No. 86102-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

YANJUN WU and RICHARD LU, wife and husband and the marital community comprised thereof; and DEMANACO, LLC, a Washington limited liability company,

Petitioners,

vs.

APTLY TECHNOLOGY CORPORATION, a Washington Corporation

Respondent.

PETITION FOR REVIEW

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A. Identity of Petitioners

Petitioners are Yanjun Wu and Richard Lu, wife and husband, and DeManaCo, LLC.

B. Decision

Petitioners seek review of Division I's 5/19/25 opinion in Aptly Technology Corp. v. Yunjun Wu, Ricard Lu and DeManaCo, LLC, No. 86102-6-I ("Decision"). This Petition for Review is timely given the Court of Appeals' July 8, 2025 Order Denying Motion to Publish, as filed by Respondent Aptly. RAP 13.4(a).

C. Issues Presented for Review

1. Is Lying Bad Faith Under the UTSA?

Issue 1. Does lying under oath to avoid losing a claim under the Uniform Trade Secrets Act (UTSA) constitute bad faith for purposes of a fee award under RCW 19.108.040?

Issue 2. Is the appellate court free to substitute its own findings on the credibility of a witness for that of the trial court judge who presided over a multi-day bench trial?

2. Is a Party Permitted to Recover Lost Profits Based on Speculative Evidence?

Issue 3. Is the Best Evidence Rule for proof of lost profits under Larsen v. Walton Plywood Co., 65 Wn.2d 1, 390 P.2d 677 (1694) satisfied when a claimant relies on evidence of its most-profitable contracts for the measure of damages under a different, less-profitable contract?

D. Statement of the Case

1. Background

Aptly is owned by Xingsuo (Rosa) Li ("Li"). Aptly provided services to Microsoft in connection with the Bing Answers and Bing Knowledge Card projects. CP842, ¶1. Petitioner Juni Wu ("Wu") is married to Richard Lu ("Lu"). CP842, ¶2. DeManaCo is owned by Lu and Xiaoou (Olivia) Wang ("Wang"). DeManaCo provided services to Microsoft on the Bing Knowledge Card project and, through Biblioso Corporation, indirectly on the Bing Answers project. CP842, ¶3.

Aptly, Biblioso, DeManaCo and other vendors of contract workers (aka "resources") receive business from Microsoft in different ways. Microsoft typically engaged such companies under a Staffing Engagement where Microsoft interviewed, approved and supervised the individuals performing the work. Under a Staffing Engagement, an individual could work for Microsoft between 18-21 months but then must stop working for six months. Microsoft also hired vendors through Managed Services Contracts. Under a Managed Services Contract, a company like Aptly could provide five or more workers on a project, to be managed by Aptly rather than Microsoft. Those individuals could remain on the project through the end of the Managed Services Contract, which are typically three-years. CP842-3, partial ¶6.

Wu began working for Aptly as Vice President of Business Development in August 2019. CP843-4, ¶9.

It was Aptly's goal to obtain a Managed Services Contract for as many projects as possible. In March 2020, Li

and Wu sent a slide deck proposal for the same for the Bing Answers project to Microsoft manager Jitu Keshri (Ex. 39). Wu made the presentation to Mr. Keshri, who declined the proposal and explained Microsoft was not yet ready for such an agreement on the project with Aptly. Keshri later changed roles and left the Bing Answers project. Hu (Hunk) Chen took over those management responsibilities. CP845, ¶14.

2. Aptly's Alleged Trade Secrets Under the UTSA

Sometime in the Fall of 2020, Lu and Wang (who at the time was an employee of Biblioso) decided to form DeManaCo. Wu testified that she attended at least one meeting with Lu and Wang concerning DeManaCo's formation. A number of trial exhibits show that Wu sent certain documents from Aptly to Wang that appear to be associated with starting a company. CP845, ¶15.

Li testified that Exhibit 303, for example, is a file containing Aptly's gross margin calculator. The information in Exhibit 303 is almost entirely ascertainable from public records.

The trial court found that Exhibit 303 was not a secret. CP845-6, ¶16.

Exhibit 304 is another example of information Wu sent from Aptly to Wang, which contained a "step by step" document concerning how to create a Bing Knowledge Card. The testimony established the template was created and owned by Microsoft and made available to suppliers or prospective suppliers on the project. The evidence did not establish the "step by step" document to be a trade secret of Aptly. Instead, it was Microsoft's property that it did not keep secret. It was shared with possible vendors and used with open source software. Only Li testified it was Aptly's trade secret. All Microsoft witnesses testified that it was Microsoft's property and not kept secret. CP846, ¶17.

Additional unchallenged Findings include:

> Supplemental FF 34. The Defendants moved for an award of attorneys' fees, costs and expenses under the Uniform Trade Secrets Act (UTSA), RCW 19.108.040 and RCW 49.62.080. Trial Exhibit 304, which is bates stamped DEM 53293 through DEM 53299, was also attached as Exhibit 9 to the

Declaration of Bryan Graff in Response to Defendants' Motion for Summary Judgment. (Docket 154) In paragraph 3 of the Declaration of Xingsuo ("Rosa') Li in Response to Defendants' Motion for Summary Judgment (Docket 153), Ms. Li testified that "[t]his is a 'step by step' design template that Aptly created and used in its design process working on the Bing Knowledge Card project for Microsoft."[1] Ms. Li's declaration testimony about Aptly's alleged creation of this "step by step" design template was an essential piece of evidence that led to the Court denying the Defendants' motion for summary judgment on this issue, thereby causing that claim under the UTSA to go to trial.

Supplemental FF 35. At trial, the evidence established that Trial Exhibit 304 was created by, and was the property of Microsoft, not Aptly, and that the template depicted by Trial Exhibit 304 was not treated by Microsoft with any steps to keep it secret. In fact, Microsoft sent it to potential vendors to submit proposed work in order to see if they could perform under the parameters required by Microsoft. All witnesses so testified except Ms. Rosa Li, who continued to contend in her trial testimony that Trial Exhibit 304 was Aptly's trade secret. Based on Ms. Li's ownership of and position within Aptly, the Court finds that Rosa Li knew that Aptly had not created the "step by step" design template portrayed by Trial Exhibit 304. Thus, there was no factual basis for Aptly's or Rosa Li's claim that Trial Exhibit 304 was Aptly's trade secret, or for Aptly's claim that Defendants had misappropriated a trade secret when Juni Wu sent Trial Exhibit 304 to Xiaoou (Olivia) Wang.

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[1] CP280, ¶3.

(CP1170.) Judge Rogers reiterated these findings in his order denying Aptly's motion for reconsideration of the UTSA attorneys' fee award in DeManaCo's favor, adding in his handwriting that "[t]here was credible evidence that Microsoft did not keep the template confidential – moreover it was never Aptly's product –as testimony originally suggested. This is the same finding made at earlier proceedings." CP1199.

Next, based on these unchallenged Findings of Fact, the trial court entered Supplemental Conclusion of Law 23:

> The Court concludes that Aptly's, and specifically its owner Rosa Li's, testimony that Trial Exhibit 304 was a trade secret of Aptly was made in bad faith because there was no factual basis to support that claim. The Court also concludes that the Defendants have established their entitlement to an award of attorney's fees under RCW 19.108.040 for having to defend against that claim.

(C1174.)

3. Bing Answers Managed Services Contract

In or around September 2020, Chen told Wu that Microsoft was looking for more resources for Bing Answers. As mentioned, Aptly had already unsuccessfully pitched a

Managed Services Contract for the project. According to Chen, Wu initially said she would look into it and look for staffing, but then Wu recommended Biblioso for the Managed Services Contract. Wu also introduced Chen to the president of Biblioso. Chen testified that after Wu's introduction, Biblioso made a proposal to Microsoft for a Managed Services Contract on the Bing Answers project. Microsoft accepted Biblioso's proposal and Biblioso's Managed Services Contract on the project took effect in early January 2021. CP847, ¶20. Wu resigned from Aptly on or about March 10, 2021. CP847-8, ¶20.

The Court found that had Wu not steered the Managed Services Contract away from Aptly and to Biblioso, it is more probable than not that Aptly would have received the Managed Services Contract with Microsoft. CP848, ¶23.

4. Aptly's Historical Profits Under Staffing Engagements Do Not Provide Competent Proof of Lost Profits Under Managed Services Contracts

The trial court included within its FF6, at CP843, ll.11-13, the following underlined statement:

> For reasons discussed in the evidence, managed service engagements are more lucrative for and sought after or preferred by vendor companies like Aptly. Microsoft also prefers managed service engagements from time-to-time and where appropriate.

(Emphasis added.) This Finding rests on speculative evidence.

Li, owner of Aptly, testified in very general terms about the difference between Staffing Engagements and Managed Services Contracts at VRP1, pp.61-63. People (i.e., "resources") employed by Microsoft under a Staffing Engagement through a vendor like Aptly are directly interviewed by, work with and report to Microsoft personnel. Those resources face the significant limitation of being allowed to work for Microsoft for only 18 months, when they must be terminated and "take off" six months before being eligible to work again. Id., pp.61-62.

By comparison, Li testified that with Managed Services Contracts Aptly organizes the manpower and delivers the work.

> [W]e can provide, uh, various human resources and business models. For example, we can actually grab the manpower from China or India, offshore,

> and where the costs can be significantly lowered. And in the meantime, *our profit can go up*, and where it will look really good.

VRP1, pp.62-63, emphasis added.[2] Since Aptly's arrangement on the Bing Answer project was a Staffing Engagement (VRP1, p.60) that had more than five resources, Aptly was in the position in March 2020 to make the managed service proposal found at Exhibit 39, as discussed by Li. VRP1, pp.65-68.

What this testimony does not explain is why, given that Aptly had seven Managed Services Contracts under its belt by the time of Li's testimony (VRP1, p.63), that Aptly did not use at trial its profit experience with *Managed Services Contracts*

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[2] The word "can" denotes a mere possibility, constitutes speculation, and does not satisfy the more-probable-than-not standard. On page 2 of the Decision, fn.1, the appellate court incorrectly states that "[s]everal witnesses testified that managed service engagements are more profitable—and thus more desirable—than Staffing Engagements." Managed Services Contracts are clearly more profitable *for Microsoft* because it pays half the hourly rate for the same amount of labor. Only Li addressed the issue from a vendor standpoint, with Aptly's expert relying on her testimony to *assume* that vendor profits under a Staffing Engagement would be the same as under a Managed Services Contract. VRP7, pp.759-760.

as the best evidence to calculate its expected lost profits, instead choosing to make its damages pitch based solely on the gross revenues lost from Staffing Engagement contracts.[3]

The answer is simple: the gross revenue earned per "resource" on a Staffing Engagement where the contract employees work on site at Microsoft is $85.00 an hour. Exhibit 39, p.6, (onsite, right, bottom row), p.12, ($85 hourly rate).) By contrast it is half that, or $42.50 per hour, for offshore Managed Services Contract employees. Exhibit 278, p.2, bottom chart listing hourly rate of $42.50 for offshore resources and $85 for onshore resources; Wang, VRP8, pp.955-956, 967, Exhibit 480, p.3; Lu, VRP12, p.1295 (two offshore to one onshore resource cost ratio for Managed Services versus Staffing Engagement).

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[3] Aptly's expert Van Zandt admitted that his analytical "starting point is ultimately determining what's the difference on the revenue level between what would be expected but-for the circumstances that caused this economic damaging event and the actual revenue that had been received after that date." VRP7, p.745, ll.16-22.

The math easily demonstrates the fallacy of Li's testimony about the lucrative nature of the Managed Services Contracts. Using the example from Exhibit 278 of 173.3 work hours each month, an on-site Staffing Engagement employee produces gross revenues of $85 X 173.3 = $14,731 per month, while it takes two off-shore, Managed Services Contract resources to generate the same revenues. So on its face, Aptly's five Staffing Engagement employees were generating annual revenues of 5 times 12 months times $14,731, or $883,860, while the Managed Services Contract produces only half that, or $441,930.00. This makes Aptly's theoretical lost profits from a Managed Services Contract equal 26.2% times $441,930 or $115,785, which is half that of a Staffing Engagement. In sum, the trial court's FF6, at CP843, and the appellate court's footnote 1 on p.2 of the Decision, that Managed Services Contracts are more lucrative than Staffing Engagements is not supported by substantial evidence.

E. Argument

1. Review of the UTSA Issues Should Be Accepted Under RAP 13.4(b)(1), (2) & (4)

a. Lying to Avoid Dismissal on Summary Judgment Constitutes Bad Faith Under the USTA

It is an uncomfortable thing to call someone a liar, but the definition of "a lie" is quite straightforward:

> A false statement deliberately presented as being true; falsehood.

The American Heritage Dictionary, Second College Edition.

And, as the trier of fact (Judge Rogers) found in Supplemental FF#s 34-35:

> .... Ms. Li testified that "[t]his is a 'step by step' design template that Aptly created and used in its design process working on the Bing Knowledge Card project for Microsoft." . . .
>
> .... Based on Ms. Li's ownership of and position within Aptly, the Court finds that Rosa Li knew that Aptly had not created the "step by step" design template portrayed by Trial Exhibit 304. Thus, there was no factual basis for Aptly's or Rosa Li's claim that Trial Exhibit 304 was Aptly's trade secret, or for Aptly's claim that Defendants had misappropriated a trade secret when

> Juni Wu sent Trial Exhibit 304 to
> Xiaoou (Olivia) Wang.

CP1170. While Judge Rogers' findings took more words than the dictionary definition of a lie, there is no avoiding the conclusion that the trial court concluded that Li lied to avoid dismissal of Aptly's UTSA claim, and that based on that finding, she and Aptly had acted in bad faith. Supplemental CL 23, CP1174.

b. The Court of Appeals Erred by Substituting its Assessment of the Evidence for that of the Trier of Fact

The underlying facts are verities on appeal, and so is the trial court's credibility finding. Wells v. Employment Sec. Dept. of State of Wash., 61 Wn.App. 306, 314 n. 8, 809 P.2d 1386 (1991); State v. Teshome, 122 Wn.App. 705, 715, 94 P.3d 1004 (2004), *petition for review denied* 153 Wn.2d 1028 (2005) ("Credibility determinations are within the province of the trier of fact and may not be reviewed on appeal.").

In its Decision, the Court of Appeals recognized and attempted to apply the above standards, citing for instance

Burnside v. Simpson Paper Co., 66 Wn.App. 510, 526, 832 P.2d 537 (1992) for the principle that "[w]here there is conflicting evidence, it is not the role of the appellate court to weigh and evaluate the evidence." Decision, p.4. The appellate court reiterated these principles on p.5 of the Decision, but in doing so made a fundamental error:

> "Questions of credibility are left to the trier of fact and will not be overturned on appeal." State v. Boot, 89 Wn.App. 780, 791, 950 P.2d 964 (1998). Moreover, in conducting our review, we view the evidence in the light most favorable to the prevailing party, **here Aptly**. Scott's Excavating Vancouver, LLC v. Winlock Props., *LLC*, 176 Wn.App. 335, 342, 308 P.3d 791 (2013).

(Bold emphasis added.) The Court of Appeals' error is seen in the bolded text because **Petitioners** were the prevailing parties on Aptly's UTSA claim.

Yet, at pages 11-15 of the Decision, the Court of Appeals acted on its error by repeatedly viewing the evidence in the light most favorable to Aptly—the losing party under the UTSA—to change the finding that Rosa Li lied to the detriment

of the prevailing Petitioners. The Court of Appeals effectively acknowledges this on page 13 of its Decision:

> Addressing this issue, the trial court explained at the hearing on Defendants' motion for attorney fees that Li "must have known" exhibit 304 was not a trade secret because the step-by-step template "belonged" to Microsoft. Even so, Aptly's claim was not intentionally frivolous as required to establish bad faith. **To the contrary, Li testified** at trial that Microsoft and Aptly each contributed to the development of the template.

As the bolded text demonstrates, the appellate court chose to supplant its interpretation of Li's testimony for Judge Rogers' credibility and factual findings.

The hearing referenced above by the appellate court occurred on 5/5/23. Judge Rogers did indeed go into great detail at pages 17-18 of that hearing transcript to explain the bases for his credibility determination that Li did what the dictionary defines as a lie. While the entirety of his ruling needs to be reviewed within the Appendix, highlights include:

> [T[he evidence that [Exhibit 304] was a trade secret for Aptly--and I want to stress that was the original claim--really rested solely on the testimony

> of Rosa Lee. The defense moved for summary judgment just before the trial began, and Rosa Lee testified in her declaration of December 29th, 2022, that the trial exhibit was an Aptly trade secret. That's paragraph 3 of her declaration. And partly because of this testimony, I denied summary judgment[.]

5/5/23 Transcript, p.17, ll.12-19.

> But at trial, the evidence from every other witness, including Microsoft employees, was that 304 was actually a Microsoft project, and it was a trade secret, I guess, but Microsoft didn't keep it much of a secret. It freely gave it to any contractor willing to compete to create knowledge cards or other products.

Id., p.17, l.22-p.18, l.3.

> Given Ms. Lee's position as president, her extensive experience and knowledge of projects, I concluded that when she testified that Exhibit No. 304 was an Aptly trade secret, she must have known that the opposite was the truth. It was Microsoft's trade secret if it was anyone's trade secret. I want to be clear, I see no evidence to indicate that Aptly's counsel expected this. In fact, I think it was a surprise when that actually finally came out through Microsoft employees, Ms. Lee alone. But I find that it was without basis to claim that Exhibit No. 304 was an Aptly trade secret, so I award partial attorneys fees to the defense for addressing this at trial.

Id., p.18, ll.6-18. This was no passing reference by a trial court that a Court of Appeals is at liberty to choose to override, but a detailed explanation for why Judge Rogers concluded Li lied. By overruling Judge Rogers, the Court of Appeals erred by disregarding long standing rules on appellate review, justifying review by this Court under RAP 13.4(b)(1)&(2).

c. Unless Addressed by This Court, the Decision Threatens to Warp the Law on Bad Faith Under Washington's UTSA

While the Decision was not published, the Court of Appeals seriously considered Aptly's motion to do the same and required a response from the Petitioners. (6/12/25 Order Calling for an Answer.) Unpublished decisions are, however, easily found and routinely cited pursuant to GR 14.1.

As observed by Petitioners in their response, bad faith takes many forms, with the "failure" of the Washington State Legislature to provide a definition of that phrase in RCW19.108.010 actually empowering the courts with the discretion to police such conduct in whatever form it may

appear. As appellate courts generally recognize, the trial court is in the best position to identify such conduct given the inherently factual nature of the inquiry. Here, Aptly wanted to publish a decision holding that a party can lie to support its UTSA claim without being found to have acted in bad faith.

Superior Court Judge Jim Rogers disagreed. He was personally led to deny a motion for summary judgment by what he found after trial to have been intentionally-false testimony provided by Aptly's owner to support her company's UTSA claim. (5/5/23 Transcript, pp.17-18.) As a result, he exercised his discretion to hold Li's, and thus Aptly's testimony to constitute bad faith for purposes of RCW 19.108.040. He did so properly and correctly, in a manner completely consistent with CR 56(g), "Affidavits Made in Bad Faith."

In reversing Judge Rogers, the appellate court improperly weighed the evidence in the losing party's favor and said:

> Aptly also made a colorable argument in support of its misappropriation claim based on federal authority, which recognizes such a claim even

> when the asserted trade secret was created by a third party. In support of this argument, Aptly cited DTM Research, L.L.C. v. AT&T Corp., 245 F.3d 327, 333 (4th Cir. 2001), which holds that if a claimant possesses confidential information belonging to a third party and both parties "have undertaken to maintain its secrecy, the information might well still have value and therefore satisfy the definition of a trade secret."

Decision, p.14. Judge Rogers, however, explicitly rejected this argument, observing that Microsoft did not undertake to maintain Exhibit 304's secrecy, not only at 5/5/23 Transcript, p.18, ll.6-18, but also at length at p.20, l.15-p.21, l.11, in response to Aptly's argument at p.19-p.20, l.14. Just as importantly, Judge Rogers observed that Li's original argument was not that Exhibit 304 was Microsoft's trade secret, to which Aptly also had rights ala DTM Research, but rather "304 was an Aptly developed trade secret." 5/5/23 Transcript, p.17, 11.12-21. In other words, Li was relying on DTM Research as an after-the-fact justification of her bad faith conduct. The appellate court erroneously fell for that gambit.

In its successful arguments to the Court of Appeals, Aptly presented an analysis of a widely-cited standard for assessing bad faith under the UTSA first announced in California. In doing so, Aptly analyzes numerous cases citing that standard, but not the leading case that actually created it. In that manner, Aptly managed to avoid the hard truth that the cited objective/subjective standard for bad faith is merely a tool to be used in the more common cases that do not contain the obvious signs of bad faith found in a perjured declaration.

The lead decision for this line is Gemini Aluminum Corp v. California Custom Shapes, Inc., 95 Cal.Ap.4th 1249, 1250 (2002). In considering what constitutes bad faith under the UTSA, the Gemini Court referenced an unpublished federal decision:

> Stilwell Development, Inc. v. Chen (C.D.Cal. Apr. 25, 1989, No. CV86 4487 GHK) 1989 U.S. Dist. Lexis 5971 (Stilwell), a federal court [which noted that] the legislative history of section 3426.4 shows it is intended to "'allow[] a court to award reasonable attorney fees to a prevailing party in specified circumstances as a *deterrent* to *specious* claims of misappropriation ....'

Gemini, at p.1261. "The *Stilwell* court interpreted "bad faith" under section 3426.4 to require objective speciousness of the plaintiff's claim and its subjective misconduct in bringing or maintaining a claim for misappropriation of trade secrets." Id., 1261-62.

In discussing the subjective aspect of this analysis, the Gemini observed that:

> The timing of Gemini's action also raises an inference of subjective bad faith. "*Good faith*, or its absence, involves a factual inquiry into the plaintiff's subjective state of mind [citations]: Did he or she believe the action was valid? What was his or her intent or purpose in pursuing it? **A subjective state of mind will rarely be susceptible of direct proof; usually the trial court will be required to infer it from circumstantial evidence."** [Cite omitted.] " '[B]ad faith' means simply that the action or tactic is being pursued for an improper motive. Thus, if the court determines that a party had acted with the intention of causing unnecessary delay, or for the sole purpose of harassing the opposing side, the improper motive has been found, and the court's inquiry need go no further." [Cite omitted.]

Gemini, 95 Cal.App.4th at 1263 (emphasis added).

Put differently, when there is no direct proof of a party's state of mind, the trial court needs to ask the questions and

explore the nonexclusive list of indicators of improper motive listed in Gemini. However, when as here there is direct proof of Li's improper motive via her knowingly false testimony about Aptly's alleged creation and ownership of Microsoft's "Step-by-Step" software tool, there is no need to ask the question "did Rosa Li believe the action was valid" because we know from Judge Rogers' findings that she did not believe her own testimony to be true. Necessarily, then, Aptly was acting in bad faith. CR 56(g).

As Judge Rogers observed at pp.15-16 of his 5/5/23 ruling, "bad faith" is "really poorly defined" in the State of Washington. Judge Rogers was correct in exercising his discretion to conclude that lying in a sworn declaration constitutes bad faith for purposes of RCW 19.108.040. Because the Decision creates dangerous precedent—even if unpublished—that lying is not sufficient for such a finding, the Washington Supreme Court should accept review under RAP 13.4(b)(4) to address a recurring issue of not only state-wide

importance, but also of national significance given the *uniform* origin of the UTSA.

2. The Decision Repudiates the Underlying Lessons of Larsen on the Best Evidence Rule

This Court should accept review of the lost profits award to Aptly under RAP 13.4(b)(1)&(4) because of fundamental questions about the burden of proof born by a claimant in such a case, and because as applied here, both the trial and appellate court are permitting such an award under circumstances that dilute the Best Evidence Rule to the point where it is virtually meaningless.

To recover for a breach of contract, a plaintiff must prove it suffered damages that were proximately caused by the alleged breach. NW Independent Forest Mfrs. v. Dep't of Labor & Indus., 78 Wn.App. 707, 712, 899 P.2d 6 (1995). The same applies to tort claims. Weisert v. University Hosp., 44 Wn.App. 167, 173, 721 P.2d 553 (1986). When a party's alleged damages are lost profits:

> they are properly recoverable as damages when (1) they are within the contemplation of the parties at the time the contract was made, (2) they are the proximate result of defendant's breach, and (3) they are proven with reasonable certainty.

Larsen v. Walton Plywood Co., 65 Wn.2d 1, 15, 390 P.2d 677 (1964). As in Larsen, the focus here is on (3), for Aptly failed to prove lost profits "with reasonable certainty or conversely, damages which are remote and speculative cannot be recovered." Id., at p.16.

The appellate court addresses Petitioners' argument related to Larsen in some depth at Decision pp.8-13. That court failed to comprehend the flaws in the evidence presented by Aptly, however, because on page 9 it uncritically wrote that "the trial court relied on historical profits and expert testimony—the two types of evidence Larsen characterizes as 'best.'"

What both the appellate and trial courts failed to recognize was that Aptly relied on inapplicable historical profits from a Staffing Engagement, which produced gross revenues of

$85 per hour per contractor, to "prove" its lost profits under the entirely-different Managed Services Contract, that produced gross revenues at the rate of $42.50 per hour. Aptly did this even though Larsen *requires* that the "Plaintiff must produce the best evidence available", id. at 16, and even though Aptly had seven Managed Services Contracts under its belt by the time of Li's testimony upon which to base a truthful presentation of its alleged lost profits. (VRP1, p.63.) Aptly did this—or rather failed to do what it was supposed to do—even though it had Exhibit 100 available to it, which demonstrated that DeManaCo was working under the Bing Answers contract at that $42.50 per hour rate.

The Court of Appeals attempts to distinguish this situation at Decision p.10 be saying that in Larsen the award based on the experts testimony was reduced, at 65 Wn. at 19-21, because it was based on hypothetical sales of high-profit specialty items that had never been achieved, while Aptly relied on historical profits data. The reality, however, is that Aptly

relied on proof of the past profits it earned under a Staffing Engagement, when it could never achieve such profits under the Managed Services Contract model. To put it bluntly, Aptly relied on evidence of lost profits that was false on its face, by contrast to Larsen's experts, who merely engaged in hopeful speculation. Unfortunately, in this regard Aptly's behavior is entirely consistent with Li's knowingly-false testimony regarding her company's alleged trade secrets. This Court should accordingly accept review under RAP 13.4(b)(1)&(4) and either remand for a new trial, as offered in Larsen at p.21, or alternatively offer a remitted judgment in the amount of $162,003.42 as calculated at Brief of Appellants, pp.61-69.

3. Petitioners Should Be Awarded Fees on Appeal

Given the appellate court's reversal of Petitioner's attorney fee award under the UTSA, the concluding section of the Decision at p.15 denying Petitioner's their fees on appeal seems like dicta, dicta which was particularly unnecessary given Petitioner's briefing requesting fees at Brief of

Appellants, pp.69-70. Petitioners accordingly reiterate their request for attorney fees on appeal pursuant to RCW 19.108.040 because, as Judge Rogers found, Aptly's claim of misappropriation of the trade secrets allegedly encompassed by Exhibit 304 was made in bad faith.

F. Conclusion

Petitioners ask the Court to accept review of and reverse the Court of Appeals' decision on the meaning of bad faith for purposes of awarding attorneys' fees under RCW 19.108.040 pursuant to RAP 13.4(b)(1)&(2) because the appellate court improperly reversed the trial court's credibility determinations and findings of fact. Petitioner further requests review and reversal of the same under RAP 13.4(b)(4) because lying under oath to preserve a baseless trade secret claim simply must be bad faith for the sake of a morally-sound UTSA.

Finally, Petitioners ask this Court to accept review and reverse the Decision with respect to the lost profits award under

RAP 13.4(b)(1)&(4) to preserve the ongoing relevance and validity of Larsen and the Best Evidence Rule.

I hereby certify that this Petition contains 4,994 words in compliance with RAP 18.17.

DATED this 7th day of August, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 2025, I caused to be delivered the foregoing PETITION FOR REVIEW to the following parties via the Washington Appellate Portal electronic email service system:

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Dated this 7th day of August, 2025, at Seattle, Washington.

/s/ William A. Kinsel
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APPENDIX

1. May 19, 2025 Unpublished Opinion
2. Aptly's Motion to Publish
3. DeManaCo's Response to Motion to Publish
4. Order on Motion to Publish
5. Uniform Trade Secret Act
6. Rosa Li's Declaration
7. Trial Exhibit 304
8. May 5, 2023 Hearing Transcript

FILED
5/19/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

APTLY TECHNOLOGY CORPORATION, a Washington corporation, Respondents, v. YUNJUN WU and RICHARD LU, wife and husband and the marital community comprised thereof, Appellants.	No. 86102-6-I DIVISION ONE UNPUBLISHED OPINION

FELDMAN, J. — Yanjun (Juni) Wu, Qi (Richard) Lu, and DeManaCo, LLC (Defendants) appeal from the trial court's final judgment in favor of Aptly Technology Corporation (Aptly) on its breach of contract and tortious interference with business expectancy claims. Defendants also appeal, and Aptly cross-appeals, from the trial court's ruling awarding attorney fees in favor of Defendants on one of Aptly's misappropriation of trade secrets claims under Washington's Uniform Trade Secrets Act (UTSA). We reverse in part the award of attorney fees, but otherwise affirm.

I

Aptly is an information technology consulting company that provides software development and design services to Microsoft Corporation. Xingsuo

(Rosa) Li, the owner of Aptly, hired Wu as Vice President of Business Development. Wu's responsibilities included selling consulting services to Microsoft. Wu is married to co-defendant Lu, who owns a consulting company called DeManaCo, LLC together with co-owner Xiaoou (Olivia) Wang. During the relevant time period, Wang was an employee of another company that provided consulting services to Microsoft, Biblioso, at the same time she co-owned DeManaCo. Like Aptly, DeManaCo also provided consulting services to Microsoft; it did so as a subcontractor of Biblioso.

While Wu was managing one of Aptly's staffing engagements[1] at Microsoft, Aptly suspected her of improper practices in violation of her employment agreement. Following an investigation, Aptly brought several claims against Defendants for diverting consulting work from Aptly to DeManaCo through Biblioso. The complaint included breach of contract claims, tortious interference with business expectancy claims, and misappropriation of trade secrets claims. The misappropriation claims were based on Wu's transmission to DeManaCo of (a) Aptly's "gross margin calculator," (b) a "step-by-step template" Aptly used for creating work product, and (c) sample communications between Aptly and Microsoft.

[1] The record below establishes that consulting companies provide services to Microsoft under two possible engagement models: "staffing engagements" and "managed service engagements." In staffing engagements, Microsoft interviews, approves, and supervises individuals performing work. The individuals may perform work for Microsoft for up to eighteen months before taking a mandatory six-month break pursuant to Microsoft's policy. In managed service engagements, a consulting company manages a fully outsourced service without Microsoft's oversight or approval of individual resources, and the individuals working on the managed service are not subject to the eighteen month maximum. Several witnesses testified that managed service engagements are more profitable—and thus more desirable—than staffing engagements.

The matter proceeded to a bench trial. In an oral ruling following the trial, the trial court largely decided the matter in Aptly's favor. Relevant here, the court found Microsoft approached Wu to start a managed service with Aptly, but Wu directed Microsoft to Biblioso instead. The court also found that, around this same time, Lu (Wu's husband) created DeManaCo with Wang (a Biblioso employee). After Microsoft awarded the managed service to Biblioso, Biblioso immediately subcontracted the service to DeManaCo. The court thus concluded Wu breached her Employee Agreement with Aptly. The trial court also concluded Wu and DeManaCo had tortiously interfered with Aptly's business relationship with Microsoft. The court determined Aptly was entitled to damages for lost profits over a three-year period from January 2021, when Defendants' wrongful conduct began, to the end of 2023, when the managed service was expected to end. The court subsequently entered written findings of fact and conclusions of law awarding Aptly damages totaling $788,974.76.

Defendants then filed a CR 59 motion to reopen the trial, for reconsideration and/or amendment of the findings of fact and conclusions of law arguing, among other things, that new evidence was available that affected the calculation of damages. The trial court granted the motion with regard to the end date of the contract with Microsoft and denied the motion as to all other issues. The court then amended and supplemented the findings of fact and conclusions of law to reflect its new finding that the time frame for which to calculate lost profits was shorter than was previously found. The trial court reduced its damages award to $633,044.94 to reflect the shortened period of lost profits.

While the trial court largely decided the breach of contract and tortious interference with business expectancy claims in Aptly's favor, it ruled in favor of Defendants on Aptly's misappropriation of trade secrets claims. The trial court dismissed Aptly's misappropriation claim related to the "step-by-step template" in response to Defendants' motion to dismiss the claim at the close of Aptly's evidence at trial. Then, following trial, the court rejected the two remaining misappropriation claims. Defendants subsequently filed a motion for an award of attorney fees for their successful defense against these claims, which the trial court granted solely with regard to the misappropriation claim relating to the step-by-step template. Aptly filed a motion for reconsideration of the fee award, which the trial court denied.

Defendants appeal. Aptly cross-appeals.

II

Defendants argue the trial court erred by awarding Aptly damages based on its breach of contract and tortious interference with business expectancy claims. More specifically, they broadly attack the trial court's findings and conclusions regarding causation and proof of damages.

Our review of these issues is deferential to the trial court's fundamental role as fact-finder. "Where there is conflicting evidence, it is not the role of the appellate court to weigh and evaluate the evidence." *Burnside v. Simpson Paper Co.*, 66 Wn. App. 510, 526, 832 P.2d 537 (1992). Rather, our "role is simply to determine whether substantial evidence supports the findings of fact and, if so, 'whether the findings in turn support the trial court's conclusions of law.'" *In re Marriage of*

Greene, 97 Wn. App. 708, 714, 986 P.2d 144 (1999) (quoting *Org. to Preserve Agric. Lands v. Adams County*, 128 Wn.2d 869, 882, 913 P.2d 793 (1996)). "Questions of credibility are left to the trier of fact and will not be overturned on appeal." *State v. Boot*, 89 Wn. App. 780, 791, 950 P.2d 964 (1998). Moreover, in conducting our review, we view the evidence in the light most favorable to the prevailing party, here Aptly. *Scott's Excavating Vancouver, LLC v. Winlock Props., LLC*, 176 Wn. App. 335, 342, 308 P.3d 791 (2013).

Applying this deferential standard of review, Defendants' arguments easily fail, as substantial evidence supports the trial court's findings and those findings, in turn, support the trial court's conclusions of law.[2]

A

Starting with Defendants' causation arguments, lost profits are recoverable as damages "when . . . they are the proximate result of defendant's breach." *Tiegs v. Watts*, 135 Wn.2d 1, 17, 954 P.2d 877 (1998). There must be "certainty as to the fact that damage resulted from defendant's breach." *Id*. at 18. Addressing this requirement, the trial court ruled, "Wu's actions by diverting work to Biblioso proximately caused the chain of events that led to Biblioso being awarded the Managed Service Contract for Bing Answers." In its amended findings of fact and

[2] While Defendants also challenge the trial court's ruling denying in part their motion to dismiss Aptly's claims under CR 41(b)(3), where, as here, a court denies a CR 41(b)(3) motion and the claim proceeds, "appellate review is limited to whether substantial evidence supports the trial court's findings and whether the findings support its conclusions of law." *In re Dep. of Schermer*, 161 Wn.2d 927, 940, 169 P.3d 452 (2007). We therefore focus on the trial court's findings and conclusions as indicated in the text above. Defendants also challenge the trial court's order denying their motion for reconsideration following trial. We review that ruling "for abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *River House Dev. Inc. v. Integrus Architecture, PS*, 167 Wn. App. 221, 231, 272 P.3d 289 (2012).

conclusions of law, the court likewise concluded, "Wu's breach of her Employee Non-Disclosure Agreement legally and proximately caused damage to Aptly in the form of past lost profits."

Substantial evidence supports the trial court's causation findings. In March 2020, Wu and Li sent Microsoft a proposal to convert Aptly's existing Bing Answers staffing engagement to a managed service. Several months later, the Microsoft lead for Bing Answers, Hu (Hunk) Chen, expressed interest in moving forward with the managed service Aptly proposed. He testified that he asked Wu, then an employee of Aptly, how to set up the managed service. He further testified that when he sought to expand the project, he only contacted one consulting company—Aptly—explaining, "I used to work only with Aptly, so [I would] contact only Aptly." Instead of recommending a managed service engagement with Aptly as requested by Microsoft, Wu directed Chen to a competitor, Biblioso. Testimony at trial established that Microsoft decided to engage Biblioso based on Wu's recommendation. Shortly after Wu set up the introduction to Biblioso, Microsoft entered into a managed service agreement with Biblioso for the Bing Answers project. Biblioso then sub-contracted the project to DeManaCo, the company co-owned by Wu's husband.

Additional evidence at trial also shows Aptly would have been awarded the engagement but for Wu's interference, when Microsoft management expressed displeasure with the quality of Biblioso's work and indicated it would cancel the managed service and return to working exclusively with Aptly unless Biblioso improved. An e-mail to Defendants and Biblioso stated:

> I always emphasize vendor quality is important. If I still receive just-so-so feedback on current vendor team, I won't grow the managed service and move back to st[a]ff mode. It is easy for me to choose Aptly because they already prove the vendor quality in history. Aptly already propose[d] the managed service mode to me.

As the e-mail indicates, in the absence of Wu's interference, Microsoft would have continued working with Aptly.

The trial court also found Wu was acting as an agent of DeManaCo when she steered the Bing Answers contract away from Aptly in January 2021. The record shows that in the weeks before Biblioso began the managed service, Wu sent Wang documents Aptly used in its work with Microsoft, including an internal gross margin (profitability) calculator for determining the pricing of consulting contracts, a step-by-step template consulting companies used to create work product for Microsoft, and several sample presentations for communicating effectively with Microsoft. Meanwhile, Wang and Lu set up DeManaCo. As soon as the service began in January 2021, Biblioso executed a sub-contracting agreement with DeManaCo. The trial court summarized its consideration of this issue by stating, "[t]here is just a great deal of circumstantial evidence that persuades me, as the Finder of Fact, at this time Juni Wu was acting as Demanaco's agent and for its benefit at the time she steered the contract away on the Bing Answers project."

Trial testimony also established that Aptly's opportunity to provide a managed service to Microsoft was lost as a result of Defendants' conduct because Microsoft did not have the budget to hire both companies. Despite Aptly's renewed attempt in March 2021 to provide a managed service after Defendants'

interference in January, Microsoft "did not consider their proposal because at the time we simply didn't have any more budget to accommodate another new managed service provider." Consequently, as expert testimony confirmed, "starting January 2021, we see that Aptly's revenue stream in connection with the Bing Answers Project fell off fairly precipitously . . . all the way down to zero." Thus, substantial evidence supports the finding that Aptly's lost profits were the proximate result of Wu's conduct.

The foregoing testimony supports the trial court's findings that but for Wu's introduction of Biblioso to fulfill the managed service contract, Microsoft would have hired Aptly for the service. The trial court concluded, "had Juni Wu not steered the contract . . . from Aptly to Biblioso, it is more probably [than] not true that Aptly would have received the contract." The trial court also found, "had Microsoft found Biblioso was not continuing to perform at the standard required . . . Aptly might have received the Managed Service Contract." Contrary to Defendants' argument, substantial evidence supports the trial court's determination that Aptly's lost profits were the proximate result of Defendants' improper conduct.

B

Turning to Defendants' arguments regarding proof of damages, Defendants claim Aptly did not establish its damages with reasonable certainty. In so arguing, Defendants rely heavily on our Supreme Court's opinion in *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 390 P.2d 677 (1964). Defendants' arguments are unpersuasive, as is their reliance on *Larson*.

As *Larsen* confirms, "The usual method of proving lost profits is from profit history." *Id.* at 16. Addressing such a damages methodology, the court noted:

> A measuring stick, whereby damages may be assessed within the demarcation of reasonable certainty, is sometimes difficult to find. Plaintiff must produce the best evidence available and if it is sufficient to afford a reasonable basis for estimating his loss, he is not to be denied a substantial recovery because the amount of the damage is incapable of exact ascertainment.

Id. (internal quotation marks omitted). The court added:

> A reasonable method of estimation of damages is often made with the aid of opinion evidence. Experts in the area are competent to pass judgment. So long as their opinions afford a reasonable basis for inference, there is departure from the realm of uncertainty and speculation. Expert testimony alone is a sufficient basis for an award for loss of profits.

Id. at 17. And the court also noted, "damages which are remote and speculative cannot be recovered." *Id.* at 16.

Substantial evidence supports the trial court's damages award. The trial court correctly noted, as *Larsen* confirms, "damages need only be reasonably ascertainable." *See id*. The court then explained it accepted "in part" the analysis of both Aptly's and Defendants' damages experts. The trial court "looked extensively at Exhibit 45," which summarized Aptly's 2019-22 revenues on Bing Answers staffing engagements, and also considered the testimony of both Aptly's and Defendants' experts. Thus, the trial court relied on historical profits and expert testimony—the two types of evidence *Larsen* characterizes as "best."

Defendants claim the evidence upon which the trial court relied was not "the best evidence available" and, thus, its damages award is "properly reversed." Defendants' argument is premised on our Supreme Court's statement in *Larsen*,

quoted above, that "Plaintiff must produce the best evidence available." 65 Wn.2d at 16. Their reliance on *Larsen* is misplaced. The court in *Larsen* reduced the lost profits award because the experts there had relied on a lost profits analysis for a business that was merely "hypothetical," as the business never successfully operated. *Id.* at 3-5. Here, unlike *Larsen*, Aptly was able to furnish historical profits, and such evidence is, in the words of *Larsen*, "the usual method of proving lost profits." *Id.* at 16. Thus, *Larsen* does not support Defendants' argument.

Defendants also argue the trial court should have used DeManaco's subcontracting agreement with Biblioso as a better estimate of the revenue Aptly would have received from Microsoft had Defendants not diverted the engagement. Addressing this argument in Defendants' unsuccessful motion for reconsideration, the trial court explained:

> [A]ll parties had a full and fair opportunity to present their evidence. Ex 100 was not at the center of the case during the trial. A damages analysis was presented by plaintiff, and defendants critiqued it. The Court will not consider a new damages analysis now. The Court considered the trial evidence and did so with great care, understanding the stakes at hand.

Since we do not review credibility determinations on appeal and substantial evidence supports the trial court's analysis, and because "Civil Rule 59 does not permit a [party], finding a judgment unsatisfactory, to suddenly propose a new theory of the case" (*Eugster v. City of Spokane*, 121 Wn. App. 799, 810, 91 P.3d 117 (2004)), we reject this argument.

Lastly, Defendants assert several additional arguments attacking the trial court's damages analysis. They claim, for example, that the trial court inflated the Bing Answers annual revenue, erred by using the value of Aptly's historical staffing

engagements to calculate lost profits, erroneously relied on "contracted gross revenue" instead of actual invoiced revenue, and awarded a "double recovery." These arguments are intensely factual and ignore the applicable standard of review. We have carefully reviewed the entire record alongside Defendants' arguments and Aptly's responses. While there is testimony supporting the contentions of both sides, the trial court accepted the testimony presented by Aptly, which supports the findings of fact to which error is assigned. Those findings, in turn, support the trial court's conclusions. Since we do not retry disputed issues of fact on appeal, we affirm the trial court's damages analysis in addition to its causation analysis.

III

In its cross-appeal, Aptly argues the trial court abused its discretion in awarding attorney fees in favor of Defendants for their defense against the misappropriation of trade secrets claim relating to the step-by-step template. Defendants, in turn, argue all three of Aptly's misappropriation claims were made in bad faith and, as a result, the trial court should have awarded attorney fees in their favor on all three claims, not solely the claim related to the step-by-step template. We agree with Aptly and disagree with Defendants

Addressing Aptly's misappropriation claim regarding the step-by-step template, the trial court ruled:

> [T]he Court hereby GRANTS IN PART Defendants' motion for attorneys' fees, but no costs or expenses, in the amount of $68,516.50 under RCW Chapter 19.108 with respect to Aptly's UTSA cause of action asserting the factually baseless claim that Trial Exhibit 304 belonged to and was Aptly's trade secret. The Court concludes that because that claim, along with the testimony of Ms.

> Rosa Li that supported it, was factually baseless, Aptly made that claim of misappropriation in bad faith for purposes of RCW 19.108.040.

We review this ruling for abuse of discretion. *Thola v. Henschell*, 140 Wn. App. 70, 89, 164 P.3d 524 (2007). Relevant here, a trial court "abuses its discretion if its ruling is based on an erroneous view of law or on a clearly erroneous assessment of the evidence." *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 530, 20 P.3d 447 (2001).

Washington's UTSA authorizes trial courts to grant attorney fees in favor of a prevailing party "[i]f a claim of misappropriation is made in bad faith." RCW 19.108.040. Neither the UTSA nor any Washington appellate court defines the phrase "bad faith" as it applies to UTSA claims. The parties' briefing presents several possible definitions. Aptly notes, for example, that a Washington court defined "bad faith" in an analogous context in *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 929-30, 982 P.2d 131 (1999). *Rogerson* reversed an attorney fee award based on the equitable grounds of a party's "bad faith" relating to a sheriff's sale of a lessee's equipment, concluding that "[b]ringing a frivolous [claim] is not enough, there must be evidence of an intentionally frivolous claim brought for the purpose of harassment." *Id.* at 929 (citing *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 267, 961 P.2d 343 (1998) (internal quotations omitted)).

Both Aptly and Defendants also cite to California case law defining the phrase "bad faith" for purposes of its trade secrets act, which requires both objective speciousness of the claim and subjective misconduct by the plaintiff in making the claim. *Gemini Alum. Corp. v. Cal. Custom Shapes, Inc.*, 95 Cal. App.

4th 1249, 116 Cal. Rptr. 2d 358 (2002). Similar to our Supreme Court's definition of "bad faith" in *Rogerson*, California courts have held that the subjective misconduct prong of this test may be established "by evidence that appellants intended to cause unnecessary delay, filed the action to harass respondents, or harbored an improper motive." *FLIR Sys., Inc. v. Parrish*, 174 Cal. App. 4th 1270, 1278, 95 Cal. Rptr. 3d 307 (2009) (citing *Gemini*, 95 Cal. App. 4th at 1261). This and other definitions of "bad faith" cited by the parties share a common feature: something more than failing to establish the elements of the claim is required, and bad faith is found where a party intentionally asserted a frivolous claim for an improper purpose, such as unnecessary delay or harassment.

When asked at oral argument to identify evidence of bad faith, Defendants stated Li falsely claimed in a sworn declaration that Aptly "created" the step-by-step template. Addressing this issue, the trial court explained at the hearing on Defendants' motion for attorney fees that Li "must have known" exhibit 304 was not a trade secret because the step-by-step template "belonged" to Microsoft. Even so, Aptly's claim was not intentionally frivolous as required to establish bad faith. To the contrary, Li testified at trial that Microsoft and Aptly each contributed to the development of the template. Consistent with Li's testimony, a Microsoft employee testified that although Microsoft developed the software behind the template, the reason it hired Aptly (and other consulting companies) was to design the content *collaboratively*. In addition, Wu e-mailed the step-by-step template to Biblioso the day after DeManaCo was formed, supporting Aptly's reasonable belief that such conduct was a misappropriation of a confidential Aptly work product.

Aptly also made a colorable argument in support of its misappropriation claim based on federal authority, which recognizes such a claim even when the asserted trade secret was created by a third party. In support of this argument, Aptly cited *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 333 (4th Cir. 2001), which holds that if a claimant possesses confidential information belonging to a third party and both parties "have undertaken to maintain its secrecy, the information might well still have value and therefore satisfy the definition of a trade secret." Testimony as to the confidentiality of the template was mixed at trial, but a Microsoft employee testified the template was confidential. Because the record establishes a tenable basis for the claim, and there is no evidence of improper motive on the part of Aptly, the trial court abused its discretion in ruling that the misappropriation claim relating to the step-by-step template was made in bad faith.

For similar reasons, we affirm the trial court's denial of Defendants' motion for attorney fees related to their defense of the two other misappropriation claims. In its ruling on attorney fees for the other claims, the trial court noted "there was at least a basis for the [margin calculator] claim" and the claim based on the sample communications "was not in bad faith." The record supports the trial court's determination. Evidence at trial established the margin calculator was available only to Aptly employees and the sample communications were "highly confidential" to Aptly and were marked with instructions "please do not share," yet Wu transmitted the materials to Defendants and her personal e-mail at the same time DeManaCo was created. Nor is there any evidence as to these two misappropriation claims that Aptly asserted an intentionally frivolous claim for the

purpose of harassment or any other improper purpose. Because there was a factual basis for the underlying claims as to the gross margin calculator and sample communications, and no evidence of improper motive on the part of Aptly, the trial court's ruling denying fees related to those claims was not an abuse of discretion.

IV

Lastly, Defendants claim they are entitled to an award of attorney fees on appeal under RCW 19.108.040. RAP 18.1 addresses attorney fees on appeal and provides that the party seeking appellate fees "must" devote a section of its opening brief to the request for the fees or expenses. RAP 18.1(b). Requests that do not comply with this directive are properly denied. *Osborne v. Seymour,* 164 Wn. App. 820, 866, 265 P.3d 917 (2011) (compliance with RAP 18.1(b) is mandatory). Here, Defendants failed to devote a section of their opening brief to the request. Because Defendants did not comply with RAP 18.1(b), we deny their request for attorney fees on appeal.

Affirmed in part, reversed in part.

Feldman, J.

WE CONCUR:

Coburn, J.

, ACJ

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

YANJUN WU and RICHARD LU, wife and husband, and the marital community comprised thereof; and DEMANACO, LLC, a Washington limited liability company, Appellants, v. APTLY TECHNOLOGY CORPORATION, Respondent.	NO. 861026-I **MOTION TO PUBLISH OPINION**

Pursuant to RAP 12.3(e), Aptly Technology Corporation ("Aptly") moves the Court to publish its May 19, 2025, Unpublished Opinion ("Opinion").

1. Movant's Interest.

Aptly is a party (Respondent and Cross-Appellant) herein.

2. Reasons for Believing Publication is Necessary.

As the Opinion states on Page 12, neither Washington's Uniform Trade Secrets Act ("UTSA") nor Washington appellate court decisions have defined the phrase "bad faith" as applied to UTSA claims and RCW 19.108.040. In the Opinion, at Page 13, the Court recognizes that "something more than failing to establish the elements of the claim is required, and bad faith is found where a party intentionally asserted a frivolous claim for an improper purpose, such as unnecessary delay or harassment."

This articulated standard is important to ensure that a claimant is not discouraged from pursuing a good faith claim under the UTSA by the possibility of an adverse attorney's fee award under RCW 19.108.040. The Opinion will be helpful to (1) UTSA claimants, (2) defendants who successfully defend UTSA claims when determining whether to request an award of attorney's fees under RCW 19.108.040, and (3) courts applying Washington law in ascertaining the meaning of "bad faith" in the

UTSA context and determining motions for attorney's fees under RCW 19.108.040.

3. The Opinion Determines an Unsettled Question of Law.

As stated above, the Opinion determines an unsettled question of law in articulating a standard for the phrase "bad faith" in the context of UTSA claims and RCW 19.108.040.

4. Alternatively, the Opinion Clarifies an Established Principle of Law.

It is an established principle of law under RCW 19.108.040 that a court may award reasonable attorney's fees to a prevailing party if a claim of misappropriation is made in "bad faith." Alternatively, if the Opinion does not determine an unsettled question of law as set forth above, the Opinion clarifies an established principle of law by articulating a standard by which "bad faith" will be found.

5. The Opinion is of General Public Interest or Importance.

The UTSA is to be applied and construed "to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it." RCW 19.108.910. Prior to this Opinion, the phrase "bad faith" under the UTSA has not been defined or explained by the Legislature or by Washington appellate court decisions. The standard articulated by the Court under which bad faith will be found under RCW 19.108.040 furthers the purpose of RCW 19.108.910. The standard articulated in the Opinion is consistent with definitions of "bad faith" established by the courts of sister states that have enacted versions of the UTSA. As the Court recognized, the articulated standard is a "common feature" of such definitions of "bad faith." (Opinion at 13.)

6. The Opinion is Not in Conflict with a Prior Opinion of the Court.

As discussed above, no prior Washington appellate court decision has previously defined "bad faith" in the context of UTSA claims and RCW 19.108.040 or articulated a standard by which "bad faith" will be found for purposes of awarding attorney's fees to a prevailing party under the statute. Washington citizens, litigants, attorneys and trial judges should have the benefit of the Opinion.

Pursuant to RAP 18.17, I certify that this motion contains 533 words, in compliance with the Rules of Appellate Procedure.

DATED this 30th day of May, 2025.

By */s/ Bryan C. Graff*

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury and the laws of the State of Washington that, on the date indicated below, I caused service of true and correct copies of the foregoing using the Washington State Appellate Courts' Electronic Filing Portal, on counsel for Appellant, as noted, at the following addresses:

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May 30, 2025 - 10:36 AM

Transmittal Information

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Appellate Court Case Title:	Yanjun Wu, et ano, App/Cross-Res v. Aptly Technology Corp., Res/Cross-App

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No. 86102-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

YANJUN WU and RICHARD LU, wife and husband and the marital community comprised thereof; and DEMANACO, LLC, a Washington limited liability company,

Appellants/Cross-Respondents

vs.

APTLY TECHNOLOGY CORPORATION, a Washington Corporation

Respondent/Cross-Appellant.

APPELLANTS' RESPONSE TO MOTION TO PUBLISH

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I. INTRODUCTION

Appellants/Cross-Respondents Yanjun Wu, Richard Lu and DeManaCo, LLC submit this response to Aptly's Motion to Publish pursuant to the Court's June 12, 2025 Order requesting the same.

II. RESPONSE

There is no doubt that the answer to the question of what "bad faith" means in the context of the UTSA and RCW 19.108.040 is an important and unsettled question of law in Washington. This Court's statement at page 13 of its Decision does not, in the opinion of the undersigned, accomplish the task of answering that question. There is and was, for instance, no dispute that "something more than failing to establish the elements of the claim is required" to establish bad faith.

Quite simply, bad faith takes many forms. And as appellate courts generally recognize, the trial court is in the best position to identify such conduct given the inherently factual nature of the inquiry. Here, Aptly would like published a

decision that it thinks limits "bad faith" to *only* "where a party intentionally asserted a frivolous claim for an improper purpose, such as unnecessary delay or harassment." Decision, p. 13. Superior Court Judge Jim Rogers disagreed. He was personally led to deny a motion for summary judgment by what he found after trial to have been intentionally-false testimony provided by Aptly's owner to support her company's claim under the UTSA. He exercised his discretion to hold that testimony to constitute bad faith for purposes of RCW 19.108.040. He did so properly and correctly. This Court erred by reversing that judgment.

III. CONCLUSION

Because this Court's Decision improperly limits the scope and meaning of the phrase "bad faith" under the UTSA, and because this Court's Decision improperly reverses a Trial Court's judgment based on that Trial Court's assessment of the truthfulness and credibility of a witness's testimony, the

Decision was made in error. For those reasons, Appellants oppose publication.

I certify that this Response to Motion contains 312 words in compliance with RAP 18.17.

DATED this 27th day of June, 2025.

KINSEL LAW OFFICES, PLLC

By: /s/ William A. Kinsel___
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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of June, 2025, I caused to be delivered the foregoing APPELLANTS' RESPONSE TO MOTION TO PUBLISH to the following parties via both the Washington Appellate Portal electronic email service system and ordinary email:

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Dated this 27th day of June, 2025, at Seattle, Washington.

/s/ William A. Kinsel
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FILED
7/8/2025
Court of Appeals
Division I
State of Washington

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

APTLY TECHNOLOGY CORPORATION, a Washington corporation, Respondents, v. YUNJUN WU and RICHARD LU, wife and husband and the marital community comprised thereof, Appellants.	No. 86102-6-I ORDER DENYING MOTION TO PUBLISH

The respondent, Aptly Technology Corporation, has filed a motion to publish. The appellants, Yunjun Wu and Richard Wu, have filed a response. A panel of the court has considered its prior determination and has found that the opinion will not be of precedential value; now, therefore it is hereby

ORDERED, that the unpublished opinion filed May 19, 2025 shall remain unpublished.

Feldman, J.
Judge

RCW 19.108.010 Definitions. Unless the context clearly requires otherwise, the definitions set forth in this section apply throughout this chapter.

(1) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means;

(2) "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 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 limit 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.

(3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(4) "Trade secret" means information, 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. [1981 c 286 s 1.]

RCW 19.108.040 Award of attorney's fees. If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or wilful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party. [1981 c 286 s 4.]

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

APTLY TECHNOLOGY CORPORATION, a Washington Corporation,

Plaintiff,

v.

YANJUN WU and RICHARD LU, wife and husband and the marital community comprised thereof; and DEMANACO, LLC, a Washington limited liability company,

Defendants.

The Honorable Jim Rogers

NO. 21-2-04058-2 SEA

DECLARATION OF XINGSUO ("ROSA") LI IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, XINGSUO ("ROSA") LI, declare under penalty of perjury under the laws of the State of Washington that I am over the age of eighteen, competent to be a witness, and make the following Declaration based on my personal knowledge.

1. I am the owner of Aptly Technology Corporation ("Aptly"), the plaintiff in this case. Aptly is an information technology company based in Bellevue, Washington. Aptly's largest client is Microsoft Corporation ("Microsoft"). At all relevant times, Aptly has provided its clients with recruiting, software development, and information technology and management solutions.

2. I have reviewed Exhibit 5 to the Declaration of Bryan Graff in Response to

Ryan, Swanson & Cleveland, PLLC
1201 Third Avenue, Suite 3400
Seattle, WA 98101-3034
206.464.4224 | Fax 206.583.0359

Defendants' Motion for Summary Judgment. The information contained therein was taken from Aptly's internal gross margin spreadsheets, which concern Aptly's cost details, information Aptly uses to calculate its cost of goods sold, its projected profit, and margin rate. This information is specific to Aptly and is not publicly known. Aptly updates such information from time-to-time as its business and market circumstances necessitate. Yanjun ("Juni") Wu ("Wu") formerly worked for Aptly as Vice President of Business Development and, in her role, had access to this information, subject to terms of non-disclosure and confidentiality. Like Wu, Aptly requires all its employees with access to such information to sign confidentiality and non-disclosure agreements to protect the information. Maintaining the confidentiality of this information is important and valuable to Aptly, as this confidential business information is a core piece of what differentiates Aptly, affects our capabilities, and allows us to achieve our business successes.

3. I have also reviewed Exhibit 9 to the Declaration of Bryan Graff in Response to Defendants' Motion for Summary Judgment. This file is a "step by step" design template that Aptly created and used in its design process working on the Bing Knowledge Card project for Microsoft. Wu had access to this file (again subject to terms of non-disclosure and confidentiality, just like any Aptly employees and contractors who needed and had access to the file) because Wu was the Vice President managing this project for Aptly. This file was not publicly available. Maintaining its confidentiality was important and valuable to Aptly and provided Aptly with a competitive advantage.

4. In March of 2020, Aptly was working for Microsoft under a staffing engagement supporting Microsoft's Bing Answer product. Aptly prepared and, on March 30, 2020, presented a proposal to Microsoft to provide managed services on the project. Microsoft informed Aptly that, at that time, it was not ready to, or interested in, transitioning Aptly's staffing engagement to such a managed services engagement. In late 2020, or very early 2021, however, Microsoft came back to Aptly asking for a managed services proposal. At that time,

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Wu was working for Aptly as its Vice President of Business Development. I later learned that rather than presenting Aptly's managed services proposal to Microsoft, as requested, Wu instead referred Microsoft to Biblioso Corporation, recommended that company, and participated on a Microsoft Teams call to facilitate the work going to Biblioso Corporation rather than to Aptly. Following this, the work Aptly was performing on the Bing Answer project in connection with its staffing engagement declined, and Aptly lost the wonderful opportunity to expand its work on the Bing Answer project to meet Microsoft's new testing and monitoring requirements under a managed services agreement.

5. I have also reviewed Exhibit 10 to the Declaration of Bryan Graff in Response to Defendants' Motion for Summary Judgment. That document is a true and correct copy of a Conversation History that I prepared following Wu's resignation from Aptly, as a part of my investigation of the circumstances and my discussions with Microsoft's Hariharan Ragunathan, Katherine Sather, and Hu ("Hunk") Chen, as well as with Aptly employees Joy Yao and Christine Shen. In my discussions with Mr. Ragunathan, I learned that Wu had misled Microsoft that the Aptly team working on the Bing Knowledge Card project was at full capacity, which was not true, and that Wu referred Microsoft to DeManaCo's Olivia Wang for support on the project.

6. Qian "April" Zhao ("Zhao") was an employee of Aptly, who worked for Aptly on the Bing Knowledge Card project and was intimately familiar with Aptly's work, methods and processes on the project. Aptly learned that Wu recruited Zhao to join DeManaCo and to work to support DeManaCo on the Bing Knowledge Card project. Exhibit 10 to the Declaration of Bryan Graff in Response to Defendants' Motion for Summary Judgment accurately sets forth my conversation with Christine Shen concerning the topic.

7. Zijie "Eva" Yuan ("Yuan") was also an Aptly employee. Ms. Yuan worked for Aptly on Microsoft's Bing Answer project. Ms. Yuan was intimately familiar with Aptly's work, methods and processes on that project.

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8. Aptly's work on the Bing Answer and Bing Knowledge Card projects diminished following Wu's actions described above, and Aptly lost important opportunities to continue and expand its work supporting Microsoft. This lost work and these lost opportunities resulted in lost profits to Aptly and damaged Aptly financially. Aptly retained Arik Van Zandt of Alvarez & Marsal Valuation Services, LLC to analyze and calculate Aptly's damages. I understand that Mr. Van Zandt has prepared a report concerning Aptly's damages.

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

EXECUTED this 22nd day of December, 2022, at Kirkland (City), Washington.

By _____
Xingsuo "Rosa" Li

Ryan, Swanson & Cleveland, PLLC
1201 Third Avenue, Suite 3400
Seattle, WA 98101-3034
206.464.4224 | Fax 206.583.0359

DECLARATION OF SERVICE

I hereby declare as follows:

1. I am a citizen of the United States and a resident of the state of Washington. I am over the age of 18 years and not a party to the within action. I am employed by the law firm of Ryan, Swanson & Cleveland, PLLC, 1201 Third Avenue, Suite 3400, Seattle, Washington, 98101-3034.

2. On this 29th day of December, 2022, I caused the above and foregoing to be served upon counsel of record at the address and in the manner described below:

William A. Kinsel, Esq., WSBA #18077 Kinsel Law Offices, PLLC 2401 Fourth Ave., Suite 850 Seattle, WA 98121 Ph: (206) 706-8148; Fax: (206) 374-3201 wak@kinsellaw.com; lori@kinsellaw.com *Attorney for Defendants YANJUN WU, RICHARD LU, and DEMANACO, LLC*	☐ U.S. Mail ☐ Hand Delivery ☒ E-mail ☐ Facsimile ☐ Federal Express ☒ Via LGR 30(B)(ii) Mandatory E-Service

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

DATED this 29th day of December, 2022 at Seattle, Washington.

A Henderson

Angela A. Henderson, Legal Assistant
henderson@ryanlaw.com

step by step 模板设计

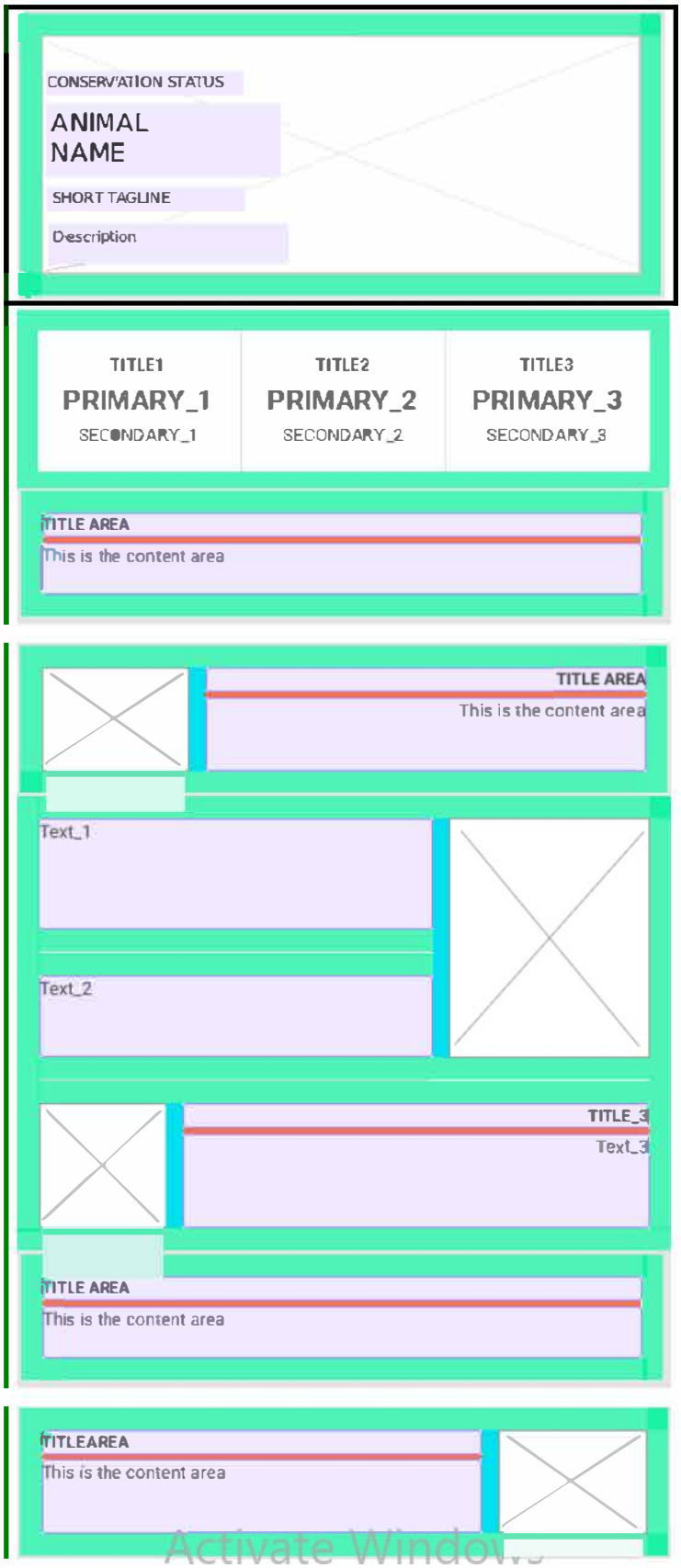
Fri, Dec 18, 2020 at 12:22 AM PST (GMT-08:00)

From: Juny Wu (APTLY TECHNOLOGY CORPORATION) <v-yanjuw@microsoft.com>
To: Xiaoou Wang (Biblioso Corporation) <v-xiaoow@microsoft.com>
Cc: <oosmile2001@gmail.com>

Attachments

- Document2.docx

Sample; Domestic Pig



LIFESPAN	HEIGHT	BODY LENGTH
15-20 years	20.1-38.2 IN 51-97 cm	35.4-70.9 IN 90-180 cm

A large, domesticated, even-toed ungulate, with **A LARGE HEAD AND A LONG SNOUT.**

Pigs have a well-developed **SENSE OF SMELL,** and use is made of this in Europe where they are trained to locate underground truffles.

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Domestication process of these animals is thought to have occurred around **9,000-10,000 YEARS AGO.**

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With around 1 billion individuals alive at any time, the domesticated pig is one of the most **NUMEROUS LARGE MAMMALS** on the planet.

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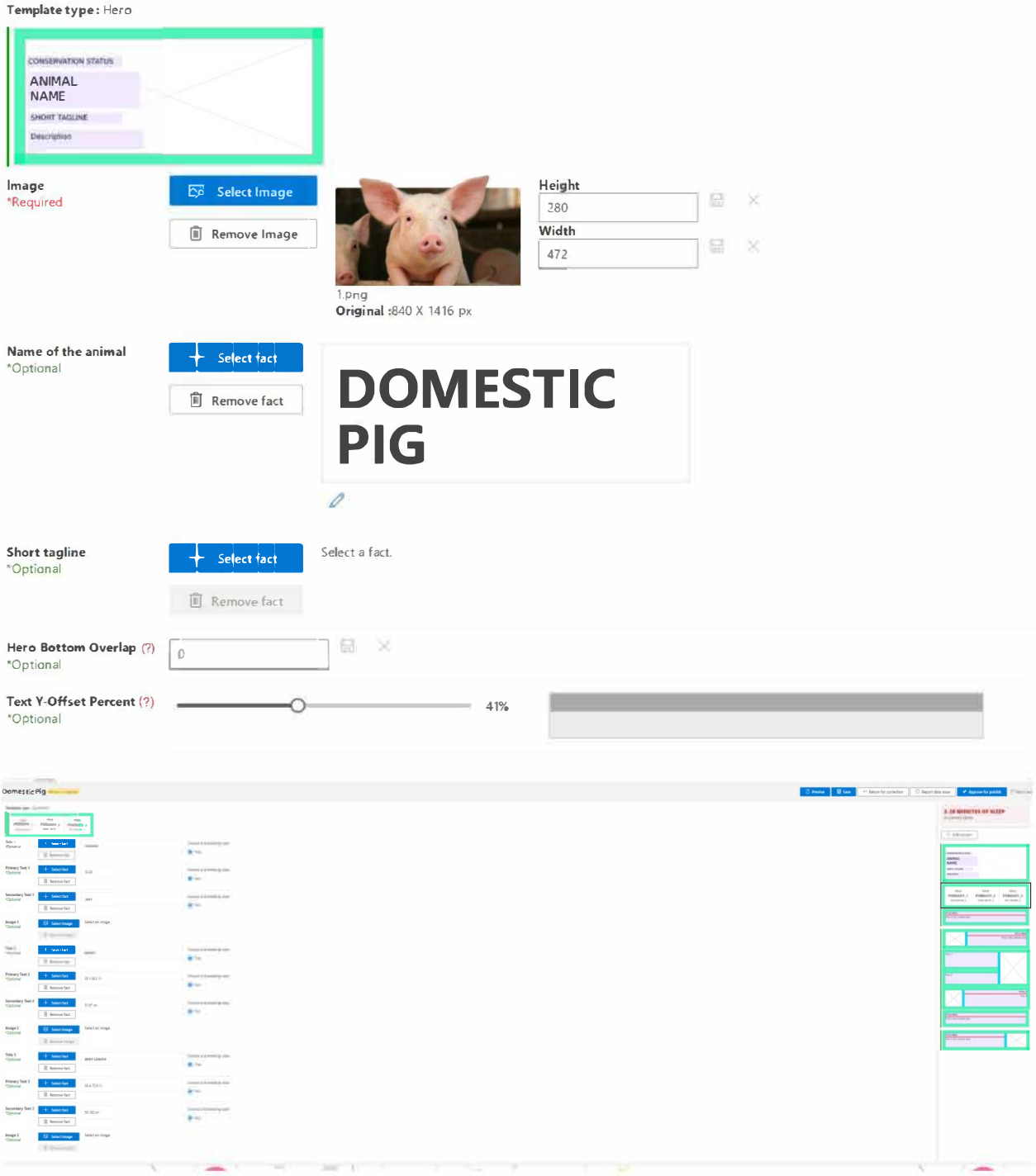
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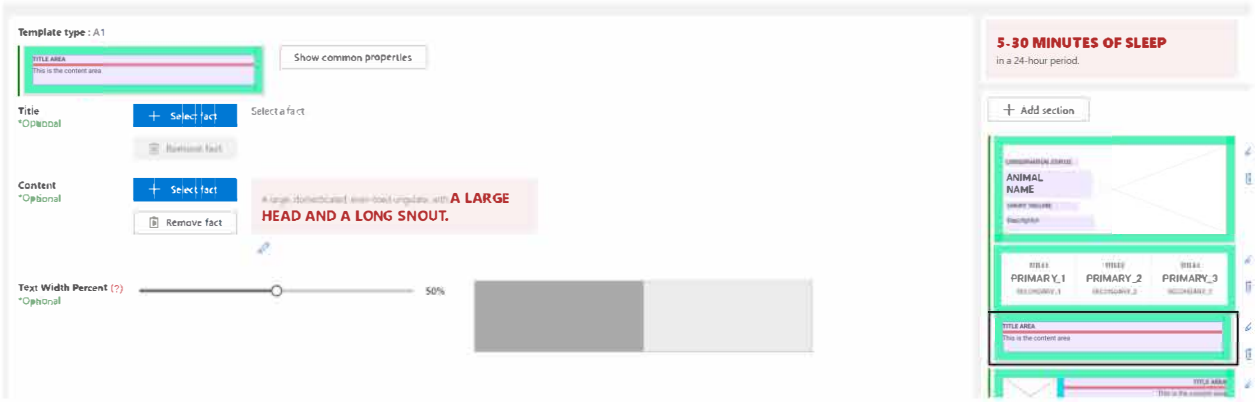
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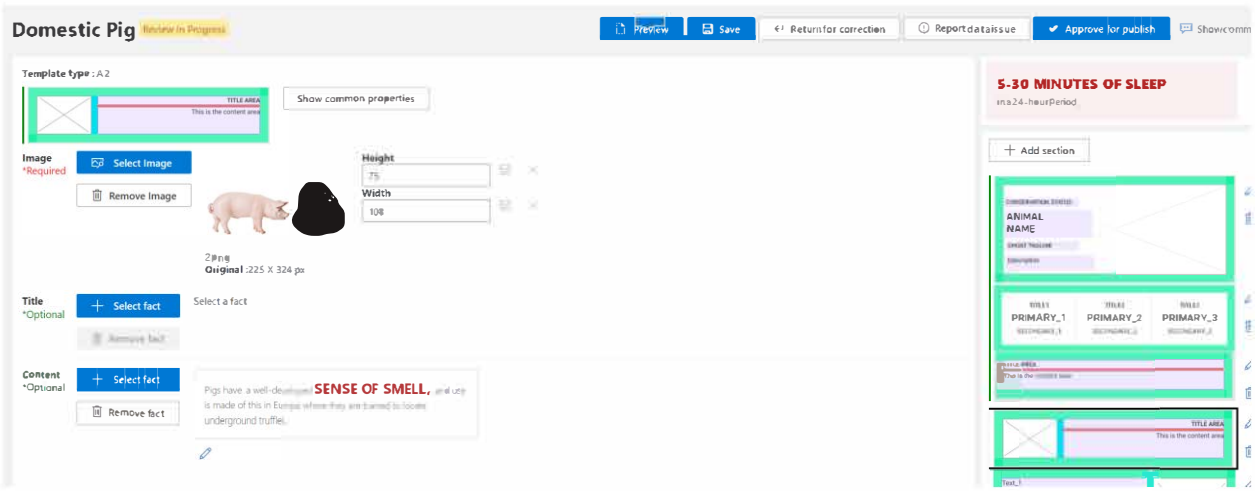
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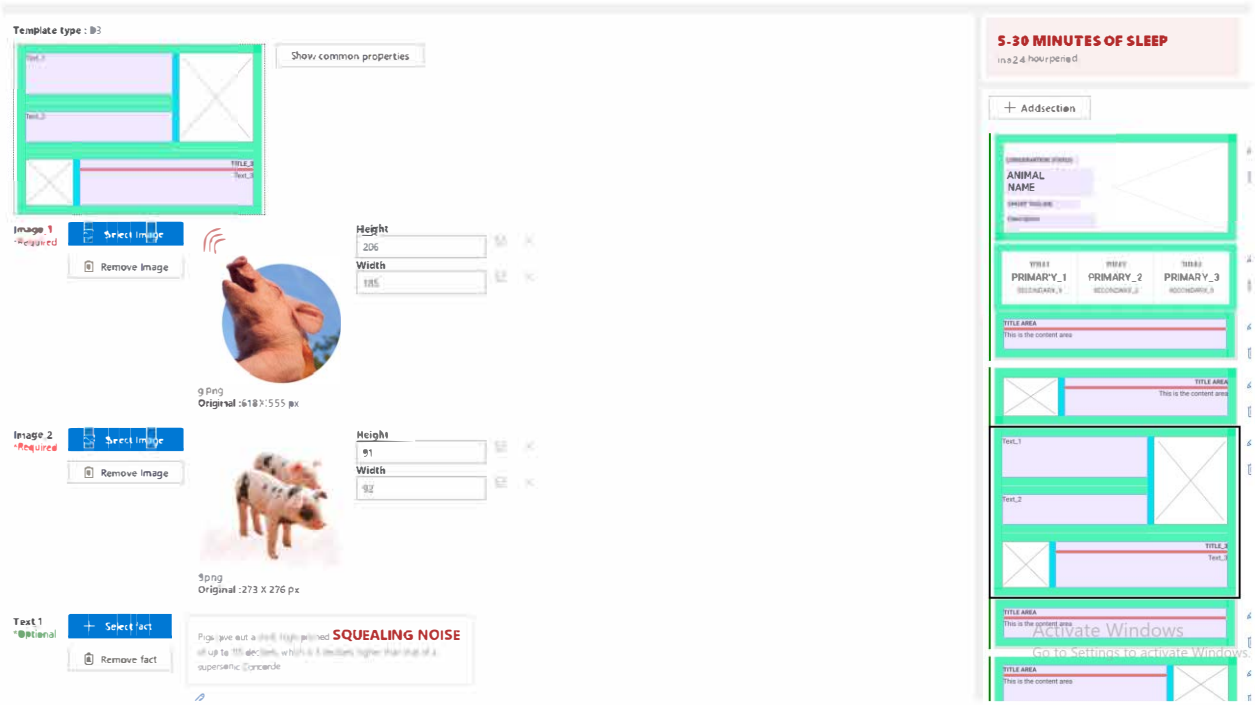
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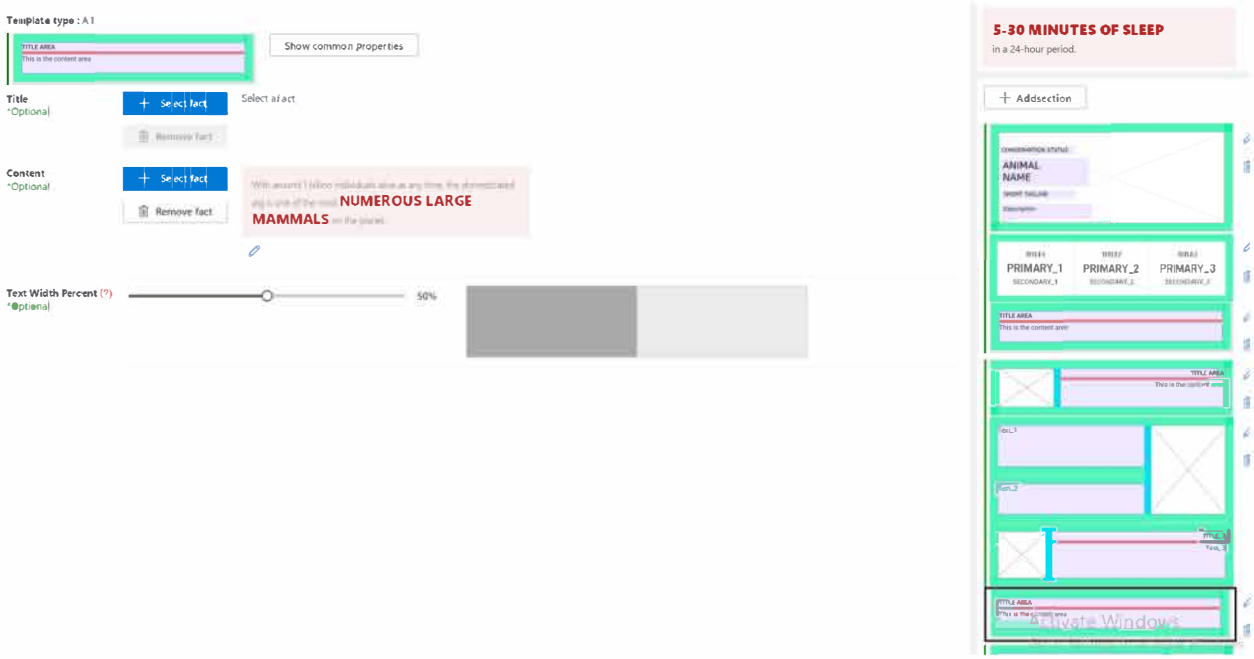
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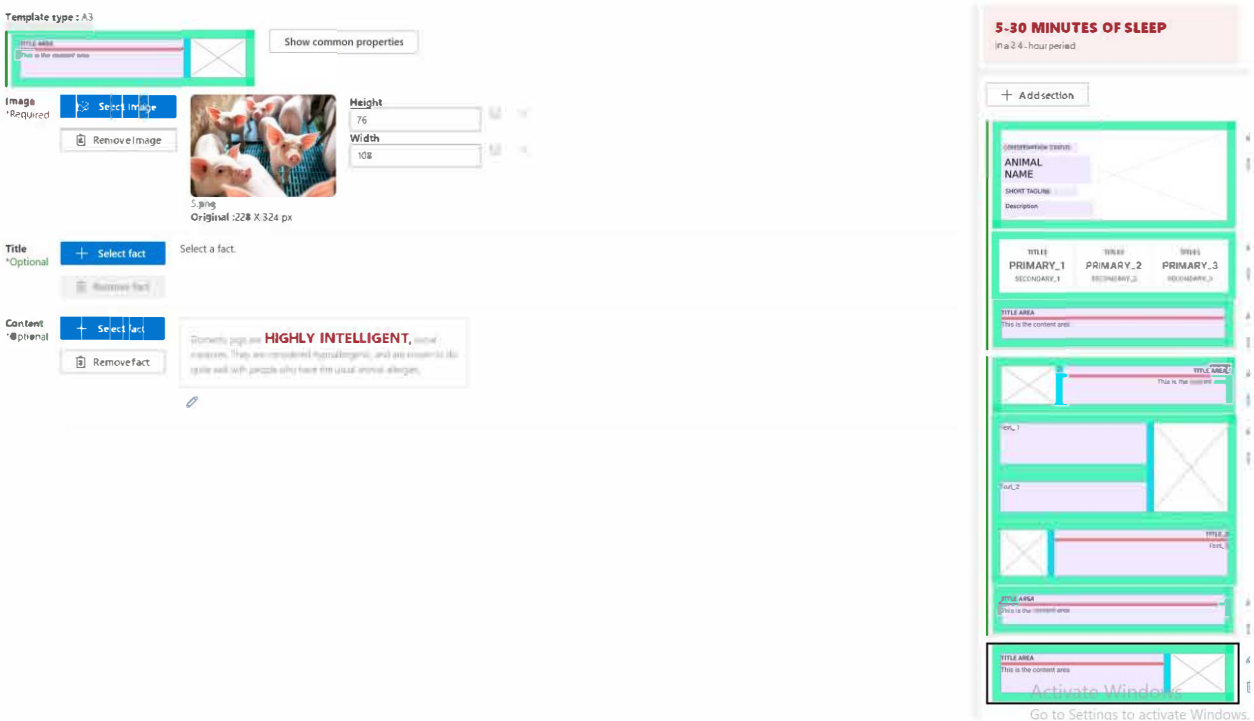
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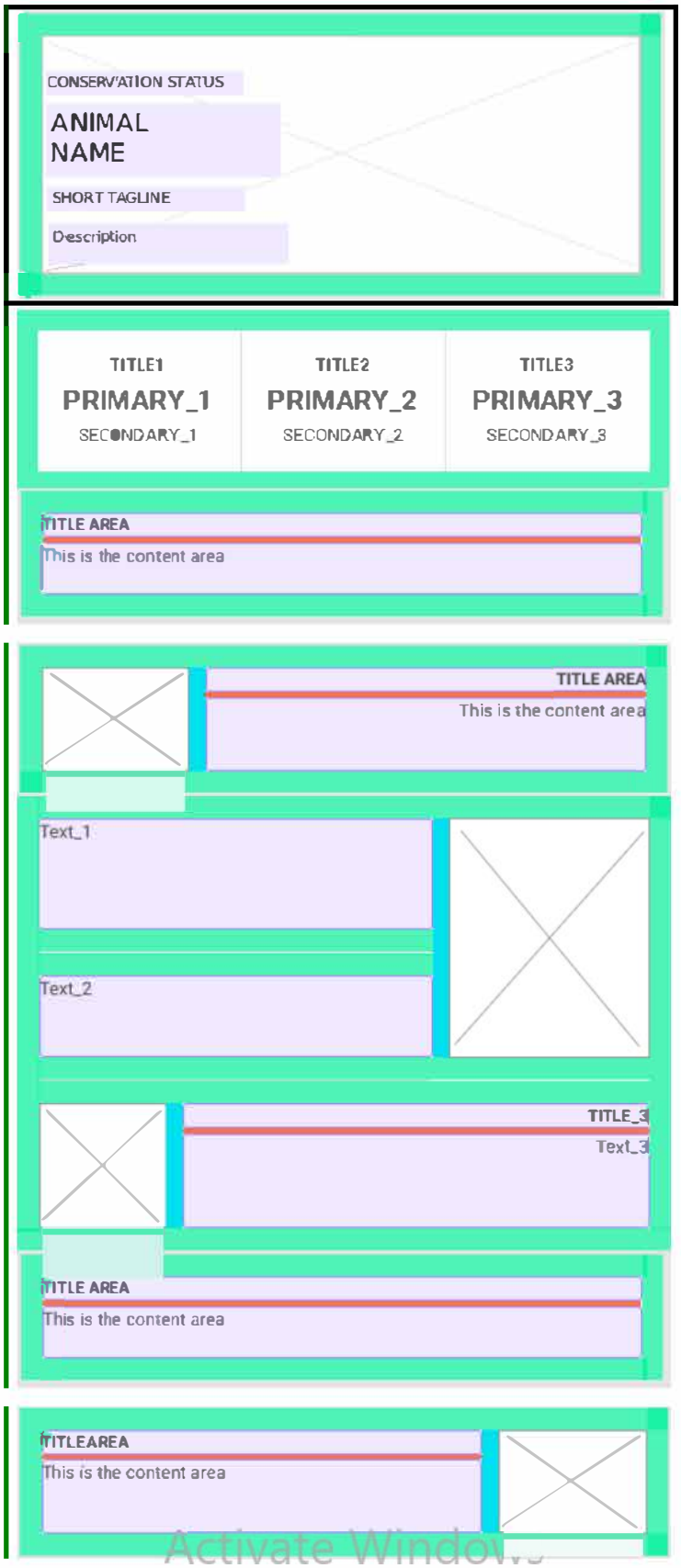
Sample; Domestic Pig



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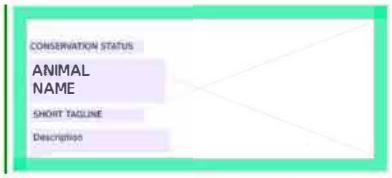

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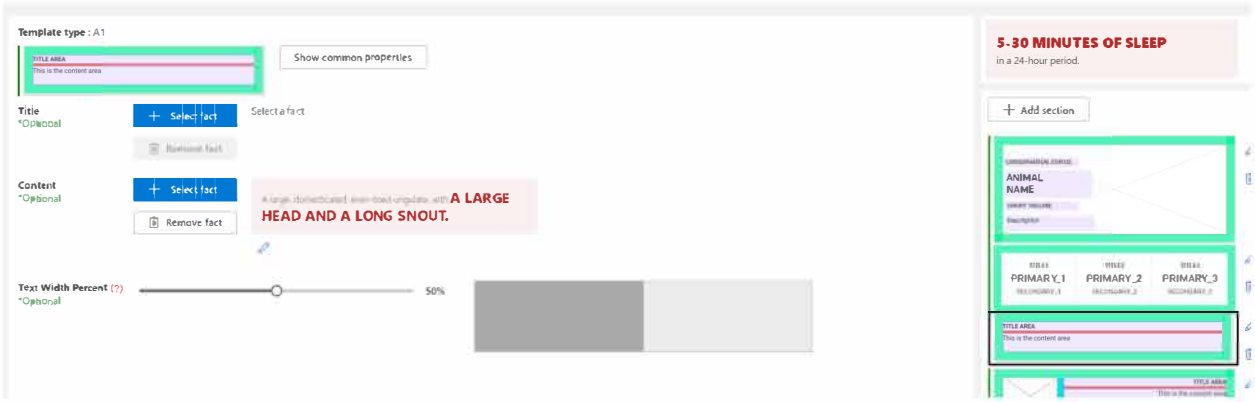
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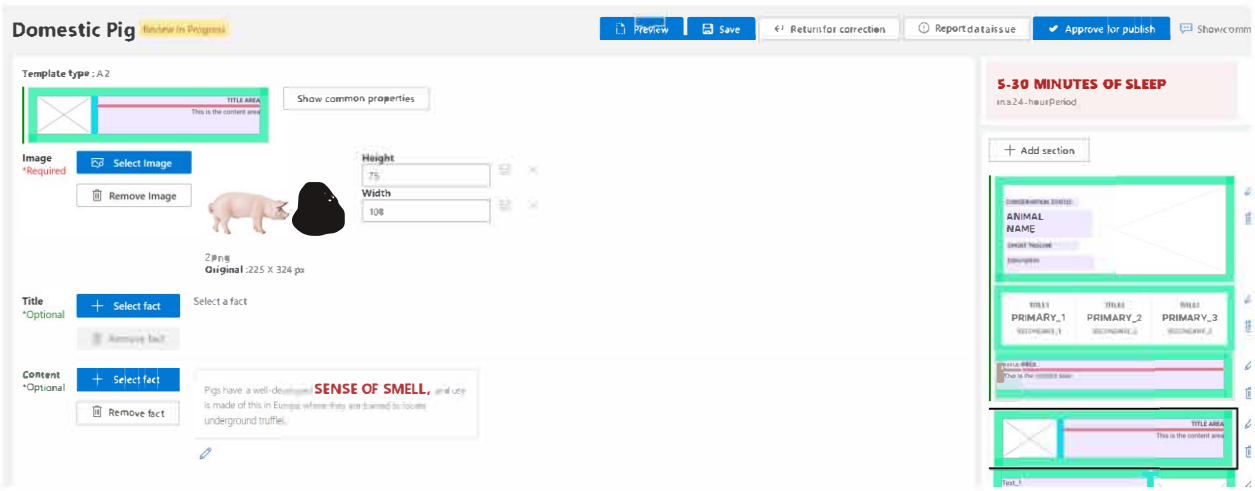
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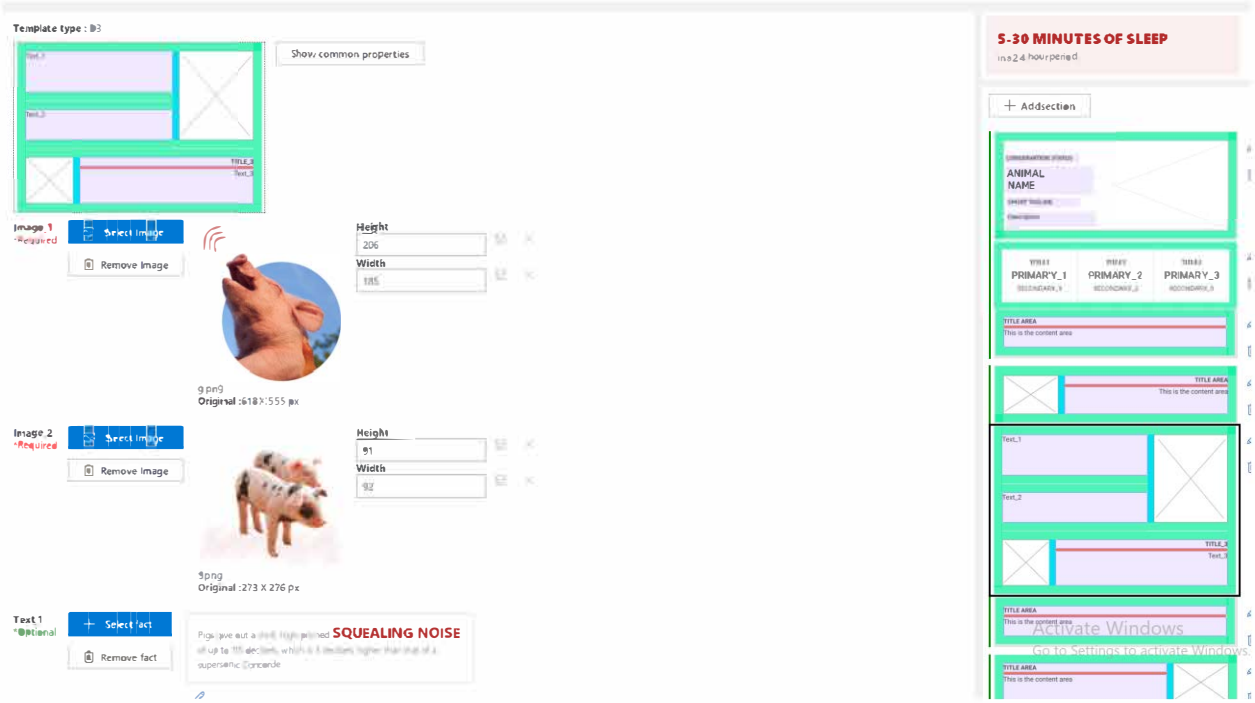
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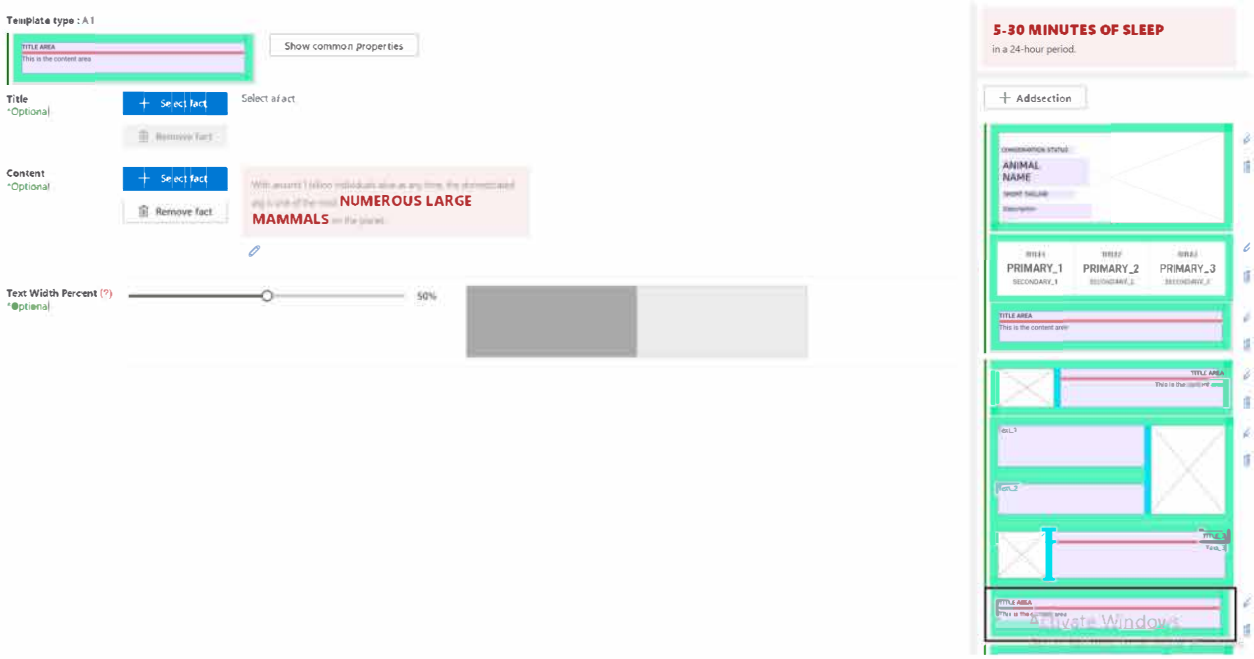
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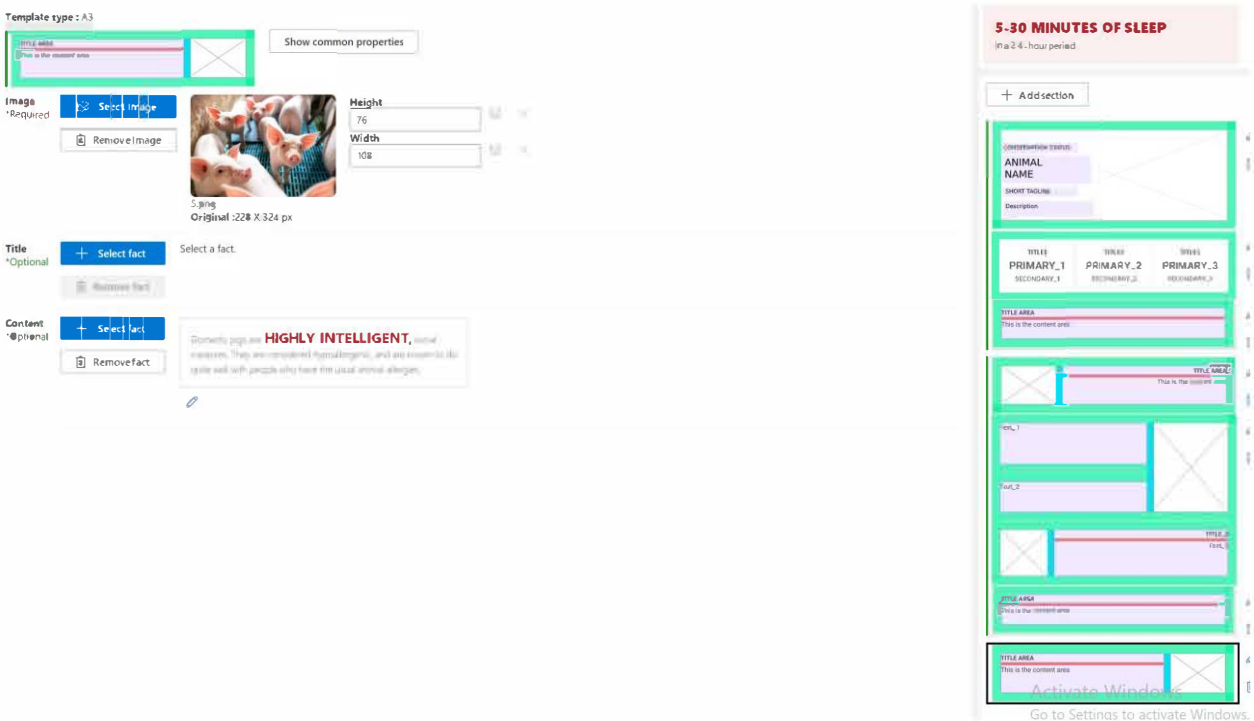
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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

APTLY TECHNOLOGY CORPORATION, a Washington Corporation, Plaintiff, v. YANJUN WU and RICHARD LU, wife and husband and the marital community comprised thereof; and DEMANACO, LLC, a Washington limited liability company, Defendants.	NO. 21-2-04058-2 SEA COA NO. 861026-I (Pages 1-23)

MOTIONS HEARING

Before The Honorable Jim Rogers

May 5, 2023

2:00 p.m.

Department 45

Transcribed stenographically from previous recorded audio files in digital reporter room KCCH E733

Reported by: John Fahrenwald, WA CR 22004363, RPR

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

APTLY TECHNOLOGY CORPORATION, a Washington Corporation, Plaintiff, v. YANJUN WU and RICHARD LU, wife and husband and the marital community comprised thereof; and DEMANACO, LLC, a Washington limited liability company, Defendants.	NO. 21-2-04058-2 SEA

AUDIO COURT-RECORDED hearing, commencing May 5, 2023 at 2:00 p.m., later transcribed by Reporter John Fahrenwald Certified Shorthand Reporter for the State of Washington CR No. 22004363, RPR.

APPEARANCES (via Zoom videoconferencing:)

FOR THE PLAINTIFF: APTLY TECHNOLOGY CORP

BY: BRYAN GRAFF, ESQ.
Ryan Swanson & Cleveland PLLC
401 Union Street, Suite 1500
Seattle, WA 98101-2668
(206) 654-2278
graff@ryanlaw.com

FOR THE DEFENDANTS: DEMANACO, RICHARD LU, YANJUN WU

BY: WILLIAM ALAN KINSEL, ESQ.
Kinsel Law Offices, PLLC
2401 4th Ave Ste 850
Seattle, WA 98121-1420
(206) 706-8148
wak@KinselLaw.com

Also Present: Bailiff, Monica Gillum, and Clerk, Tonja Hutchinson, are present in Court and by Zoom

Index

P R O C E E D I N G S

(2:00 p.m.)

THE COURT: I see you're both exactly in the place where I left you several months ago.

MR. GRAFF: Haven't moved, your Honor.

THE COURT: We're here on findings of fact and conclusion of law following the trial in this case. I have received the proposed findings from the plaintiff as well as the objections, and so I'll make a couple rulings and a couple comments about where we find ourselves procedurally.

First of all, if you haven't already sent me these in Word, would you both send me your versions in Word, please?

MR. KINSEL: Yeah.

MR. GRAFF: Absolutely.

THE COURT: Secondly, I sent a letter that has been filed in the record, but I'll just state it here, asking the parties -- if there's an objection, call it an objection, but it's really a request to change some of the findings and conclusions of the Court with regard to damages that Mr. Kinsel has requested. They're actually found in his objections in the first few pages, regarding damages. And this kind of objection, asking me to really revise the decision I made, it -- it -- it is approached by counsel in different ways. You know, for example, I have another trial

that I'm entering findings and conclusions in, the last five feet of the property boundary is still hotly disputed, and the parties are moving to have me change my ruling before entering findings and conclusions over a bush. Probably lower stakes than this.

But this one, there was a different request, and I'm prepared to do that without prejudice to you, Mr. Kinsel. So there's a -- but there's a -- the objection is actually shot through the objection -- through the findings and conclusions, and I'm going to make that clear as we go through. And you've already partially responded, Mr. Graff, on the -- on the damages issue. Here's the damages issue. Did the Court, in its decision, wrongly calculate, for a variety of reasons, the amount of damages without prejudice to Mr. Kinsel to object to the ultimate findings and conclusions of liability. Did -- were the damages overstated?

And I think the issue -- and Mr. Kinsel will correct me if I'm wrong in briefing following all this, is can he enter different evidence -- new evidence -- there's two pieces of evidence, specifically, by his damages expert, a new declaration and by Mr. Lu, who provided evidence about when the contract ended. I've indicated that I look a little bit askance at the expert's declaration just from the get-go. Mr. Lu, there's reasons to believe that I think Mr.

Kinsel should, you know -- not leaning one way or the other, but he can make his arguments on -- on new evidence. I'm sure he will want to do that.

But I'm not deciding any -- I -- I am deciding the damages consistent with how I issued my oral ruling. That's without prejudice for Mr. Kinsel to move under CR59 to change the damages ruling and I don't want to delay that too much, but we will set up some schedules for that. So with that, Mr. Kinsel has objected to this Court's findings of damages in pages 1 through 4 of his brief. And while I am overruling those objections today, I'm leaving it without prejudice to Mr. Kinsel to be heard -- fully heard -- on his damages issue at a follow up subsequent hearing, and we need not delay terribly long to have that hearing.

So Mr. Kinsel, I think, has made his motion and his objections. If you want to file a separate motion you can, Mr. Kinsel, but I don't want to incur a lot of attorney's fees of form over substance, so I'm going to ask you that question.

Mr. Graff, you've already partially responded in substance and in a footnote actually, about Exhibit No. 100, for example. But if you wish to file a separate brief on that as well, you may. I think Mr. Kinsel, at a minimum you've got to file a brief as to why I should consider any new evidence. So I'm going to ask you all to arrive at a

briefing schedule for that. I'm in a long two month trial that will give me Fridays off to be able to hear any further argument you think I need to hear on that issue and decide it as quickly as I can, because I'm sure the parties want to move forward on this.

Secondly, in the letter I addressed informally -- so I'll informally now address, on page 5, Mr. Kinsel objects -- it would be 1, a and b. His objection is that there's no sound factual basis to conclude that Junie Wu referred Hong Chen to build Biblioso in September 2020 for the purpose of diverting a subcontract to Demanaco when Demanaco itself was not created until September 2020. That objection is overruled.

And the other objection is there's insufficient evidence on a more probable than not basis to support the finding and conclusion that Ms. Wu's referral of Mr. Chen to Biblioso was a proximate cause of Aptly's failure to be awarded the manager's service contract for the Bing Answer Project. And that objection also is overruled.

So let's object -- let's move on to additional specific objections to the extent that you wish me to rule on them or be heard on them now, or whether you simply wish me to look at your Word versions and -- and create a final document.

MR. KINSEL: Who would you like to hear from first,

your Honor?

THE COURT: Well, there -- I think from you, Mr. Kinsel. They're -- they're your specific objections. And then, I should have said at the beginning, I'm then going to rule on the trade secrets attorney cease motion.

MR. KINSEL: Okay. The -- first to address the procedural issues. I think I'll need to file a CR59 motion. And I can work with Mr. Graff in terms of the briefing schedule and that all has to be done within 30 days. I don't see why that can't be accomplished. Much of our briefing is -- is done. It's more just providing the structure of CR59 to -- to guide the Court's analysis of what we're presenting to it.

In terms of the specific objections, I -- I think sending a Word copy is certainly a good way for you, because I have many specific objections.

But I do have some overall observations, which I think apply even on the understanding that you're issuing the ruling based on -- or, issuing the findings of fact and conclusions of law based on the oral ruling you previously made. One of those is that there is no evidence to support Microsoft issuing contracts that end at the end of a calendar year. All the evidence is that Microsoft issues contracts on fiscal years that run from July 1 through June 30th. If, again, the evidence shows that somebody picks up a

contract in the middle of a fiscal year, that first year fiscal contract ends on June 30th of the fiscal year that it starts in, and so the three year fiscal year contract at issue for the services contract for Bing Answer, the only evidence that I believe was admitted, was that it would have ended on June 30th, 2023. And Aptly has requested the initial six months through December 31st of 2023, and that's a significant amount of money. And -- and there is no evidence to support it, so we think that the damages need to be reduced for that, even if nothing else is granted via the CR59 motion.

Additionally, my recollection --

THE COURT: Why don't I hear from Mr. Graff? It'll be easier for me if I hear one at a time.

MR. KINSEL: Okay. Sure.

MR. GRAFF: Your Honor, I think the evidence at -- the actual evidence at trial was quite clear, and Hong Chen's testimony that in January of 2021 is when they entered into a three-year master services agreement. That -- that was the testimony at trial. That was the evidence at trial. If counsel wanted to cross-examine Mr. Chen, or try to get additional details as to, you know, how that would be handled in a fiscal year setting with respect to this particular master services agreement, that should have been done at trial. That was not done. The testimony at trial,

again, was by Mr. Chen. It was January 2021, three-year master services agreement. And I think the evidence also indicated, through the Microsoft representative's testimony, that look, the projects end when the projects end. It's not -- while contracts may be executed, at least in some situations including under staffing engagements on a fiscal year, to -- to, you know, correspond to the fact that Microsoft operates under a fiscal year, not a calendar year, it doesn't mean that the project ends. It doesn't mean that that work ends. And there certainly was no evidence presented at trial that a manage services agreement cannot -- cannot be for a term that extends beyond any one particular fiscal year at Microsoft. That would be our response to that objection.

THE COURT: All right. I have to look at that again with my notes. Of course, my memory is that Mr. Chen entered into that three year manage services agreement in January 1, but I do understand the fiscal year is -- is at the end of the -- it's at the end of June 30th. So let me look at my notes again on that.

Next, Mr. Kinsel?

MR. KINSEL: Thank you, your Honor. Next, on the calculation of damages, my recollection of the Court's oral ruling was that you found that Aptly had incorrectly included a contract for the Satori project, Yi Lee was the

manager of that. And that shows up on Exhibit No. 45, line 12, which was a different project than the answered project. And my recollection is you stated that their expert incorrectly included that, and that needed to be excluded. That contract was about $30,000 a month. And again, that -- the exact numbers show up on Exhibit No. 45, and the -- if the Court actually compares, if you look back to look at your notes, Exhibit No. 45 line 12, and then look at that Exhibit No. 39 at page 12, and Exhibit No. 39 was the proposal for the manage services contract that Junie Wu and Rosa Lee prepared and presented, the Court will see that the presentation for -- the Bing Answer project was for a gross potential amount of 89,760 a month. And that did not include the Satori contract amount that is included in this damage request.

And so I think there's -- you know, the two fundamental errors in the plaintiff's damage request, assuming that nothing changes on CR59, is that they've included six extra months, and they have included an entirely different project which they never lost.

THE COURT: Mr. Graff?

MR. GRAFF: I guess there are probably three comments with respect to that objection, your Honor.

Number one, we understood the Court's oral decision to be different than Mr. Kinsel's representing

there. That -- I believe the Court's oral decision, to the extent we understand it correctly, is that the Court found that that -- that Mr. Fansdant (phonetic) did not properly include any of those figures, to the extent our understanding is -- is incorrect -- and again, we don't think it is -- but to the extent that our decision is incorrect, I would note that if -- if any portion of that work is going to be pulled out -- and -- and again, let me backtrack for a second. The testimony at trial, and particularly Rosa Lee's testimony at trial, with respect to Satori, was that it was, you know, Satori and Bing Answers were projects that merged together. One involved back end, one involved front end, so they were one and the same projects with respect to Ms. Lee's, you know, understanding and her testimony, and that was what was presented at trial. That's the position, certainly, we've taken, that's the position we believe is right. To the extent that the Court disagrees with that, and believes that those amounts should be pulled out, they would have to be pulled out both in calculating the amount of gross revenue from 2021, which Mr. Kinsel wants, but then any earnings under that project, or that Bing Satori work, would also have to be pulled out of the actuals in 2021, moving forward. So for instance, Mr. Kinsel is effectively wanting all amounts under trial Exhibit No. 18 to be pulled out of the baseline revenue

calculations for 2020.

To the extent that's going to happen -- and again, we don't think it should -- but to the extent that's going to happen, then all of the amounts, the actual amounts received after 2020, reflected in Exhibit No. 45 under the SOW that is trial Exhibit No. 20, which again would be the manager Yi Li's project renewal for those subsequent periods would have to also be taken out so that it's actually reflecting the amount of loss that Aptly suffered in those subsequent years, notwithstanding that project. You can't have it both ways.

THE COURT: Mr. Kinsel, do you want to look at that? I don't -- I'm not sure.

MR. KINSEL: The -- the difficulty -- well, first off, it's their obligation to prove their damages, and the Bing Satori -- I can pull it up, I don't know if we want to look at it together. I mean, I think you can simply yank out -- maybe that needs to be in a CR59 motion, if we're getting that far. It sounds like Mr. Graff needed more testimony from his expert on that.

MR. GRAFF: I don't. It's reflected in the SOWs and Exhibit No. 45.

THE COURT: Yep. I -- I just want to be clear, if I haven't already been clear, I'm not likely to take more testimony from the experts in a CR59 motion. I understand

that, you know, Mr. Kinsel, you're trying to introduce your -- one of your client's -- Mr. Wu's declaration as new evidence, but that seems to be a different grounds than having the experts re-testify. So I am -- how do you wish to proceed, Mr. Kinsel?

Do you want to make this part of the CR59 motion, or do you want to be heard now? I am indifferent, actually, as to how -- because this -- trial, I can treat this in different and more flexible ways.

MR. KINSEL: I think it would be better as part of the CR59 motion.

THE COURT: Okay. All right.

MR. KINSEL: That would provide for better clarity than, you know, a written response.

THE COURT: Because my understanding is that what Mr. Graff is saying is that if you take out the damages on the one end, the -- the diminution is not as great as one might imagine because of the way the math all works out. So it might be worth a careful consideration of it, I'll say. And so, let's put that as part of the CR59. All right. Thank you.

And so the next -- do you have another specific objection you'd like to make? Please make that.

MR. KINSEL: I think that those are the major ones. I -- I do have the red lined editions. I can send those to

the Court and the Court can look at them that way. I think those are --

THE COURT: Yeah. I think that would be faster. It would certainly be faster for me. I don't think I need to have you be heard necessarily on all these various issues. I think -- I think that would be fine. I can get that out relatively quickly.

MR. KINSEL: Okay. And then in terms of the CR59, obviously we need to -- I mean our ten days will start running from whenever those are entered. That's how I read the rule. To get it filed.

THE COURT: Yeah. I think you can -- you can go ahead and start whenever you'd like. But you certainly have at least that time once I get the final decision in.

MR. KINSEL: Right. Okay. Yeah. I can certainly start preparing it, but just to clear that up.

THE COURT: Okay. All right. Well, the only other thing I have then is my decision on the award of attorney fees request by Mr. Kinsel under the Trade Secrets Act. Here it is.

RCW19108040 allows you award of attorney's fees 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 or malicious misappropriation exists.

The question here is whether the trade secrets

claim, or part of the claim, is made -- was made in bad faith. That term is really poorly defined, as parties know, in the State of Washington. It -- but it appears to be, probably at a minimum, a claim for a trade secret protection made without basis. The confusing part in this case, of course, just -- I'm saying this for -- if a Court of Appeals reviews this, and that is that there is also a separate claim that the employment agreement had confidential provisions to it. And I've addressed that in my trial decision, but I want to say this is not addressing that unless I specifically say so.

There were several aspects to the trade secrets claim. One was Exhibit No. 303, the so-called margin calculator. And that had to do -- there was a disputed issue as to whether or not that was a confidential document that was used to calculate the margin for bidding for contracts, or whether it was publicly available information. And also at one point, it was discussed whether it was actually -- I believe it was discussed as possible notes of a business meeting. I found -- I dismissed this part of the claim, did not find in favor of the plaintiff, but I found -- I believe there was at least a basis for the claim, and I decline to award attorney's fees under this basis.

The second is the Exhibit No. 310, which is the timeline and graphics. It was stamped confidential. It was

something created by Ms. Lee. It had a variety of examples of graphics she had used to show timelines, deadlines, delivery, benchmarks for products -- or, shall I say deliverables, for Aptly. And I did not find this was a trade secret as such, but found that it was intended to be confidential by Ms. Lee. As such I find it was not in bad faith.

The last is Exhibit No. 304, the so-called step by step, which is a template for creating Microsoft knowledge cards. There was a lot of testimony about these exhibits and the events and the contracting around the knowledge cards. And the evidence that this was a trade secret for Aptly -- and I want to stress that was the original claim -- really rested solely on the testimony of Rosa Lee. The defense moved for summary judgment just before the trial began, and Rosa Lee testified in her declaration of December 29th, 2022, that the trial exhibit was an Aptly trade secret. That's paragraph 3 of her declaration. And partly because of this testimony, I denied summary judgment, genuine issues of material fact as a matter of law precluded judgment. And once again, Rosa Lee testified that Exhibit No. 304 -- excuse me. 304 was an Aptly developed trade secret. But at trial, the evidence from every other witness, including Microsoft employees, was that 304 was actually a Microsoft project, and it was a trade secret, I guess, but Microsoft

didn't keep it much of a secret. It freely gave it to any contractor willing to compete to create knowledge cards or other products. In fact, open source software was also used to create the cards. There was testimony from Mr. Ragunathan and Mr. Chen that there was a period of time where Microsoft was looking for as many contractors as possible. Given Ms. Lee's position as president, her extensive experience and knowledge of projects, I concluded that when she testified that Exhibit No. 304 was an Aptly trade secret, she must have known that the opposite was the truth. It was Microsoft's trade secret if it was anyone's trade secret. I want to be clear, I see no evidence to indicate that Aptly's counsel expected this. In fact, I think it was a surprise when that actually finally came out through Microsoft employees, Ms. Lee alone. But I find that it was without basis to claim that Exhibit No. 304 was an Aptly trade secret, so I award partial attorneys fees to the defense for addressing this at trial.

That concludes my ruling on that. That's a part of a claim. It's going to be an interesting analysis as to how I segregate that from everything else, but Mr. Kinsel, I am sure you will educate me, and Mr. Graff, you will tell me why I should award almost no fees, and I'll wait to get your briefing on that.

MR. KINSEL: Great.

THE COURT: That's my decision on the trade secrets claim.

MR. GRAFF: If I could address that just briefly. I'm -- I'm expecting, based on the Court's decision then, that the authority that we cited -- I know Mr. Kinsel suggested in the reply that the authority that we had cited, and I understand that it's out of jurisdiction authority, but I think it relies upon the same restatement that Washington relies upon, that a trade secret, in order to become a trade secret, one doesn't have to create it or -- or be an owner in order to -- well, ownership. One doesn't have to create or develop a trade secret in order to become -- to be an owner. And that a trade secret can be a trade secret of multiple parties. The fact that it's created by one entity doesn't necessarily provide -- deprive Aptly of the ability to claim that it's a trade secret so long as there's independent economic value of that thing not being generally known, and that there are reasonable efforts to maintain that secrecy. So we just, again, submit that with respect to -- to that case law that we cited the Court to, there is a basis, even independent of the fact that Ms. Lee, or Aptly, didn't -- according to the Court's determination, and I understand it -- you know, engage in efforts to actually keep the secret itself. They still were one of the very few selected vendors or suppliers that had access to

it, when they would get access to it, as the Court knows, as a supplier or vendor of Microsoft, they're having to sign confidentiality agreements, so I think there were reasonable efforts being undertaken by Microsoft and Aptly to maintain the secrecy of that exhibit. And the fact that Aptly didn't itself solely or in part work to develop and create that trade secret doesn't mean that it cannot claim it or is not an owner of the trade secret.

So I understand the Court's decision, but I wanted to highlight that area of law, because I do think it provides a basis in existing law, based on these sets of facts there's certainly an argument for a good faith extension of the law in Washington based on the existing facts presented in trial.

THE COURT: Sure. Let me reread part of my decision, because I probably went over it very quickly. I said that it could only be Microsoft's trade secret. Moreover, I said Microsoft did not keep it much of a secret. It freely gave it out to any contractor willing to compete to create knowledge cards or products, and used other open source software used to create the cards. During this applicable time, Microsoft was looking for as many contractors as possible. And I guess I'll just add to my decision. There's no evidence of any confidentiality agreements when getting the knowledge card template. There

wasn't any. I didn't see any. And so as far as I gather from the trial, Microsoft freely shared it with anyone without any confidentiality agreement, in an effort to rapidly create as many knowledge cards as possible.

So anyway, you certainly may readdress that in your response to anything Mr. Kinsel requests. And I accept your -- actually your view of the law, that it is possible for someone to hold a trade secret, and continue to hold it even as they give it to someone else by certain protections. But I don't -- I don't think the evidence established that in this particular case.

Anyway, that concludes everything I have. Please send me your Word documents and -- as soon as you can, and thank you very much again for your clear presentation on the evidence, and it looks like we have a ways to go. So I look forward to that, and getting the decision out to you and then receiving your additional briefing on the CR59 motion.

MR. KINSEL: Your Honor, just -- this is Mr. Kinsel. Just for clarification, I am understanding the fact that you have not addressed our request for fees under the non-competition statute RC49.062.080 as denial of the same?

THE COURT: You did request that under the injunction.

MR. KINSEL: Right.

THE COURT: And I'm going to deny that. Given the

way that the request was phrased by Mr. Graff on behalf of Aptly, I believe he made it very clear at the beginning he was asking for an extension, but he understood that that might be an extension of the law and so I find no basis under the statute to grant fees on that basis.

MR. KINSEL: Yeah. I just wanted to clarify that.

THE COURT: Yeah. I appreciate that. I actually had that written down, and I did not read it. So thank you for asking. All right. If there's nothing else then, have a good weekend.

MR. KINSEL: Thank you.

MR. GRAFF: Thank you very much, your Honor.

(2:31 p.m.)

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IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: February 5, 2024.

John Fahrenwald

JOHN FAHRENWALD

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