IN THE COURT OF APPEALS OF THE
STATE OF OREGON

IVERSON'S UNLIMITED, INC.,
Plaintiff-Appellant,

v.

WINCO FOODS, LLC,
Defendant-Respondent,

WINCO FOODS, LLC,
Counterclaim-Plaintiff,

v.

IVERSON'S UNLIMITED, INC.;
and James Iverson,
Counterclaim-Defendants.

Marion County Circuit Court
12C13617; A157397

Vance D. Day, Judge.

Argued and submitted January 26, 2016.

Kevin J. Jacoby argued the cause for appellant. With him on the briefs were Paul R.J. Connolly, Tyler P. Malstrom, and Connolly & Malstrom.

Elizabeth Tedesco Milesnick argued the cause for respondent. With her on the brief were John F. Neupert, P.C., and Miller Nash Graham & Dunn LLP.

Before DeVore, Presiding Judge, and Lagesen, Judge, and James, Judge.*

DeVORE, P. J.

Reversed and remanded.

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* Lagesen, J., *vice* Flynn, J. pro tempore; James, J., *vice* Duncan, J. pro tempore.

DeVORE, P. J.

Plaintiff Iverson's Unlimited, Inc. (Iverson) brought claims against WinCo Foods, LLC (WinCo), that included misappropriation of trade secrets and breach of an oral contract. The trial court entered a limited judgment dismissing those two claims after granting WinCo's motion for summary judgment and denying Iverson's motions to amend the claims and to plead punitive damages. Iverson assigns error to each of those rulings. As to the first assignment of error, we agree that there is a genuine issue of material fact on the issue of causation that is common to the claims, which precludes summary judgment. Therefore, we reverse and remand. We do not reach the latter assignments, because the questions of amendment of the complaint may be renewed and reconsidered in a different light given our reversal of the summary judgment ruling.

We describe the facts consistent with our standard of review of a summary judgment ruling. "On review, we view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the nonmoving party." *Becker v. Pacific Forest Industries, Inc.*, 229 Or App 112, 114, 211 P3d 284 (2009). The nonmoving party is Iverson.

Iverson had provided unloading services to commercial carriers of goods being delivered to WinCo, an owner and operator of supermarkets. In the past, Iverson had been paid largely by the carriers. Beginning about 2005, WinCo put the contract for unloading services out for bid, providing that, in exchange for the right to exclusive use of WinCo's facilities and equipment, the unloading contractor would pay WinCo a percentage of fees collected from the carriers in a "revenue share" arrangement. Iverson was awarded the contracts after bidding in 2005 and 2008. Iverson paid WinCo about 50 percent of its revenue from carriers.

During this time, Iverson provided WinCo with reports on the dates of unloading, number of loads, service fees by load, number of cases and pallets unloaded, the elapsed times of unloading, and names of carriers paying Iverson ("unloading data"). The information allowed WinCo to confirm that Iverson was charging carriers correctly and

sharing the proper amount of revenue. Iverson expected its data to remain confidential when shared with WinCo. Iverson did not intend that its data would be shared with companies outside of WinCo or Iverson. As construed in Iverson's favor, such productivity, cost, and revenue information was confidential.[1]

In 2011, Belliveau, a WinCo employee, began another request for proposals (RFP) process. Upon request, Iverson gave Belliveau general access to Iverson's secured server and emailed an electronic file to him containing all of Iverson's unloading data for 2010 and seven months of 2011. Iverson told Belliveau that the electronic file was confidential. Belliveau agreed.

WinCo solicited bids from Iverson and a number of competitors, and, when WinCo sent its 2011 RFP documents, WinCo attached the file that Iverson had prepared for Belliveau. Iverson's information, which WinCo sent to Iverson's competitors, was in a searchable database or spreadsheet form. The spreadsheets included unloading dates, times, purchase order numbers, vendors, start and stop times of tasks, the number of cases, and the amounts Iverson charged carriers, but excluded the revenue share that Iverson owed WinCo for each load. WinCo's vice-president of distribution, Parker, explained that WinCo provided unloading data for over a year so that "RFP proponents [had] a good view of what they were actually going to be doing." Belliveau admitted that Iverson's competitors could have used the database to add together the total amount of time and the number of cases to determine the total amount that Iverson charged.[2]

In the 2011 bidding, there were three finalists: Iverson, Eclipse Advantage LLC (Eclipse), and RoadLink Workforce Solutions, LLC (RoadLink). RoadLink bid the

[1] Iverson's complaint alleged that the unloading data was confidential and a matter of trade secrets. WinCo disputes that the data was truly a trade secret but that dispute was not addressed on summary judgment and is not addressed on appeal.

[2] After questions from Iverson's competitors, WinCo also disclosed the number of Iverson's personnel working at each location ("head count"). The parties dispute whether evidence of disclosure of the "head count" was within the scope of the operative complaint without amendment.

highest percent to be paid to WinCo at 67 percent; Eclipse bid 60 percent; and Iverson bid lowest at 58 percent. In the previous round of bidding in 2008-09, Eclipse had bid only 51 percent, based on less information, but, with the unloading data of 2011, Eclipse increased its bid to 60 percent. Eclipse entered Iverson's data into Eclipse's cost model to analyze costs and profits for each location. RoadLink used at least some of the unloading data provided by WinCo when RoadLink put together its financial model.[3] RoadLink inquired of Belliveau about the start-and-finish time column in the unloading data. When done, RoadLink's model included a "man-hours" factor (*i.e.*, "MHPL" under "Unload Time"). RoadLink's model also referred to "Assumed Iverson Rate."

WinCo chose RoadLink as the successful bidder. In November 2011, WinCo awarded the contract to RoadLink, which took over on January 9, 2012. From November 2011 to January 8, 2012, Iverson provided unloading services for carriers but did not remit revenue-share payments to WinCo, which Iverson calculated at over $600,000. WinCo demanded payment, and Iverson filed this action.

In the common allegations of its complaint, Iverson alleged that WinCo disclosed confidential unloading data to its competitors. Iverson alleged that

> "WinCo's disclosure of this data gave [Iverson's] competitors a compilation of work performed by [Iverson] at WinCo facilities with significant detail, that no person other than [Iverson] would have been able to compile independently. This allowed [Iverson's] competitors to project [Iverson's] *labor expenses*, revenue and other costs to an unparalleled degree of certainty."

(Emphasis added.) The reference to "labor expenses" presupposed that the competitors could "reverse-engineer" the labor that was needed from the other data. In the trade-secrets claim, Iverson alleged that the unloading data comprised trade secrets "from which [Iverson's] costs and profit margins can easily be calculated." In its contract claim, Iverson alleged that a term of its agreement with WinCo

[3] The parties dispute whether the evidence shows that RoadLink used the "Time" column information in the unloading data.

was that WinCo would "keep [Iverson's] non-public financial and operational information confidential." Iverson alleged that WinCo's breach of that promise allowed RoadLink to outbid Iverson, causing the closure of Iverson's business.

WinCo filed a motion for summary judgment as to the trade secret and contract claims, contending that there was no evidence from which a reasonable jury could find that disclosure of the unloading data actually caused RoadLink and Eclipse to outbid Iverson and that, absent causation, neither claim could provide a basis for relief. Iverson opposed the motion and argued that the facts, recited above, presented a question of fact for a jury whether the competitors had taken advantage of the unloading data to calculate Iverson's costs and profits in order to devise better bids. Iverson also filed declarations of its attorney pursuant to ORCP 47 E reporting that the attorney has retained an expert who, among other things, would render opinions on "the extent to which [Iverson's] trade secret data may have benefitted WinCo's 2011 RFP process and whether and to what extent RoadLink and other competitors may have used [Iverson's] trade secret data to make an aggressive bid." The attorney later added that the expert's opinions included the extent to which Eclipse, as well as RoadLink, may have benefitted and used Iverson's trade secret data to submit a bid that exceeded the bid submitted by Iverson. Iverson also argued that the issue was more than whether disclosure of its trade secrets had caused damages; Iverson argued, alternatively, that it should recover because WinCo was unjustly enriched and because, if nothing else, a reasonable royalty should be imposed.

The trial court saw the central issue as a matter of causation. The court observed that, in order for Iverson to prevail on the contract or trade secret claim Iverson "must provide some evidence that the harm it alleges was caused by the use of the unloading data." Under Iverson's theory, the court explained, Iverson needed evidence to permit a finding that

> "disclosure of the unloading data caused [Iverson's] competitors, through that data, to determine [Iverson's] cost of doing business, its profit margin, and ultimately its bid

> price for the 2011 request for a proposal that was issued by Defendant WinCo. And that in turn, that information prompted its competitors to then outbid Plaintiff [Iverson]."

The court indicated that such evidence needed to be shown as to both RoadLink and Eclipse and that the evidence as to Eclipse was lacking. The court continued,

> "I don't see on this record *** that the trade secret case can survive. I do not view it as a three-part—separate cases. I think that you've got to get causation in each one of these and the emphasis on this motion is on causation, not on the damages that may flow, necessarily from this *** that were caused by the use of the unloading data."

The court concluded that, for want of causation, both the trade secrets and contract claims should be dismissed. The court granted WinCo's motion and entered a limited judgment dismissing the two claims.

On appeal, the parties reiterate their arguments for and against summary judgment. We review an order on a motion for summary judgment, viewing the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the nonmoving party, to determine "whether there are any genuine issues of material fact and whether the prevailing party is entitled to judgment as a matter of law." *Biomass One, L.P. v. S-P Construction*, 120 Or App 194, 200, 852 P2d 847 (1993). Because the issue is dispositive, we, too, focus on causation. Because the issues were not presented, we do not address whether the unloading data, in whole or part, is confidential per contract or a matter of trade secrets; nor do we address whether the extent or manner of the competitors' use of some lesser portion of unloading data sufficed to violate trade secrets. Those issues are not presented or developed on appeal.

In relevant part, the Oregon Uniform Trade Secrets Act provides that a "complainant is entitled to recover damages adequate to compensate for misappropriation." ORS 646.465(1). As Iverson contends, three forms of relief may be available for misappropriation. ORS 646.465(2) provides:

> "Damages may include both the actual loss caused by misappropriation, and the unjust enrichment caused by

> misappropriation that is not taken into account in computing actual loss, but shall not be less than a reasonable royalty for the unauthorized disclosure or use of a trade secret."

As WinCo contends, Iverson's operative complaint did not seek relief in the form of a reasonable royalty. Consequently, Iverson's claim for misappropriation depends upon providing some evidence from which a reasonable jury could find "actual loss *caused* by misappropriation" or "unjust enrichment *caused* by misappropriation that is not taken into account in computing actual loss." *See* ORS 646.465(2) (emphases added). In light of those allegations, the trial court correctly framed the issue as a question of cause in fact.

WinCo argues that the competitors merely used the unloading data to project their own cost and profit when developing their bids, that the competitors did not project Iverson's cost of doing business, and, accordingly, WinCo's disclosure did not actually cause Iverson to lose the bid. Further, WinCo argues that, although an attorney's declaration pursuant to ORCP 47 E, involving an expert, may create a question of fact where the factual issue is a matter subject to expert opinion, here Iverson's expert cannot create a question of fact because he has no personal knowledge about how the competitors constructed their bids. *See generally* *Hinchman v. UC Market, LLC*, 270 Or App 561, 570-72, 348 P3d 328 (2015) (discussing points provable through expert testimony versus points provable with ordinary witnesses with personal knowledge); *see also* *LaVoie v. Power Auto, Inc.*, 259 Or App 90, 95-98, 312 P3d 601 (2013) (an expert affidavit was insufficient to create an issue of fact because the issue of actual or implied consent was not an expert issue); *Deberry v. Summers*, 255 Or App 152, 162-65, 296 P3d 610 (2013) (whether attorney agreed to draft documents to protect the plaintiff was not subject to expert's opinion lacking personal knowledge).

Trial may or may not prove the strength of WinCo's arguments, but, on a motion for summary judgment, we conclude that Iverson has the better argument. "Causation may be proved by circumstantial evidence, expert testimony, or

common knowledge." *Two Two v. Fujitec America, Inc.*, 355 Or 319, 332, 325 P3d 707 (2014). Iverson presented evidence from RoadLink's president, Navarete, in which he allowed that RoadLink used at least some of the unloading data from WinCo to formulate its bid. RoadLink expressed interest in Iverson's time data, and RoadLink's model referenced the "Assumed Iverson Rate." Although Iverson's expert would indeed lack personal knowledge how RoadLink or Eclipse constructed their bids, the financial complexity of bidding would be an appropriate matter for expert testimony to explain how Iverson's unloading data could be used to "reverse engineer" Iverson's cost and profit. That appropriate aspect of expert testimony could be considered together with other witness testimony to permit a jury to draw a reasonable inference that RoadLink did employ Iverson's trade secrets—its unloading data—in developing more improperly competitive bids. *See Hinchman*, 270 Or App at 573-74 (plaintiff's theory of liability is susceptible to proof through expert testimony).

The same is true of Eclipse. With lesser data, Eclipse had bid nine percent less in 2008-09, but, with Iverson's more detailed unloading data, Eclipse increased its bid nine percent in 2011 and to outbid Iverson. Further, without amendment of the pleadings, Iverson's current complaint (which does not mention "head count") alleged that the unloading data allowed competitors to calculate its "labor expenses" and determine profit margins. Presumably, Iverson's expert, when explaining how the unloading data would benefit competitors, could explain how "labor expenses" could be "reverse-engineered" from the data alleged in the current complaint. On this point, Iverson notes that Eclipse admitted that it used the "head count" data that WinCo obtained from Iverson and was able to improve its bid as a result. Consequently, plaintiff's expert opinion, coupled with testimony from percipient witnesses could lead jurors to make a reasonable inference that disclosure of Iverson's unloading data was a cause-in-fact of damage or unjust enrichment.

On summary judgment, "a reasonable jury could reach *** a contrary conclusion, but *** the question is not which conclusion is most likely but whether an issue of fact exists that permits jury resolution." *Two Two*, 355 Or at

332. We conclude that Iverson's contravening evidence presented a genuine issue of material fact on causation asking how its competitors used Iverson's trade secrets to formulate their bids. The same factual question remains as to Iverson's claim for breach of contract. Accordingly, we reverse the limited judgment and remand for further proceedings consistent with this opinion.

Reversed and remanded.