

No. 32616-1-III

FILED

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

2016.02.10
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

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

Respondents.

v.

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

Appellants,

LAKODA'S RESPONSE BRIEF

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I. INTRODUCTION

This is a case where the Defendants engaged in willful and malicious conduct aimed at intentionally damaging Lakoda, Inc. (“Lakoda”) for their own benefit. A Jury rejected the arguments made by the Defendants in this appeal, and the Trial Court properly exercised its discretion and provided the parties a fair trial. Consequently, the Verdict and the Trial Court rulings should be affirmed.

Lakoda entered into a business relationship with OMH Proscreen USA, Inc. who then operated through its agent OMH Innovations USA, Inc. Those entities are owned by Brad Hilmoe and John O’Connell. (The Defendants in this action are collectively referred to as “OMH”). Prior to any business being conducted, John O’Connell, as “*owner*” of OMH Proscreen USA, Inc. (“Proscreen”), entered into a Non-Disclosure Agreement (“NDA”) with Lakoda, Inc. Based on the NDA’s protections, Lakoda entered into an agreement to source parts and manufacture soil screeners for Proscreen in China. Proscreen, acting through OMH Innovations, O’Connell and Hilmoe, used the information and access it obtained

as a result of the NDA to go around Lakoda and begin doing business directly with Lakoda's manufacturer. Lakoda filed suit alleging that this conduct constituted a breach of contract, misappropriation of Lakoda's trade secrets and tortious interference with Lakoda's business expectancies.

After years of litigation, a Jury found that Proscreen breached the NDA. CP 1059-1061. The Jury also found that OMH willfully and maliciously misappropriated Lakoda's trade secrets and tortiously interfered with Lakoda's business relationships. Id. OMH had filed counterclaims for breach of contract and misappropriation of trade secrets. As to the counterclaims, the Jury also found that Lakoda did not breach its contracts with OMH and that Lakoda did not misappropriate any trade secret of OMH. Id.

Despite being given the opportunity to fairly argue their case and theories, OMH asks this Court to second guess the Jury that heard the evidence and saw the witnesses. As explained below, neither the Trial Court nor the Jury abused their discretion. Both properly fulfilled their roles and determined that OMH acted in a

malicious and willful manner that caused damages to Lakoda. The Trial Court's rulings and the Jury's Verdict should be affirmed.

II. RESTATEMENT OF ISSUES PRESENTED

1. Did the Trial Court correctly exercise its discretion by refusing to admit inadmissible hearsay contained in an unauthenticated and untranslated document that OMH purported to be a "*registration*" that had a legal effect?
2. Did the Trial Court correctly exercise its discretion by refusing to admit evidence which attempted to present conclusions concerning foreign law which OMH had not pled?
3. Did the Trial Court properly exercise its discretion by ruling that questions about what OMH did to protect its alleged trade secrets did not open the door for OMH to discuss inadmissible evidence and conclusions about Chinese law?
4. Did the Jury have evidence upon which it could determine the damages it awarded to Lakoda?
5. Did the Trial Court properly deny OMH's Motion for a Directed Verdict and allow the Jury to decide Lakoda's breach of contract claim?
6. Was there evidence upon which the Jury could decide OMH misappropriated Lakoda's trade secrets?
7. Did the Court correctly exercise its discretion by refusing to admit an exhibit that was not authenticated and finding that testimony about the unadmitted exhibit was irrelevant?
8. Did the Trial Court correctly exercise its discretion in the amount of attorney fees awarded?

III. STATEMENT OF THE CASE

A. Relevant Facts.

1. Lakoda Is A Contract Manufacturer.

Lakoda is an experienced “*contract manufacturer*” that makes parts and/or assemblies for people in various locations, including the U.S. and Asia. RP 66, ll. 18-21. Dale Ames, the owner of Lakoda, has been working with factories in Asia and China since 2000. RP 67, ll. 25–68, ll. 1-2. Lakoda requires customers to sign a Non-Disclosure Agreement to protect the information and experience that Lakoda has amassed. RP 69, ll. 4-10. This information included Lakoda’s contacts, factories, processes, and procedures. RP 70-71. One of the Chinese factories that Lakoda had been working with for a number of years was Long Fei. RP 70, ll. 10-16. Lakoda uses a compilation of contacts its owner, Dale Ames, made in China over many years along with methods, techniques, and processes it developed in dealing with Chinese manufacturers to successfully outsource the manufacturing of products in China. Lakoda invested significant time and money to locate the appropriate contacts and factories in China. The process Lakoda utilized in dealing with its

contacts in China are exactly why Lakoda is hired to do contract manufacturing for other companies.

Lakoda makes its money for the services it provides by obtaining a price from the factory, marking up that price and then providing the customer with a quote. RP 72, ll. 13-17. In essence, Lakoda is a middle man. In order to prevent its customers from going directly to the factory, Lakoda protects itself by having its customers agree not to do so through a Non-Disclosure Agreement. RP 72, ll. 23-25; RP 73, ll. 1-4. See also RP 73, ll. 15-25. Lakoda works with Tomorrow Product Development (“TDP”) to find factories it uses, including Long Fei. RP 75, ll. 5-17.

2. Lakoda’s Agreements With O’Connell/Proscreen.

Brad Hilmoe (OMH Proscreen) and Dales Ames (Lakoda) first met on a flight from Spokane to China. RP 78-79. That trip was only Hilmoe’s second trip to China. RP 678, ll. 7-14. In March 2010, O’Connell and Hilmoe met with Ames in Spokane. RP 82-84. The parties discussed the services Lakoda could provide to O’Connell/Proscreen. Id.; see also Ex. 1. On March 23, 2010, O’Connell signed a Non-Disclosure Agreement (“NDA”) with

Lakoda as the “owner” of OMH Proscreen USA, Inc. **Ex. 5.**
However, Proscreen was not incorporated until October 2010.
Ex. 40.

Based on the assurances of protection provided by the NDA, Lakoda entered into an agreement with O’Connell/Proscreen for Lakoda to use its experience, connections, and proprietary compilation of information and processes to source parts and have screeners manufactured for O’Connell/Proscreen. RP 84; 87-90; and 97-99. After Lakoda provided O’Connell/Proscreen and Hilmoe access to Long Fei, Defendants began to purchase screeners and equipment directly from Long Fei in direct violation of the NDA and the oral agreements O’Connell/Proscreen had with Lakoda. O’Connell/Proscreen and Hilmoe intentionally and purposefully induced Long Fei to breach its separate NDA with Lakoda for the improper purpose of unjustly enriching themselves and usurping Lakoda’s profits. RP 130-133; 137-140. O’Connell/Proscreen’s intentional interference forced Lakoda to sever its business relationship with Long Fei and deprived Lakoda of the benefit of its business expectancy.

B. Procedural History.

1. Background.

On April 9, 2012, Lakoda filed its Amended Complaint for Damages and Injunctive Relief that was at issue in trial. CP 37-45. Defendants filed Answers including Counterclaims and Third-Party Claims against Dale Ames and Dodie Ames, individually. CP 50-62; 70-75; and 399-404.¹ None of the Answers, Counterclaims or Third-Party Claims filed included any allegation that Chinese law would apply to any issue in the case.

As found by the Trial Court in its Findings of Fact supporting the award of attorney fees, the case had a tortured history as a direct result of Defendants' actions. CP 1170. *"The Defendants created significant discovery issues, including refusing to provide discovery to Plaintiff and forcing Plaintiff to draft and litigate motions to compel the production of discovery."* CP 1170, ll. 9-12. See also CP 1762-1764 and CP 2308-2310.

¹ Prior to filing an Answer, Defendant John O'Connell moved to dismiss for lack of personal jurisdiction. CP 1411-1412. A motion that he lost.

2. Trial.

A Jury trial commenced on May 5, 2014. CP 1045-1046. The Jury considered the testimony of 9 witnesses, and 142 exhibits were admitted. See CP 3274-3275 and CP 1048-1058. On May 20, 2014, the Jury entered a Special Verdict in favor of Lakoda on every issue. CP 1059-1061. This included determining that Lakoda's trade secrets were misappropriated and that the misappropriation was willful and malicious. CP 1060.

At trial, the evidence was that the Defendants willfully and maliciously misappropriated Lakoda's trade secrets which constituted not only a violation of the Trade Secret Act, but it was also a tortious interference with Lakoda's business expectancy and a breach of contract. The evidence at trial was that the conduct and the liability created by these claims all resulted in the same damages. Although the same damages applied, the Court instructed the Jury that they were not allowed to "*duplicate the damages*" when answering the Special Verdict Form. CP 1059. Based upon the Jury's Verdict, Judgment was entered against the Defendants. CP 1157-1150. Pursuant to RCW 19.108.040, the Court ruled that

Lakoda was entitled to an award of its reasonable attorney fees and costs. CP 1169. The Trial Court entered Findings of Fact and Conclusions of Law supporting the amount of reasonable attorney fees and costs awarded as a result of the willful and malicious misappropriation. CP 1168-1172.

OMH appealed and assigned error to several rulings by the Trial Court. Notably, OMH did not appeal the Jury's determination with regard to OMH's counterclaims. As explained below, the Jury's Verdict with regard Lakoda's claims and the discretionary rulings of the Trial Court should be affirmed.

IV. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion By Refusing To Admit Exhibit 329 Or To Allow Testimony About It.

Defendants refer to **Exhibit 329** as a "*registration of drawings.*" This is an untranslated document consisting of what is assumed to be Chinese characters. **Ex. 329**. At trial, OMH wanted to argue **Ex. 329** had the legal effect of providing the Long Fei factory with "*ownership*" of designs and that it had the legal effect of making it so only Long Fei had the right to "*produce the screeners in China.*" As explained below, the Trial Court properly

exercised its discretion in deciding that **Exhibit 329** and the purported legal effect of it were not admissible.

1. OMH Improperly Attempted To Introduce Chinese Law To The Jury By Offering Conclusory Testimony About An Untranslated Document.

“The statutes or decisional law of a foreign country must be pleaded.” CR 9(k)(2); Byrne v. Cooper, 11 Wn. App. 549, 550 (1974) (citing RCW 5.24.040). *“Applicable foreign statutes should be set forth with their citations, and decisional foreign law should be concisely recapitulated.”* Id. at 551. The determination of foreign law is an issue for the court. Id. at 555-56. The party seeking to apply foreign law bears the burden of producing *“sufficient proof to establish with reasonable certainty the substance of the foreign principles of law.”* Prime Start Ltd. v. Maher Forest Products, Ltd., 442 F. Supp.2d 1113, 1119-20 (2006) (applying Washington law).

OMH did not plead that Chinese law applied to any aspect of the parties’ dispute. CR 44.1; CR 9(k). Nor did OMH produce or reference any Chinese statutes or decisional law confirming that the purported *“registration”* had any legal effect under Chinese law. Indeed, a review of the record confirms that Defendants did not

present the Court with any evidence with regard to the actual substance of Chinese law with regard to “*registration*.” Yet, OMH wanted to present the Jury the legal conclusion that, under Chinese law, the “*registration*” prevented anyone except Long Fei from producing the OMH screeners in China. RP 861, ll. 17-23. Notably, there was no evidence at all with regard to whether or not that actually represents Chinese law.

In an attempt to end around the fact they did not plead Chinese law, OMH claimed they were not relying on actual Chinese law but should be allowed to tell the Jury what Mr. Hilmoe “*believed*” or was “*told*” was the effect of the purported registration. In other words, OMH wanted the Court to allow Hilmoe to speculate to the Jury the legal effect of a purported Chinese “*registration*.” However, there was no evidence that either Brad Hilmoe or any other witness was qualified to offer legal opinions with regard to Chinese law. Admission of the evidence requested would have injected a legal issue which was not pled, which was not for the Jury and which would have misled the Jury. ER 701; ER 702; Byrne, 11 Wn. App. at 555-56. As a result, the Trial Court did not err by

exercising its discretion and deciding that **Exhibit 329** was not admissible. The Trial Court also did not abuse its discretion by ruling that Mr. Hilmoe could not testify with regard to the conclusory statement that he claims to have been told about the “*effect*” of the “*registration.*”

OMH relies on cases that are inapplicable to the issue at bar and simply do not hold that a lay witness may testify to unpled foreign law. Without context, OMH claims “*the law of a foreign jurisdiction is presumed to be the same as the law of Washington.*” However, In re Marriage of Landry, 103 Wn.2d 807, 811 (1985), the court addressed a conflict of law analysis with regard to what law applied as between Washington law and another state. There was no conflict of law issue in this case. Instead, OMH attempted to use the unpled and unproven law of a foreign country to try to invent a defense. Furthermore, OMH did not make any such argument to the Trial Court or present what it believed the law of Washington was with regard to “*registration.*”

Similarly, the cases OMH cites in an attempt to claim that a lay person can testify with regard to legal conclusions also do not

apply. In Skagit State Bank v. Rasmussen, 109 Wn.2d 377 (1987), the court did not hold that a “*witness can testify regarding his understanding of legal effect of loan documents.*” That evidentiary issue was not even considered by the Skagit court and was not at issue. Instead, the issue was whether the defendant, who signed loan documents without reading them, could avoid the obligations because the legal effect of the documents was misrepresented to him. Skagit, 109 Wn.2d at 378. The recitation of the facts in the opinion stated that a trial witness testified he had described his understanding of the legal effect of the documents to the plaintiff before the loan documents were executed. Id. at 379. The Skagit court did not hold that witnesses were free to testify about their opinion of the law or the legal effect of a document.

Likewise, in Bennett v. Shinoda Floral, Inc., 108 Wn.2d 386 (1987), the court did not consider or hold that witnesses are entitled to testify with regard to their understanding of the law. Instead, that case involved the enforceability of a settlement release the plaintiff executed. The plaintiff was allowed to testify with regard to the circumstances surrounding its execution. In contrast, OMH was not

a party to the document in question and was attempting to testify as to the legal effect of the document under Chinese law.

The Nationwide Transp. Fin. v. Cass Info. Sys., Inc., 523 F.3d 1051, 1059 (9th Cir. 2008) opinion also does not support OMH's position. Nationwide argued that it was offering the witness' legal opinions on the UCC "*not as legal conclusions, but to show [the witness'] state of mind and reasoning....*" Id. Nationwide asserted

"[t]he fact that [the witness] rescinded the [hold harmless agreement] because he believed it violated applicable commercial law would have shown to the jury that [the witness'] rescission was a reasonable business decision to make under the circumstances."

Id. The Ninth Circuit rejected the argument that such testimony was admissible to establish "*state of mind*" and the reasonableness of a business decision. Id. The Ninth Circuit affirmed the District Court's decision to limit the witness' testimony to "*the circumstances that led him to formulate his opinion.*" Id. at 1060.

Similarly here, the Trial Court did not allow legal conclusions but did allow testimony concerning the circumstances. As a result, OMH was able to argue their theory that their motive was because

they claimed Long Fei was the only one allowed to manufacture screeners.

Q. Did you tell them that Longfei was the only company that could manufacture screeners?

A. I'm not sure. I forgot. I think I forgot.

Testimony of Xiao Ping Zhang - RP 307, ll. 9-11.

Q. At any time subsequent – anytime after that, did you tell Brad or Jack that Longfei was the only one that was allowed to manufacture screeners in China?

A. Yes.

Testimony of Xiao Ping Zhang - RP 307, ll. 19-22. Thus, the Trial Court properly exercised its discretion to prevent testimony with regard to Chinese law and legal conclusions but still allowed OMH to present evidence to argue the theory of their case.

2. The Trial Court Properly Excluded Hearsay.

OMH's appeal also ignores that the Court properly concluded the evidence sought to be introduced also constituted inadmissible hearsay. OMH's offer of proof was that it wanted to present to the Jury testimony by Brad Hilmoe of the "*representations from Longfei*" about the "*registrations*" – in other words, what Mr. Hilmoe was told by a third party. The Court properly excluded the

testimony as inadmissible hearsay. RP 864, ll. 21-25; RP 865, ll. 11-17. Likewise, **Exhibit 329** is inadmissible hearsay and no exception providing for its admission was presented by OMH.

3. The Trial Court Properly Excluded Exhibit 329 Which Was Not Authenticated.

A review of the record also confirms that **Exhibit 329** was never authenticated. There simply was no evidence that it was an actual “*registration*,” an official document or otherwise authenticated. As recognized by the Court, the document was not even translated. There was no evidence allowing the Court to even determine what the document said to determine its admissibility. Since it was not translated, there simply was no foundation for the Court to determine its admissibility or conclusory statements by witnesses about it. Accordingly, it was inadmissible.

B. Lakoda Did Not Open The Door To Discussion Of Actions Taken By Third Parties.

OMH’s argument with regard to “*opening the door*” makes as little sense on appeal as it did at trial. In its counterclaims, OMH alleged that it had a trade secret. The Jury found against OMH on those counterclaims. There was no assignment of error, and the

counterclaims have not been appealed. In order to defend against the counterclaims, Lakoda elicited evidence that OMH had not taken steps to protect what it claimed to be trade secrets. See RP 568-572; RP 640. This included asking if OMH had obtained any patents. Notably, OMH did not object to any questions concerning whether or not it had obtained patents.

OMH fails to identify how pointing out that OMH did not take steps to protect its alleged trade secret opens the door for it to present inadmissible evidence with regard to a third party's alleged registration based upon Chinese law that was not pled. Indeed, as the Trial Court pointed out, “[i]t has absolutely nothing to do if he’s [OMH] registered his patent.” RP 839, ll. 21-23.

OMH’s argument continues to center around its claim that under Chinese law, if Long Fei registered designs, then OMH could not register them “*because the Longfei factory registered these designs.*” As pointed out above, there was no evidence that this actually constituted Chinese law. If OMH wanted to make that argument, they should have pled Chinese law and presented evidence of what Chinese law provided. They did not do so.

Consequently, the fact Lakoda pointed out all of the things OMH failed to do to protect its alleged trade secret does not open the door for OMH to present unsubstantiated conclusions about Chinese law or evidence about what a non-party did. In addition, “*opening the door*” does not render otherwise inadmissible evidence admissible. In this case, the evidence was inadmissible regardless of whether or not a “*door*” had been opened. The Trial Court did not abuse its discretion.

C. The Trial Court Properly Denied OMH’s Motion For A Directed Verdict.

A trial court’s ruling on a CR 50 motion for judgment as a matter of law is reviewed de novo with the same standard applied as the trial court. Goodman v. Goodman, 128 Wn.2d 366, 371 (1995). Judgment as a matter of law may only be granted if there is “*no competent evidence or reasonable inference sustaining the jury’s verdict for the nonmoving party.*” Hill v. GTE Directories Sales Corp., 71 Wn. App. 132, 143 (1993). The court must consider whether the evidence, accepted as true and all inferences viewed in the light most favorable to the nonmoving party, support the verdict.

We have oft repeated the rule that a challenge to the sufficiency of the evidence, or a motion for nonsuit, dismissal, directed verdict, new trial, or judgment notwithstanding the verdict, admits the truth of the opponent's evidence and all inferences which can reasonably be drawn therefrom, and requires that the evidence be interpreted most strongly against the moving party and in a light most favorable to the opponent. No element of discretion is involved. Such motions can be granted only when the court can say, as a matter of law, there is no substantial evidence to support the opponent's claim.

Davis v. Early Constr. Co., 63 Wn.2d 252, 254-55 (1963); see also Goodman, 128 Wn.2d at 371. “*In ruling on a motion for judgment notwithstanding the verdict, a trial court exercises no discretion.*” Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha, 126 Wn.2d 50, 98 (1994). Furthermore, “[i]f any justifiable evidence exists on which reasonable minds might reach conclusions consistent with the verdict, the issue is for the jury.” Mega v. Whitworth College, 138 Wn. App. 661, 668 (2007).

1. Lakoda Presented Evidence Supporting Its Trade Secret Claim.

“*It is well established that an appellate court will not disturb a jury award supported by substantial evidence.*” Alpine Industries, Inc. v. Gohl, 30 Wn. App. 750, 758 (1981).

Trade secrets include formulas, patterns, compilations, programs, devices, methods, techniques, or processes that:

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

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

RCW 19.108.010(4).

Lakoda presented substantial evidence supporting the conclusion that its information and know-how as a contract manufacturer in China constituted trade secrets. RP 67-77. This included its relationship with the Long Fei factory through TPD. Lakoda took steps to protect that information prior to providing OMH with access to it by requiring a Non-Disclosure Agreement. **Ex. 5.** This included protecting the relationship that Lakoda had with Long Fei through an agent, TDP. OMH makes the illogical argument that Lakoda cannot use an agent to obtain information that constitutes part of the trade secret. This argument not only makes no sense, but it also asks the Court to weigh the evidence. OMH had

the opportunity to make this argument to the Jury. The Jury weighed the evidence and rejected this argument.

2. Lakoda Presented Evidence Supporting Its Contract Claims.

Under Washington law, contracts are interpreted based upon the intent of the parties. Berg v. Hudesman, 115 Wn.2d 657 (1990).

Determining the parties' intent requires consideration of:

'the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties.'

Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (quoting Stender v. Twin City Foods, Inc., 82 Wn.2d 250, 254, 510 P.2d 221 (1973)).

a. The NDA And Contracts As A Whole Created A Question Of Fact To Be Decided By The Jury.

In this case, the parties' "*contract*" included not only the NDA but also subsequent purchase orders. See Ex. 5, Ex. 24 and RP 97-98. Contract interpretation is normally a question of fact for the fact-finder. See, e.g., Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990) (distinguishing contract interpretation, a

question of fact, from contract construction, a question of law); and In re Estate of Richardson, 11 Wn. App. 758, 761, 525 P.2d 816 (1974) (“*The existence of a contractual intention is ordinarily a fact question to be resolved by the trier of the facts.*”). This includes consideration of extrinsic evidence, including the parties’ subsequent acts.

In this case, not only did Lakoda have a claim for breach of contract, but OMH also made a counterclaim for breach of contract, showing OMH’s intent that damages be recoverable. The Jury found that Proscreen breached its contracts with Lakoda and that Lakoda did not breach its contract. CP 1059-1061. OMH’s Motion for a directed verdict asked the Court to read Paragraph 15 of the NDA while ignoring the rest of the terms of the Agreement and to interpret Paragraph 15 in a vacuum. See Ex. 5 and RP 434. The NDA also included Paragraph 8 which recognized that the parties would have rights and remedies in addition to injunctive relief. Ex. 5; RP 435-436.

‘If only one reasonable meaning can be ascribed to the agreement when viewed in context, that meaning necessarily reflects the parties’ intent; if two or more meanings are reasonable, a question of fact is

presented.’ Mayer, 80 Wn. App. at 421, 909 P.2d 1323.

GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 135, review denied, 181 Wn.2d 1008 (2014). The interpretation proposed by OMH would have been inconsistent with this provision and would have rendered the contract illusory. “*Moreover, the court will not give effect to interpretations that would render contract obligations illusory.*” Taylor v. Shigaki, 84 Wn. App. 723, 730 (1997). As a result, it was not error for the Trial Court to deny the Motion for Directed Verdict and allow the Jury to weigh the parties’ intent with regard to the contracts.

b. A Limitation Of Liability Is Not Enforceable Where There Has Been An Intentional Breach.

The Jury correctly considered the totality of the parties’ Agreements, the NDA and purchase orders, and found that Lakoda was entitled to recover its damages. OMH was provided the opportunity to argue its case. However, even if the Court were to consider the limitation of liability found in Paragraph 15 in a vacuum, it is unenforceable as a matter of law because of OMH’s intentional breach and bad faith.

Under Washington law, “[t]here is in every contract an implied duty of good faith and fair dealing.” Badgett v. Sec. State Bank, 116 Wn.2d 563, 569 (1991). Because of this duty, a limitation of liability clause may not apply where the party relying on the clause acted in “*bad faith*.” Valve Corp. v. Sierra Entertainment, Inc., 431 F. Supp. 2d 1091, 1101 (W.D. Wash. 2004) citing City of Dillingham v. CH2M Hill Northwest, Inc., 873 P.2d 1271, 1275 (Alaska 1994) (“*a party may contract to limit liability for damages resulting from breach of contract but... such a provision is not effective in case he acts fraudulently or in bad faith.*”), quoting 6A CORBIN ON CONTRACTS § 1472 (1962); and McNally Wellman Co. v. New York Elec. & Gas Corp., 63 F.3d 1188, 1198 (2d Cir. 1995) (finding liability limitation unenforceable where actions constituted an “*intentional breach of the contract*”).

This general rule of contract interpretation has been approved by numerous other courts. See Colonial Life Ins. Co. of Amer. v. Elec. Data Sys. Corp., 817 F. Supp. 235, 242-43 (D.N.H. 1993) (“*[A] contractual limitation of liability is not enforceable... if the plaintiff’s claim of fraud, bad faith and/or ‘total and fundamental’*”).

breach is proven at trial.”); Long Island Lighting Co. v. Transamerica Delaval, Inc., 646 F. Supp. 1442, 1458 (S.D.N.Y. 1986) (“A defendant may be estopped from asserting a contractual limitation of consequential damages if the defendant has acted in bad faith.”); J.A. Jones Constr. Co. v. City of Dover, 372 A.2d 540, 545 (Del. Super. Ct. 1977) (“Even if a contract purports to give a general exoneration from ‘damages,’ it will not protect a party from a claim involving its own fraud or bad faith.”); and Jewish Hosp. of St. Louis v. Boatmen’s Nat’l Bank of Belleville, 633 N.E.2d 1267, 1280 (1994) (“Although exculpatory provisions such as this are not given special favor in the law, they are generally held effective except as to reckless or intentional breaches or those committed in bad faith.”).

In this case, the entire purpose of the NDA was to protect Lakoda’s trade secrets and confidential information. **Ex. 5.** Lakoda alleged that OMH’s misappropriation of Lakoda’s trade secrets also constituted a breach of the NDA. Supra. The Jury determined that the misappropriation was willful and malicious. Supra. As a result, there is no question that the breach of the NDA was intentional and

in bad faith. Consequently, it was not error for the Trial Court to submit the issue of the breach of contract to the Jury. Since the Jury found conduct by OMH that was willful and malicious, the limitation of liability provision in Paragraph 15 would not apply, and the Jury's Verdict should be affirmed.

D. The Jury's Damage Award Was Supported By The Evidence.

“[D]amage questions are usually discretionary and therefore for the trier of fact, so long as damages fall within the range of relevant evidence.” Womack v. Von Rardon, 133 Wn. App. 254, 263 (2006). *“The difficulty of ascertainment of the amount of damage is not to be confused with the right of recovery.”* Dunseath v. Hallauer, 41 Wn.2d 895, 902 (1953). *“The measure of damages in any particular case will depend upon the facts in that case.”* Id. at 904. *“[W]here the fact of damage is firmly established, the wrongdoer is not free of liability because of difficulty in establishing the dollar amounts.”* Reefer Queen Co. v. Marine Const. & Design Co., 73 Wn.2d 774, 781 (1968).

In this case, OMH willfully and maliciously used information it obtained access to by agreeing to a NDA to go around Lakoda and

begin purchasing directly from Long Fei. As a result, Lakoda was deprived of income that it would have received on the equipment that OMH was purchasing. Because OMH went around Lakoda, OMH was in possession of the information that would be necessary to prove the damages incurred. As recognized by the Court, OMH engaged in substantial gamesmanship when it came to discovery. As a result, Lakoda had a difficult time obtaining information from OMH with regard to its purchases from Long Fei. After the Court forced the production of discovery, Lakoda had obtained a voluminous amount of purchase orders, invoices and other documents relating to the amount of business that OMH did directly with Long Fei in contravention of the NDA. At trial, Lakoda presented summaries and calculations of the numerous purchase orders, invoices and other documents to establish the amounts being paid to Long Fei and compare that to what Lakoda had been making on the same purchases. See RP 110-116; **Exs. 16, 17, 18, 24, 26, 27, 28, 126, 127, and 128.** Lakoda laid the proper foundation for the admissibility of these exhibits, and the Trial Court properly exercised its discretion by admitting the exhibits. RP 120-150.

OMH's argument on appeal is one that does not go to the admissibility of the evidence. Instead, OMH is arguing the credibility of the calculations and summaries admitted pursuant to ER 1006. However, OMH had the opportunity to make these very same arguments to the Jury. The Jury rejected these arguments. As a result, there is no question that Lakoda submitted substantial evidence upon which the Jury Verdict is based.

E. The Trial Court Properly Exercised Its Discretion By Refusing To Admit The Unauthenticated Video And Hearsay.

OMH attacks the Trial Court's decision to exercise its discretion by not admitting testimony by Gerald Clancy about **Exhibit 330**, a video that was not admitted. OMH's argument is backwards and ignores the fact that it failed to authenticate **Exhibit 330**. As a result, Ex. 330 was inadmissible. It does not matter why OMH wanted to admit the inadmissible video. Since the video was not being admitted, the testimony referring to Clancy submitting the video in conjunction with a prior deposition would have confused the Jury and was irrelevant since the video was not being admitted. The Jury would have had no clue what was being discussed.

Videos are subject to the same authentication standards as photographs. State v. Newman, 4 Wn. App. 588, 593 (1971). Therefore, to authenticate the video, OMH needed to have a witness testify as to “*when, where and under what circumstances*” the video was taken and that it accurately portrays the subject illustrated. State v. Sapp, 182 Wn. App. 910, 914 (2014). The witness, Gerald Clancy, could not identify when the video was taken, where it was taken, the circumstances under which the video was taken and could not identify the individual depicted in the video. CP 622-623. As a result, the fact it was not admitted was not an abuse of discretion. Because it was not admitted, any testimony about it would have been irrelevant and prejudicial.

In addition, OMH’s counsel represented to the Trial Court that another witness would be able to identify people in the video. RP 821, ll. 10-18. Yet, OMH failed to offer any such testimony.² A review of the record confirms that OMH did not present any witness to authenticate the video. OMH does not indicate anywhere in the record where it attempted to properly authenticate the video. If, as

² OMH also did not seek to re-call any witness for this purpose.

its counsel represented, there were other witnesses who could authenticate the video, OMH should have called them. It elected not to do so, and the Trial Court properly refused to admit an unauthenticated video.

F. The Trial Court Properly Exercised Its Discretion In Awarding Attorney Fees And Costs To Lakoda.

Defendants misstate the law. Washington does not have a per se prohibition for awarding attorney fees where nominal damages are awarded. Instead, Washington law looks to the specific provisions authorizing attorney fees, analyzes the harm intended to be protected and the intent of authorizing such attorney fees. See Lay v. Hass, 112 Wn. App. 818, 827 (2002) (attorney fee award appropriate under RCW 4.84.250 where damages award is only \$433); Minger v. Reinhard Distributing Co., Inc., 87 Wn. App. 941 (1997) (plaintiff receiving a nominal award of damages in an employment discrimination claim is entitled to attorney fees as the prevailing party under RCW 49.60.030); Miles v. F.E.R.M. Enterprises, Inc., 29 Wn. App. 61 (1981) (plaintiff entitled to attorney fees under RCW 4.84.030 as prevailing party based upon award of nominal damages).

Washington cases have stated that the “*the amount of damages involved is not a compelling factor in fixing the amount of fees.*” Target National Bank v. Higgins, 321 P.3d 1215, 1225 (2014), citing Travis v. Wash. Horse Breeders Assn’n, 111 Wn.2d 396, 409 (1988). Further, in Target National, the court recognized that the Washington cases addressing disproportionate fee requests were based upon padding by the lawyers. Id. There is no allegation of or evidence suggesting that padding occurred in this case.

The Defendants’ reliance upon Farrar and Sintra is misplaced. In Farrar, the United States Supreme Court held that awarding attorney fees in federal civil rights cases may not be appropriate when the plaintiff received only nominal damages “*because of his failure to prove an essential element of his claim for monetary relief.*” Farrar v. Hobby, 506 U.S. 103, 115 (1992). In Farrar, the plaintiff sought seventeen million dollars against six different defendants in litigation lasting ten years. Id. The jury was given special interrogatories and found that only one of the six defendants violated the plaintiff’s civil rights, but that the violation was not the proximate cause of plaintiff’s injuries. Id. Despite the jury’s finding

that the violation was not the proximate cause of injury to the plaintiff, under the federal statutes, the trial court was required to award a nominal amount for damages based solely upon the finding that a civil rights violation occurred. Id. It is within this context that the Supreme Court held that plaintiffs who fail to prove an essential element of their claim are not entitled to an award of attorney fees. Id. It should be noted that the Supreme Court did agree that the plaintiffs qualified as a “prevailing party” as a result of the nominal damages award. Id. at 112. However, based upon the facts, the plaintiffs fell within a small class of “prevailing parties” who should not be awarded attorney fees. Washington courts have critically analyzed Farrar and concluded that its applicability to Washington law is limited to nominal damage awards under section 1983 claims. See Ermine v. City of Spokane, 143 Wn.2d 636, 650 (2001); Martinez v. City of Tacoma, 81 Wn. App. 228, 243-44 (1996). The Washington Supreme Court acknowledged in Ermine that even federal courts agree that Farrar does not establish a per se rule that attorney fees are improper when only nominal damages are obtained. Ermine at 644.

Sintra is likewise inapposite to the case before this Court. Sintra, Inc. v. City of Seattle, 131 Wn.2d 640 (1997). Sintra also involved a section 1983 claim in which plaintiff sought millions of dollars in alleged damages. Id. at 665. However, the trial court awarded plaintiffs only \$3 in nominal damages based upon plaintiffs' failure to establish actual damages caused by the civil rights violation. Id. Following the United States Supreme Court's precedent in Farrar for federal 1983 claims, the Washington Supreme Court held that attorney fees were not warranted in this situation. Id.

A plaintiff is entitled to recover for its actual losses resulting from misappropriation of a trade secret. Eagle Grp., Inc. v. Pullen, 114 Wn. App. 409, 420-21 (2002). Such actual losses include lost profits, lost business opportunities or future profits, and "*any additional damages needed to compensate for unjust enrichment.*" Id. In this case, Lakoda presented extensive evidence regarding its lost profits. These lost profits were based upon the Defendants' invoices for equipment and parts purchased from Lakoda's vendors after Defendants went around Lakoda.

The Jury was instructed that because the evidence included the same damages for the alternative claims, the Jury could not award the same damages twice. As a result, this case is not a “*nominal damages*” case where the Jury found there was no damage. Instead, the Jury recognized that Defendants’ conduct caused \$250,000 of damage. However, they were instructed those damages could only be awarded once.

Defendants also ignore the fact that in this case, the Jury was not instructed regarding nominal damages. Nominal damages are defined as “*damages awarded for the infraction of a legal right, where the extent of the loss is not shown, or where the right is one not dependent upon loss or damage....*” Steele v. Organo, Inc., 43 Wn. App. 230, 235 (1986) quoting C. McCormick, Damages § 20, at 85 (1935). There is no basis to conclude that the Jury’s damages award was intended as a nominal award. The Jury’s Verdict reflects that the Jury followed the Court’s instructions, found liability under each of Lakoda’s theories of liability, and did not duplicate the damages award for those theories.

Defendants' conclusory claim that the damages presented were exclusive to the breach of contract claim is revisionist history that ignores the facts of the case, the evidence presented at trial, and the Court's instructions to the Jury. The allegations in this case are similar to those in Boeing Co. v. Sierracin Corp. in which Boeing asserted claims for breach of a confidential relationship, breach of contract, and misappropriation of trade secrets. Boeing Co. v. Sierracin Corp., 108 Wn.2d 38 (1987). Boeing alleged that Sierracin violated a confidentiality provision of the contract and utilized Boeing's trade secret designs for its own use. Ostensibly, the trial court recognized that the measure of damages for each claim was the same and gave a Special Verdict Form asking the Jury to answer whether the defendants committed each alleged breach and the alleged misappropriation. Id. at 672. The Special Verdict Form then asked for a single measure of damages for all such claims. Id. at 672. The Jury found that each of the alleged breaches and the misappropriation had been committed and returned a Verdict with a single damage calculation. Id. The trial court then awarded and the Supreme Court affirmed an award of attorney fees to Boeing as the

prevailing party under RCW 19.108.040. Id. at 65-66. As in Boeing, the harm suffered and the damage caused by the breach of contract claim and the misappropriation claim were the same.

1. Lakoda Was Entitled To An Award Of Fees For Work Related To A Common Core Of Facts.

Washington law is well settled on this count, a prevailing party is entitled to recover attorney fees for the hours reasonably expended upon claims with “*a common core of facts and related legal theories.*” Chuong Van Pham v. City of Seattle, Seattle City Light, 159 Wn.2d 527, 538 (2007), quoting Martinez v. City of Tacoma, 81 Wn. App. 228, 242–43, 914 P.2d 86 (1996).

As discussed above, Lakoda’s claims for misappropriation of trade secrets, breach of contract, and tortious interference were alternative legal theories for the same common core of facts. Specifically, Lakoda’s claims all revolved around Defendants cutting Lakoda “*out of the program*” in order to avoid paying Lakoda’s markup price and increase Defendants’ profitability.

Defendants ignore the facts of the case and the instructions to the Jury. As discussed above, the jury instruction for the misappropriation claim specifically authorizes lost profits as a

measure of damages for such claim. Thus, Defendants' argument that "the vast majority" of discovery centered on the number of screeners OMH produced after removing Lakoda from the program is without merit. This is the very type of discovery upon which lost profits is calculated. These lost profits serve as the basis for damages under theories of misappropriation, breach of contract, or tortious interference.

Likewise, Defendants' claims for damages against Lakoda were generally related to the same common core of facts. There were some nuances to Defendants' affirmative claims which were unique and unrelated to Lakoda's claims. Counsel reviewed, identified, and removed such unique issues from Lakoda's request for attorney fees. CP 3302-3304. In addition to counsel's diligent review of the billing records, Lakoda also applied an across-the-board reduction to the attorney fees request in a good faith effort to ensure that non-recoverable fees were not requested. Id.

2. Lakoda Was Entitled To An Award Of The Attorney Fees Incurred To Obtain An Award Of Fees.

As explained below, OMH is being less than forthright with this Court and has advanced an argument that is contrary to well-established law. A review of the record confirms that the issue of whether the attorney fees incurred seeking an award of attorney fees was raised prior to the hearing and OMH had an opportunity to be heard. CP 3425. However, the issue is black and white under Washington law.

*The general rule is that time spent on establishing entitlement to, and amount of, a court awarded attorney fee is compensable where the fee shifts to the opponent under fee shifting statutes. 2 M. Derfner & A. Wolf, Court Awarded Attorney Fees ¶ 16.02[3] (1989). See also Daly v. Hill, *supra* (time spent defending entitlement to attorney fees compensable); Copeland v. Marshall, *supra* (time spent litigating the fee award itself compensable).*

Fisher Properties, Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 378, 798 P.2d 799, 807 (1990). The Trial Court did not abuse its discretion by awarding the reasonable attorney fees and costs incurred litigating the attorney fee award.

V. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

Based on RAP 18.1, Respondents respectfully request an award of reasonable attorney fees and costs incurred on appeal pursuant to RCW 19.108.040.

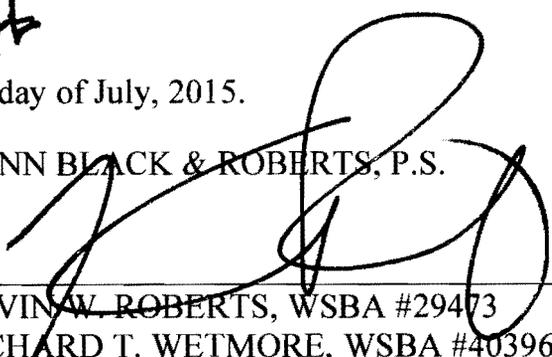
VI. CONCLUSION

OMH's appeal primarily addresses discretionary rulings. Consequently, as explained above, the Trial Court rulings and Jury Verdict should be affirmed.

Furthermore, OMH's appeal fails to identify exactly what relief it seeks from this Court. However, based on the Verdict Form which prevented the Jury from awarding damages to Lakoda on every claim, it appears OMH is seeking a new trial on Lakoda's claims. As explained above, OMH was heard on its theories, and the Jury rejected its arguments. Accordingly, the Verdict should be affirmed.

DATED this 27th day of July, 2015.

DUNN BLACK & ROBERTS, P.S.

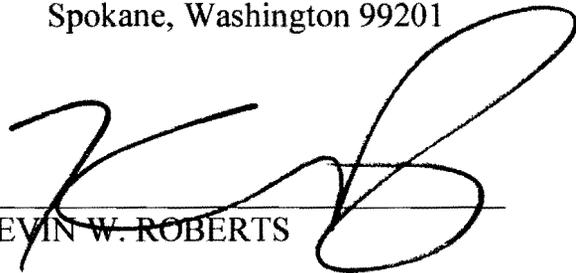


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of July, 2015, I caused to be served a true and correct copy of the foregoing document to the following:

- | | | |
|-------------------------------------|------------------|--------------------------------|
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| <input type="checkbox"/> | OVERNIGHT MAIL | Sheldon, PLLC |
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