

FILED

IN THE WASHINGTON STATE COURT OF APPEALS,
DIVISION III

AUG 26 2015
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS NO. 326161

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

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

v.

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

APPELLANTS' REPLY BRIEF

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II. INTRODUCTION

Respondents Lakoda and Dale Ames failed to rebut OMH's clear demonstration of legal and factual errors by the trial court in their brief. Lakoda makes numerous factual assertions that are not supported with reference to the record in its Statement of the Case and should not be considered by this Court in its analysis. RAP 10.3(a)(5). Lakoda should not be allowed to rebut OMH's assignments of error using uncited narrative to fill the gaps of evidence that it lacks.

OMH also refers this Court to the actual assignments of error cited by Appellants. Appellants brief at 3-4. Specifically, the Court did not rule on the applicability of foreign law and OMH, therefore, has not appealed that non-existent ruling.

III. LAW AND ARGUMENT

1. The Trial Court Abused Its Discretion by Precluding Evidence Relevant to OMH's Defenses and Counterclaims.

The trial court made two rulings during motions in limine regarding the registration of OMH's designs by the Longfei factory. First, the Court ruled that the actual registrations, Defense Exhibit 329, were not relevant. RP 10. Second, the

Court ruled that the fact that designs had been registered was relevant, but that witnesses would not be allowed to testify regarding the legal effect of registration. RP 10-11.

If the fact that the designs had been registered is relevant, then it follows that the actual registrations were relevant to prove that the designs were indeed registered. However, during trial, the Court allowed neither.

The Court erred by not allowing the registrations to first be authenticated by the owner of the registrations, Xiao Ping Zhang. ER 901(b)(1). RP 295-96. Lakoda has argued that since the documents are not in English, they cannot be admitted. RP 9. This is not a basis for excluding a document. See, *Castrojon v. State*, 428 S.W.3d 179 (2014); *Leal v. State*, 782 S.W. 2d 844 (1989) (treating foreign language exhibits as analogous to a non-speaking witness testifying through a court approved interpreter). There were three witnesses who testified in Chinese at trial and a court-approved interpreter was present to translate their testimony

Xiao Ping Zhang would have been able to provide the testimony to authenticate the registrations under ER 901. After

the documents were authenticated, the Court could then make evidentiary rulings as to the admissibility of testimony about the legal effect of the registrations, if necessary.

Further, in contrast to the Court's pre-trial order, Xiao Ping Zhang was not allowed to testify regarding his registration of the drawings. RP 306-07. Instead, Zhang's testimony was limited to giving a yes or no response to the question — "Did you take any measures to try to protect your investment that you had put into the manufacture of screeners?" On this scant amount of evidence, the jury was precluded from understanding OMH's motivation for continuing to work with Longfei directly after Lakoda was fired.

In an attempt to divert focus much of Respondents' brief addresses pleading foreign law. Pleading of foreign law is not necessary in this case. Mr. Zhang should have been allowed to testify that he registered the OMH designs and that he told Mr. Hilmoie that, because the designs were registered, only Longfei could manufacture the screeners in China. That is what the Court ruled in motions in limine. This testimony is simply fact, not law. Whether, in fact, registering the designs gave Longfei

exclusive rights under Chinese law is irrelevant.

The purpose of offering evidence of Longfei's design registration was to show that OMH continued to work directly with Longfei in order to protect OMH's own financial interests; to show that OMH did not act willfully and maliciously; and to show that Lakoda failed to protect OMH's designs under the NDA agreement, all of which relate to the issues raised by OMH as part of its defenses and counterclaims.¹

OMH was not allowed to argue the theory of its case as Lakoda suggests. Respondents brief at 15. The trial court precluded the background and context of Longfei's claim to ownership and the jury was kept from being fully informed on the issue. OMH had to protect its own financial interests because Longfei's claim to ownership coincided with the busiest time of the season for OMH. OMH was told that they no longer had ownership of their designs and that the factory was going to quit production at the end of March. RP 528. The first quarter of every year is the busy season for production because screeners are used during the construction season. RP

¹Lakoda asserts that OMH's counter-claims have not been appealed. That assertion is incorrect. The entirety of the verdict was appealed.

352, 501, 528, 912-913. 90% of OMH sales occur from March to August. RP 676. There was no way OMH could tool up another factory and would have lost an entire sales season. RP 759.

The court's refusal to allow highly relevant and admissible evidence and testimony precluded OMH from explaining its actions and left the jury with the false impression that OMH's actions were malicious.

Testimony by Brad Hilmoe should also be allowed as evidence of his motive, state of mind, and defense to the claim of acting maliciously. Yet the Court again disallowed his testimony regarding the registrations. RP 540.

Longfei's filing of the registrations and telling OMH that it owned the designs was highly relevant evidence that should have been presented to the jury and the trial court abused its discretion when it precluded¹³ that testimony from being presented. Whether or not the registration was actually binding does not change the motive and intent of the parties at the time the claim was made.

The trial court abused its discretion when it precluded

Defendants from presenting evidence that OMH's designs were registered in China by the Longfei factory showing a violation of the NDA agreement by Lakoda.

2. The trial court abused its discretion when it precluded testimony regarding the registration of OMH designs after Lakoda raised the issue of ownership design.

Lakoda's claim it did not open the door to discussion of actions taken by a third party is disingenuous. Lakoda's reference to the Longfei factory as a third party makes little sense when the Longfei factory is a central figure in this case. It is Longfei that Lakoda alleges is its trade secret. It is Longfei that Lakoda claims to have always had an NDA with. It is the continued interactions between Longfei and OMH that Lakoda bases its breach of contract claim on.

Lakoda admits it elicited evidence that OMH had not taken steps to protect itself. Respondents Brief at 17. Lakoda also recognized the importance and relevance of any claim to owning designs. RP 859.

Lakoda's actions eliciting testimony regarding OMH's failure to protect its trade secrets is precisely the reason the trial court should have allowed evidence regarding Longfei's

registration of OMH designs. Fairness dictates that an opposing party be given the opportunity to question on a subject matter the other party first introduced. *State v. Gallagher*, 112 Wn. App. 601, 610, 51 P.3d 100, 105 (2002). However, the trial court refused OMH the ability to rebut the evidence that OMH did nothing to protect itself.

OMH was either harmed by Lakoda not having a valid NDA, which allowed Longfei to register OMH designs, or OMH was harmed by Lakoda because Lakoda failed to protect OMH designs under the NDA with Longfei. Because Lakoda presented evidence of an NDA with Longfei, the trial court should have allowed OMH to discuss the registration of documents as a defense to the invalidity of that NDA, as well as an explanation of their motivation to continue working with Longfei.

Lakoda's bad faith claim is directly correlated to OMH's ability to discuss the registration of OMH drawings by Longfei. When the trial court precluded the registration based on lack of relevance it precluded OMH from defending itself against a bad faith claim. It could appear to a jury that OMH acted in bad

faith based on the lack of evidence that was allowed to be presented. However, had the jury heard evidence regarding the actions of the Longfei factory in registering OMH designs they would be made aware of OMH's real or perceived requirement to continue to work with the Longfei factory. Without the jury hearing evidence of OMH's reasons for continuing to work with Longfei until it had created new designs the jury's determination that OMH acted willfully is put into question.

The trial court's abuse of discretion in precluding the evidence after Lakoda opened the door lead to Lakoda's attorney stating that "there's lots of stuff [OMH] didn't do to protect themselves from Longfei. They didn't get a patent." May 15, 2014 RP 100. The jury was also left with the false statement that "[a]s of February 2011, Mr. Hilmoe knew a hundred percent that there was an arrangement with Lakoda and Longfei that Longfei would not produce OMH products for anyone but Lakoda." May 15, 2014 RP 87. The jury was not presented with all relevant evidence and was presented with skewed evidence because of the trial court's preclusion. It was an abuse of discretion to allow this to happen.

3. The trial court erred by not interpreting Paragraph 15 and precluding the damages sought by Lakoda.

Paragraph 15 of the NDA does not need to be read in a vacuum. Lakoda attempts to create ambiguity when the NDA can be read as a whole and with no inconsistencies. Even if the NDA was ambiguous, which it is not, an ambiguous contract should be construed against the party who drafted it. *Dwelley v. Chesterfield*, 88 Wn. 2d 331, 337, 560 P.2d 353, 356-57 (1977). It is the province of the court, not the jury, to interpret contract construction. *Mega v. Whitworth College*, 138 WnApp 661, 158 P.2d 1211 (2007). Even when parol evidence is allowed to aid in the interpretation, it may not be used to contradict the written agreement. *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). Thus, the Court erred in leaving to the jury the discretion to interpret a clause that specifically excludes damages as one that allows them.

Paragraph 8's reference to injunctive relief and "other rights and remedies" is not inconsistent with Paragraph 15's limitation of liability. Paragraph 8's other rights and remedies could include specific performance of the NDA, rescission of

the NDA, or declaratory relief under the NDA. These are all other rights and remedies that are not limited under Paragraph 15.

Lakoda sought lost profits, which were explicitly excluded in Paragraph 15. Respondent's brief at 33, 36-37. Lakoda is now attempting to create an ambiguity to justify the Court's error in leaving the jury to interpret the contract language. However, as previously stated, the contract can be read without ambiguity by looking to other remedies not excluded by Paragraph 15.

Applying Paragraph 15 also does not make the contract illusory. Lakoda could have sought injunctive relief, specific performance, rescission or declaratory relief under the NDA it drafted.

Lakoda argues that a limitation of liability clause may not apply when the relying party acted in bad faith. This argument fails for several reasons. First, the jury was not instructed that it could disregard contract language upon a finding of bad faith. Second, Lakoda had not even raised the issue of bad faith when OMH moved for a directed verdict on the no damage clause.

Finally, as discussed *supra*, the jury's determination that OMH acted willfully and maliciously was made without the knowledge that Longfei stole OMH's designs..

4. Lakoda failed to justify the damages that were awarded by the jury.

As stated in the opening brief, Lakoda's summaries are inaccurate, do not accurately reflect the exhibits they are supposed to originate from, and these inaccuracies were used to inflate Lakoda's damages. Appellants' brief at 30-34.

No document showing the amount that Longfei was charging Lakoda or amount Longfei was charging TPD was ever produced despite numerous requests. Testimony was that Lakoda and TPD discussed whether TPD would have enough room on the product that he can make a profit from the quote that TPD was giving Lakoda or whether Lakoda would need to pay in addition. RP 77. No evidence was presented to show exactly how TPD was receiving profit.

Lakoda fails to explain the inconsistencies of their summaries in their response. The jury's damage award is not supported by sufficient and accurate evidence in the record and

Lakoda's damages should be reversed.

5. The trial court abused its discretion by redacting portions of Gerald Clancy's deposition.

There was sufficient relevancy for Clancy's perpetuation deposition testimony to be admitted. Clancy recalled producing the video in a prior deposition. CP at 622. Clancy agreed that the video shown at the perpetuation deposition was the same video he produced. CP at 623. The purpose of OMH offering the video was to prove that Clancy received a video and nothing more. RP 820, 1. 19-22. There would be no confusion to the jury if the video was played and Clancy's testimony was read.

It was OMH's intention that, once the video was authenticated, it could later be used by other witnesses to identify the person in the video as Geng Min (Peter). Although other witnesses could have identified Peter as the man marketing counterfeit OMH screeners to Mr. Clancy, they could not testify that Clancy received the video from Peter. RP 820-22.

Significantly, the Court reversed its ruling from the

previous day that e-mails Clancy received, including the email containing the video, were relevant and authenticated. RP 785-97.

After the video depicting Geng Min (Peter) testing knock-off screeners was excluded, Lakoda then called him to testify. RP 908. It was evident that Peter could not be called to testify by Lakoda if the jury could identify him in the video, if admitted. Peter then testified that he had never had email communications with Gerald Clancy, RP 977, that a former co-worker at Longfei had stolen his computer password to communicate with Mr. Clancy, RP 924-28, and that he had never seen the email containing the video. *Id.*

6. Lakoda fails to provide sufficient evidence to support the trial court's denial of a directed verdict on its trade secret claim.

The review of a ruling on a motion for a directed verdict is de novo with the appellate court applying the same standard as the trial court. *Chaney v. Providence Health Care*, 176 Wn. 2d 727, 732, 295 P.3d 728, 731 (2013). A directed verdict is appropriate if, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the

nonmoving party. *Id.*

It is well established that a plaintiff seeking to establish a trade secrets claim has the burden of proving that legally protectable secrets exist. *Petters v. Williamson & Associates, Inc.*, 151 Wn. App. 154, 164, 210 P.3d 1048, 1054 (2009) *citing* *Boeing Co. v. Sierracin Corp.*, 108 Wash.2d 38, 49, 738 P.2d 665 (1987). A trade secret is something that derives independent economic value, that is not generally known to, and not being readily ascertainable by other persons and ceases to exist once it becomes “generally known,” *Petters v. Williamson & Associates, Inc.*, 151 Wn. App. 154, 167-68, 210 P.3d 1048, 1055 (2009). A party alleging a trade secret must demonstrate that every necessary element of its trade secret claim is supported by evidence sufficient to permit a fair-minded jury to return a verdict in its favor. *Eco-Separator, Inc. v. Shell Canada, Ltd.*, 872 F.2d 427 (9th Cir. 1989).

The evidence produced in Lakoda’s case in chief was insufficient to persuade a rational fair-minded person that Longfei was Lakoda’s trade secret, if it was a trade secret at all.

Dale Ames was the only person to provide testimony

regarding trade secrets. Lakoda sites to only 10 pages of testimony regarding trade secrets in the over 1000 pages of trial record. Respondents Brief at 20. It is undisputed that TPD located the Longfei factory. RP 75. It is undisputed that Lakoda sent its purchase orders for OMH's product to TPD. RP 76. It is undisputed that Lakoda purchased products for OMH exclusively through TPD. RP 158, 207. TPD sold Lakoda all of the parts that went into the OMH screeners. RP 103. TPD billed Lakoda for all of the screeners produced. RP 402. Finally, Cindy Thompson, Lakoda's office manager, testified that the process and procedure of using TPD to locate manufacturers was the same as was used by Ames' former employer, Wintech. RP 363, 409.

OMH did not ask the court to weigh any evidence because no weighing of the evidence is necessary when the testimony states Lakoda worked exclusively with TPD. Even if the Longfei factory itself could be considered a trade secret, under Lakoda's trade secret theory, it was TPD's trade secret.

The fact that the parties entered into a non-disclosure agreement does not make everything disclosed between the

parties a trade secret. Ames admitted that OMH could have stopped using Lakoda at any time and that OMH could have walked out the door and found another factory, RP 33; May 15, 2014 RP 86, presumably with any knowledge or information gleaned from their relationship. Thus, the only trade secret that Lakoda could claim to own is the existence of the Longfei factory, which is clearly not a secret.

Lakoda is being less than forthright with this Court when it claims to be a “contract manufacturer.” Respondents’ Brief at 4. Lakoda does not actually manufacture anything. RP 66, l. 25 – 67, l.1. The customer decides which factory to use. RP 67, l. 13-16. The customer decides whether a product is manufactured in the U.S. or China. RP 67, l. 19-24. Peter finds the factory, communicates with the factory, understands the engineering, teaches the factory and communicates with the factory. RP 75, l. 9-17. Peter receives the purchase orders. RP 76, l. 23. Peter receives and disburses payments. RP 77, l. 1-2. Lakoda quotes through Peter. RP 76, l. 11-12.

TPD did everything with respect to Longfei. And because TPD did everything, the Longfei factory cannot be Lakoda’s

trade secret, if it is a trade secret at all.

7. The Court abused its discretion when it awarded attorney fees and costs to Lakoda.

Lakoda asks this tribunal to adopt the same flawed analysis, or lack of analysis, that the trial court applied in awarding attorney fees.

First, the trial court presumed without any evidence that the jury awarded nominal damages on the trade secret claim to avoid a duplication of the damages awarded on the breach of contract claim. This is pure speculation. Prior to reaching the damages on the breach of contract claim, the verdict form asked the jury to determine if there was a trade secret violation and, if so, the amount of damages attributable to the violation. CP 1039-40. The jury awarded \$1.00 for the trade secret claim, which compels a determination, without evidence to the contrary, that the jury found no damages stemming from the trade secret violation. *Id.* Further, the jury was not given an instruction on nominal damages. Therefore, the only presumption that can be drawn from the verdict, if any, is that the jury believed Lakoda's trade secret claim was valued at one

dollar. It is patently clear that the jury, as did Lakoda at trial, gave short thrift to trade secret claim.

Second, the trial court accepted that all aspects of the trial, including OMH's counter-claims, involved a common core of facts relating to Lakoda's trade secrets claim. The trial court allowed Lakoda to recover its fees in their entirety for defending OMH's claims, even after Lakoda had rested its case.

Next the trial court presumed that because the parties had signed a non-disclosure agreement, that any information exchanged from that point was a trade secret:

...the trade secret came when they signed the contract, and he told them where the Longfei factory is after they signed the nondisclosure agreement and then interfered with Lakoda's working with the Longfei factory and, in fact, went around them and started working with them, and they found it malicious and willful. I think these attorney fees are more than reasonable based on that.

RP June 27, 2014, pg. 20

The trial court made no attempt to discern what attorney fees related to trade secrets claim because it wrongly assumed

that everything that OMH and Lakoda did after the nondisclosure agreement was signed was a trade secret.

The Court then adopted Lakoda's completely arbitrary method of rounding the attorney's fees off at \$220,000 as "a very reasonable way" to determine the fees attributable to the trade secret claim.² In the end, the Court awarded \$231,441.78 of Lakoda's gross fees of \$290,140.50 for a nominal damage award on the trade secret claim. CP 1156, 1171.

The Lodestar method is the starting point for attorney fees. *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 846-47, 917 P.2d 1086, 1089 (1995). The trial court must determine the number of hours reasonably expended in the litigation. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn. 2d 581, 597, 675 P.2d 193, 203 (1983). The court must limit the Lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn. 2d 581, 597, 675 P.2d 193, 203 (1983).

²The Court added additional fees for bringing the motion for attorney fees as well as statutory costs.

Central to the calculation of attorney fees award is the purpose of the statute authorizing the fees; thus it is important to evaluate the purpose of the attorney fees provision and apply the statute in accordance with the purpose. *Brand v. Dept. of L&I*, 139 Wn.2d 659, 989 P.2d 1111 (1999). A judge must make specific findings or articulate specific reasons supporting the amount of attorney fees awarded. *Id.* (holding that the court erred in “rounding off” an attorney fee award to account for unproductive work). The trial court, instead of merely relying on the billing records of the plaintiff’s attorney, should make an independent decision as to what represents a reasonable amount for attorney fees. *Scott Fetzer Co. v. Weeks*, 122 Wn. 2d 141, 151, 859 P.2d 1210, 1217 (1993) quoting *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 744, 733 P.2d 208 (1987). When a number of actions are argued and only some of those allow for recovery of attorney fees, it would give the prevailing party an unfair benefit to award attorney fees for the entire case and attorney fees should be awarded only for those services related to the causes of action which allow for fees. *Boeing Co.*

v. Sierracin Corp., 108 Wn. 2d 38, 66, 738 P.2d 665, 682-83 (1987).

While the “common core of facts” doctrine may be used as a shield to prevent reduction of fees based on limited success of recovery, it cannot be used as a sword to recover attorney fees that are not otherwise covered by the trade secret act. *Pietrzyk v. Oak Lawn Pavilion, Inc.*, 329 Ill. App.3d 1043, 769 N.E. 2d 134 (2002).

The trial court did not do a Lodestar analysis. It took a “to the victor goes the spoils” approach. Although the Court stated that it reviewed all of the bills, there was no analysis of duplicate or non-productive work. There was no analysis of the time expended in defending OMH’s counterclaims, which consumed a majority of the trial. There was no analysis of which evidence over-lapped the various claims Lakoda asserted. Rather than conduct its own analysis, the Court accepted Lakoda’s analysis entirely. June 27, 2014 RP 20-21.

VI. CONCLUSION

OMH was prohibited a fair trial because of the trial court's abuse of discretion and errors.

For these reasons, OMH requests a new trial.

DATED this 26th day of August, 2015.

Respectfully submitted,




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CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on the 31st day of August, 2015, a true and correct copy of APPELLANTS' MOTION FOR EXTENSION OF TIME TO FILE OPENING BRIEF, to which this declaration is attached, was served by the method indicated below, and addressed to the following:

Kevin W. Roberts	<input type="checkbox"/>	U.S. Mail
Richard Wetmore	<input checked="" type="checkbox"/>	Hand Delivered
Dunn Black & Roberts	<input type="checkbox"/>	Overnight Mail
111 N Post Street, Suite 300	<input type="checkbox"/>	Fax: 455-8734
Spokane, Washington 99201	<input type="checkbox"/>	Email:

DATED: August ³¹~~26~~, 2015 _____



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