relevance to Burien Toyota's UTSA claim and should have been excluded.

E. The Trial Court Erred in Failing to Give Certain of Respondents' Proposed Jury Instructions

The trial court erred in failing to give several of Respondents' proposed jury instructions, namely Respondents' Proposed Instructions 3, 5, and 12, and erred in giving the court's Instruction No. 17 rather than Respondents' Proposed Instructions 3 and 5.¹³ Respondents objected to the trial court's failure to give these instructions. RP Jan. 31, 2013 at 16-17. Again, Respondents raise the issues regarding jury instructions only to preserve their objections should this Court grant Burien Toyota's claim for relief and remand for further proceedings or should Burien Toyota seek further review in the Supreme Court.

1. The Trial Court Erred in Failing to Give Respondents' Proposed Instruction Nos. 3 and 5 Rather than the Court's Instruction No. 17, Which Was Confusing and Unduly Emphasized Respondents' Burden of Proof

¹³ These instructions are set out in full in Appendix B. The instructions Respondents proposed are at CP 509-537.

The court's Instruction No. 17 instructed the jury on both the plaintiff's burden of proving its case by a preponderance of the evidence and the defendants' burden of proving affirmative defenses by clear, cogent, and convincing evidence. The instruction mentions defendants' burden of proof in both of its paragraphs, while mentioning the plaintiff's in only the first paragraph. Respondents objected to Instruction No. 17 on the ground that it was confusing and unduly emphasized Respondents' burden of proof over Burien Toyota's burden of proof and objected to the court's failure to give their proposed instructions Nos. 3 and 5, which would have provided one instruction on the plaintiff's burden of proof and one instruction on the defendants' burden of proof.¹⁴ RP Jan. 31, 2013 at 14-16.

Jury instructions should be impartial and fair to both sides in a lawsuit. *Dods v. Harrison*, 51 Wn.2d 446, 451, 319 P.2d 558 (1957). The court's Instruction No. 17 is not impartial or fair to Respondents because the instruction unduly emphasized Respondents' burden of proof. Two separate instructions – one setting out the plaintiff's burden of proof and the other setting out the defendants' burden of proof – would render the instructions impartial and fair to both sides. Further, two separate

¹⁴ Respondents' proposed instructions nos. 3 and 5 are taken directly from the Washington Pattern Instructions, specifically WPI 21.01 and WPI 160.03.

instructions would be less confusing to a jury, likely composed of persons not familiar with terms of art such as “preponderance of the evidence” and “clear, cogent, and convincing evidence.” The trial court abused its discretion in giving Instruction No. 17, rather than Respondents’ Proposed instruction Nos. 3 and 5. Should this matter be remanded, this Court should direct that the trial court give separate instructions on each party’s burdens of proof.

2. **Failing to Give Respondents’ Instruction No. 12 Prevented Respondents from Fully Arguing Their Theory of the Case**

Respondents extensively briefed the issue of the federal statutory and regulatory requirements pertaining to the safeguarding of customers’ nonpublic information.¹⁵ Respondents argued that the forms Burien Toyota required Mr. Butler to sign after his employment began cannot be used as evidence of a promise by Mr. Butler not to take his customer list with him or as evidence that Burien Toyota, by requiring employees to sign these forms, took measures to protect the secrecy of a trade secret. These arguments, in turn, supported Respondents’ theories that Mr. Butler’s customer list was not a trade secret and that Mr. Butler did not appropriate any trade secret belonging to Burien Toyota.

¹⁵ See, *supra*, section VII(C) of this brief for a discussion of this issue.

Respondents' proposed instruction no. 12 would have instructed the jury as to the federal customer privacy laws and would have instructed the jury that Burien Toyota does not have the right to privately enforce these laws by bringing suit against individuals, including employees. The instruction is a correct statement of the law. By failing to give this proposed instruction, the trial court prevented Respondents from arguing a theory of their case. The trial court's failure to give the instruction was, therefore, error. *See De Koning v. Williams*, 47 Wn.2d 139, 141, 286 P.2d 694 (1955) ("Each party is entitled to have his theory of a case presented to the jury by proper instructions, if there is any evidence to support it"); *Owens v. City of Seattle*, 49 Wn.2d 187, 193, 299 P.2d 560 (1956) (the failure to give an instruction that is a correct statement of the law pertinent to a party's theory of the case, where the theory is supported by the evidence, is prejudicial error).

VIII. CONCLUSION

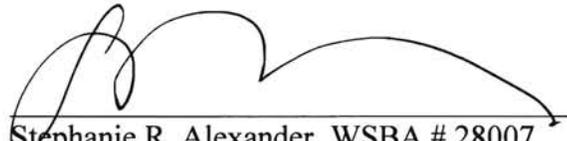
This Court should affirm the judgment on the jury verdict in favor of Respondents and deny Burien Toyota's request for an award of attorney fees. Should, however, this Court remand this matter for further proceedings, this Court should grant Respondents the relief requested in their cross-appeal. Respondents request an award of their costs on appeal.

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DATED this 18th day of December, 2013.

Respectfully submitted,

MICHAEL & ALEXANDER PLLC

A handwritten signature in black ink, appearing to be 'Stephanie R. Alexander', written over a horizontal line.

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APPENDIX A

COURT'S INSTRUCTION NO. 8

TRADE SECRETS – BURDEN OF PROOF

On the claim of misappropriated trade secrets, Burien Toyota has the burden of proving each of the following propositions:

(1) That Burien Toyota had a trade secret;

(2) That Mr. Butler and/or Larson Toyota misappropriated Burien Toyota's trade secret;

and

(3)(a) That Mr. Butler and/or Larson Toyota's misappropriation was a proximate cause of damages to Burien Toyota (Actual Damages);

and/or

(3)(b) That, as a result of the misappropriation, Mr. Butler and/or Larson Toyota received money or benefits that in justice and fairness belong to Burien Toyota (Unjust Enrichment). Under (3)(b) (Unjust Enrichment), plaintiff has the initial burden of proving damages from sales attributable to the use of a trade secret. The burden then shifts [to] Mr. Butler and/or Larson Toyota to establish any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits.

If you find from your consideration of all the evidence that proposition (1), (2) and either (3)(a) or (3)(b) have been proved, then your verdict should be for Burien Toyota. On the other hand, if you find that propositions (1) nor (2) or alternatives (3)(a) or (3)(b) have not been proved, your verdict should be for Mr. Butler and Larson Toyota.

[CP 555.]

COURT'S INSTRUCTION NO. 18

TRADE SECRETS – DAMAGES

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for Burien Toyota on its claim, you must determine Burien Toyota's damages. The Plaintiff, Burien Toyota, has the burden of proving damages. Damages means the amount of money that will reasonably and fairly compensate Burien Toyota for any injury you find was proximately caused by Mr. Butler and/or Larson Toyota. Plaintiff may recover actual damages in the form of past and future lost profits as well as related expenses and may recover restitution for unjust enrichment, but the law does not permit the plaintiff to recover twice for the same damages. Thus, you may include as damages both plaintiff's lost profits

as actual damages and defendants' gain as unjust enrichment only if and to the extent that they do not overlap in any way.

It is for you to determine what damages, if any, have been proved. Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

[CP 565.]

APPENDIX B

RESPONDENTS' PROPOSED INSTRUCTION NO. 3

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression “if you find” is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably than not true.

WPI 21.01

[CP 515.]

RESPONDENTS' PROPOSED INSTRUCTION NO. 5

CLEAR, COGENT, AND CONVINCING EVIDENCE

Proof by clear, cogent, and convincing evidence means that the element must be proved by evidence that carries greater weight and is more convincing than a preponderance of the evidence. Clear, cogent, and convincing evidence exists when occurrence of the element has been shown by the evidence to be highly probable. However, it does not mean that the element must be proved by evidence that is convincing beyond a reasonable doubt.

WPI 160.03

[CP 517.]

COURT'S INSTRUCTION NO. 17

Except for defendants' equitable estoppel and "unclean hands" affirmative defenses, when it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question that the proposition on which that party has the burden of proof is more probably true than not true.

The defendants have the burden of proving their equitable estoppels and "unclean hands" affirmative defenses by a different standard of proof, by clear, cogent and convincing evidence. Proof by clear, cogent and convincing evidence means that the element must be proved by evidence the carriers [sic] greater weight and is more convincing than a preponderance of the evidence. Clear, cogent and convincing evidence exists when occurrence of the element has been shown by the evidence to be highly probable. However, it does not mean that the element must be proved by evidence that is convincing beyond a reasonable doubt.

[CP 564.]

RESPONDENTS' PROPOSED INSTRUCTION NO. 12

FEDERALLY MANDATED CUSTOMER PRIVACY LAWS

Federal law imposes minimum requirements that all automobile dealerships must comply with for purposes of protecting customer privacy and the security and confidentiality of nonpublic personal customer information. In relation to those federal requirements, the federal government created the following regulations and guidance:

(1) In May 2003, the Federal Trade Commission (“FCT”) enacted a “Safeguards Rule” which established federal standards for developing, implementing, and maintaining reasonable policies and procedures for safeguarding customer information.

(2) In January 2005, the FTC issued guidance on the impact of a related “Privacy Act” which required all automobile dealerships to ensure the security and privacy of non-public customer information.

(3) In November 2007, the FTC enacted a “Red Flags Rule” which required automobile dealerships to establish a reasonable process for the red flag of customer information in connection with potential identity theft, and for the restriction of access to customer information.

Automobile dealerships do not have the right to privately enforce any of the above laws or regulations by suing individuals, including employees.

15 U.S.C. § 6801(a); 16 C.F.R. § 313(k)(2)(iii); 16 C.F.R. § 314.1(a); 16 C.F.R. § 681; *Dunmire v. Morgan Stanley DW, Inc.*, 475 F.3d 956, 960 (8th Cir. 2007); *Enriquez v. Countrywide Home Loans, FSB*, 814 F. Supp. 2d 1042, 1061 (D. Haw. 2011); *Cannon v. Zurich N. Am.*, 2007 WL 2875500 (D. Ariz. 2007); *Rowland v. Prudential Fin., Inc.*, 2007 WL 1893630 (D. Ariz. 2007); *Wood v. Greenberry Fin. Services, Inc.*, 2012 WL 5381817 (D. Haw. 2012); *Lacerte Software Corp. v. Professional Tax Servcs, L.L.C.*, 2004 WL 180321 (N.D. Tex. 2004); *Menton v. Experion Corp.*, 2003 WL 21692820 (S.D.N.Y. 2003); *Borinski v. Williamson*, 2004 WL 433746 (N.D. Tex. 2004).

[CP 524.]

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief of Respondents/Conditional Cross-Appellants on:

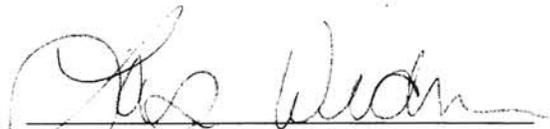
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by the following indicated method or methods:

- by **emailing** full, true, and correct copies thereof to the individuals at the email address shown above, which is the last-known email address for the individuals' offices, on the date set forth below.
- by **mailing** full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the individuals as shown above, the last-known office address of the individuals, and deposited with the United States Postal Service at Seattle, Washington, on the date set forth below.
- by sending full, true and correct copies thereof via **overnight courier** in a sealed, prepaid envelope, addressed to _____ as shown above, his last-known office address, on the date set forth below.
- by causing full, true and correct copies thereof to be **hand-delivered** to the individuals at their last-known office address listed above on the date set forth below.

DATED this 18th day of December, 2013.



Lois Widmer