IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FLUKE CORPORATION, a Washington corporation; and DANAHER CORPORATION, a Delaware corporation, Appellants/ Cross Respondents, v. MILWAUKEE ELECTRIC TOOL CORPORATION; a Delaware corporation; EVANS NGUYEN, an individual; and JON MORROW, an individual, Respondents/ Cross Appellants.	No. 64408-4-I DIVISION ONE UNPUBLISHED FILED: July 11, 2011

Cox, J. — In this second review of this case, Fluke Corporation and its parent company, Danaher Corporation, (collectively "Fluke") appeal the summary dismissals of multiple claims against Milwaukee Electric Tool Corporation (MET), Evans Nguyen, and Jon Morrow. Also before us are the cross-appeals of Morrow and MET of the denial of attorney fees to them.

There are no genuine issues of material fact and both Morrow and MET were entitled to judgment as a matter of law regarding the breach of contract, tortious interference with a business expectancy, breach of fiduciary duties, and trade secret misappropriation claims. The trial court did not abuse its discretion in denying both Fluke's CR 56(f) motion for a continuance and its motion to amend its complaint shortly before trial. We affirm.

Fluke Corporation is a leading product manufacturer in the test and measurement (T&M) market. Morrow and Nguyen formerly worked for Fluke, but now work for MET.

Morrow worked for Jacobs Chuck Manufacturing Company, a South Carolina subsidiary of Fluke's parent company, Danaher. Morrow signed a noncompetition agreement with Jacobs Chuck in the summer of 2004. In November 2004, he ceased working for Jacobs Chuck and transferred to Fluke.

After Nguyen worked for Fluke for a time, he signed an employment agreement that contained a provision not to solicit Fluke employees for one year after leaving Fluke. This agreement contains a paragraph that states that the consideration for the agreement was eligibility to be considered for recommendation of annual option grants.

MET recruited several Fluke employees, including Nguyen and Morrow. Shortly after MET hired Morrow, Fluke commenced this action against him. Fluke then amended the complaint to include MET and Nguyen. The amended complaint included claims for misappropriation of trade secrets, breach of contract, breach of fiduciary duties, and tortious interference with a business expectancy.

The trial court entered a temporary restraining order against Morrow. After a preliminary injunction hearing, the trial court entered a preliminary injunction against Morrow and MET. This court granted discretionary review, reversed the preliminary injunction, and remanded for further proceedings.[1]

Following remand, the trial court summarily dismissed all of Fluke's claims. It denied Fluke's CR 56(f) motion for a continuance and motion to amend its complaint. The trial court also denied MET's and Morrow's motions for attorney fees.

Fluke appeals. MET and Morrow cross-appeal.

Misappropriation of Trade Secrets

Fluke argues that genuine issues of material fact exist on its trade secret misappropriation claims. We disagree.

This court reviews de novo a summary judgment order, viewing the evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party.[2] A moving defendant meets its initial burden by pointing out that there is an absence of evidence to support the plaintiff's case.[3] Then, the inquiry shifts to the plaintiff to set forth specific facts demonstrating a genuine

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[1] Fluke Corp. v. Milwaukee Electric Tool Corp., noted at 148 Wn. App. 1041, 2009 WL 376801, at *6.

[2] Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

[3] Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989).

issue for trial.[4] Summary judgment should be entered if the nonmoving party fails to establish the existence of an element essential to its case.[5] Allegations, unsupported by evidence, do not establish a genuine issue.[6] The nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value."[7]

In order to survive summary judgment, a plaintiff must present evidence creating a genuine issue of material fact that a trade secret exists and was misappropriated by the defendant.[8]

Under the Washington Uniform Trade Secrets Act (UTSA), a "trade secret" is defined as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process that:
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> (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
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> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[9]

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[4] Id. at 225.

[5] Id.

[6] Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

[7] Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

[8] See RCW 19.108.010.

[9] RCW 19.108.010(4).

In order to have a legally protectable trade secret, a party must establish (1) that the information derives independent economic value from not being generally known or readily ascertainable to others who can obtain economic value from knowledge of its use, and (2) that reasonable efforts have been taken to maintain the secrecy of the information.[10]

The UTSA defines "misappropriation" as:

> (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
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> (b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
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>> (i) Used improper means to acquire knowledge of the trade secret; or
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>> (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
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>> (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.[11]

Here, Morrow and MET jointly moved for summary dismissal of Fluke's

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[10] Precision Moulding & Frame, Inc. v. Simpson Door Co., 77 Wn. App. 20, 25, 888 P.2d 1239 (1995).

[11] RCW 19.108.010(2).

misappropriation of trade secrets claims. They met their initial burden by establishing that there was an absence of evidence to support Fluke's case. Thus, our inquiry shifts to whether Fluke set forth specific facts in its response below to demonstrate a genuine issue of material fact for trial.

In opposition to summary judgment below, Fluke stated in its brief that:

> Fluke has narrowed its trade secrets claim ***to twelve specific documents and discrete categories of information that constitute or contain readily identifiable trade secrets*** that Morrow created, used, or had ready access to in his last months ***at Fluke***.[12]

Fluke cited Plaintiffs' Memorandum in Opposition to Defendants' Joint Motion for CR 37 Sanctions for its narrowed specification of trade secrets.[13] That pleading included the following list of alleged trade secrets:

> 1. Portions of Fluke's 2008 Strategic Plan, specifically the portion addressing Fluke's value brands including Amprobe, Fluke 6721-6726 and 7017-7025, and the portion identifying the "white space" market, specifically Fluke 6707-6719 and 6999-7008[;]
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> 2. The Amprobe Policy Deployment Action Plan, Fluke 5512-13;
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> 3. Fluke's daily FY 2008 Bookings Performance Reports, *e.g.*, Fluke 5775-76;
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> 4. Fluke's IG New Product Vitality reports, *e.g.*, Fluke 4694;
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> 5. The Cross Market Analysis prepared by Morrow, Fluke 7107-7166 (and in native format);
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> 6. The Competitive Landscape Report, Fluke 4547-4620 (and in native format)[;]
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> 7. The Updated New Product Initiative Spreadsheet, Fluke 4421-

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[12] Clerk's Papers at 1579 (emphasis added).

[13] Id.

4484 (and in native format);

8. The Amprobe Engineering 2008 Projects document; Fluke 5729-32;

9. The Asia New Products 2007 Report, Fluke 7527-29 (and in native format);

10. Nonpublic information regarding the strengths and weaknesses of the Ultrasonic Distance Meter developed by Morrow during his Fluke employment;

11. Voice of the Customer information gathered by Morrow in December 2007 and analyzed in the Amprobe Rep Performance Market Research Report; Fluke 4710-17; and

12. Distance Marketing Plan for Leica, Fluke 007660-007665.[14]

Fluke argued further that it had "described in detail why each identified trade secret is confidential and the steps it has taken to preserve the confidentiality" of its alleged secrets.[15] It cited the Declaration of Jarek Bras in Opposition to Defendants' Motion for Summary Judgment in support of this argument.[16]

We first note that this declaration of Bras, who is identified as Fluke's Amprobe Business Unit Manager, only addresses a limited portion of those items on Fluke's narrowed list of 12 alleged trade secrets. Specifically, this declaration only discusses items numbered 4, 8, and 9 of Fluke's list.[17] These

[14] Id. at 1207-08.

[15] Id. at 1579-80.

[16] Id. at 1580.

[17] Id. at 1595-96.

are further identified as Fluke 4694, 5729-32, and 7527-29.[18]

Bras's declaration primarily discusses what these three excerpts are, how they are generated, and what measures Fluke takes to keep them confidential. There is nothing in this declaration to explain why these excerpts fit the definition of a trade secret. Specifically, it is not evidence to show that this information "[d]erives 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."[19] Thus, this evidence does not show that any of these excerpts—items numbered 4, 8, and 9 of the Fluke list—are trade secrets.

Fluke also argued below that the evidence it submitted met the statutory criteria for its trade secrets claim, creating a genuine issue of material fact for trial.[20] In support of this argument, Fluke cited the "Sanders Decl., Exs. L&M; Conf. Sanders Decl. at Ex. R."[21]

Exhibit L to the "Sanders Decl." is a Declaration of Ken Konopa, who identifies himself as the President of Fluke's Industrial Group.[22] This declaration describes a December 19, 2007, e-mail forwarding a marketing plan for a

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[18] Id.

[19] RCW 19.108.010(4)(a).

[20] Clerk's Papers at 1580.

[21] Id. at 1580-81.

[22] Id. at 3518-19.

distance meter to Jon Morrow. It states that Fluke had not publicly announced the launch of its laser distance meters. The same declaration also describes marketing plans as confidential.

But this declaration does not explain how this information "[d]erives 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," as the definition of trade secrets requires.[23] Thus, it does not show how this information about the distance meter is a trade secret under the statute.

Exhibit M to the "Sanders Decl." is a Declaration of Jarek Bras Regarding Plaintiffs' Memorandum In Support of Sealing Trial Exhibits.[24] This document refers to "Trial Exhibits 6, 21, and 23." According to this declaration, these exhibits generally describe information about Amprobe's market analysis, new product offerings, and development schedules.[25] Again, this declaration does not explain how this information "[d]erives 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," as the definition of trade secrets requires.[26]

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[23] RCW 19.108.010(4)(a).

[24] Id. at 3522-25.

[25] Id. at 3523-24.

[26] RCW 19.108.010(4)(a).

Fluke also bases its claim to trade secrets on the "Conf. Sanders Decl. at Ex. R." Exhibit R to that declaration contains excerpts of the deposition of Ken Konopa.[27] The testimony generally describes measures that Fluke takes to limit access to documents. But it does not explain how any of the excerpts that Fluke identifies as the 12 categories of trade secrets meet the definition of trade secrets. Specifically, there is no explanation why any of the information in that list "[d]erives 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," as the definition of trade secrets requires.[28]

Fluke's final reference to support for its claim is to "Conf. Sanders Decl. Ex. L," which is an excerpt of a deposition of Shawn Holland.[29] Specifically, Fluke cites to testimony by Holland, a former Fluke employee, that certain information was confidential.[30] Whether a former Fluke employee believes information is confidential is irrelevant to the question whether such information meets the legal definition of trade secret. Thus, this information does nothing to establish the existence of a genuine issue of material fact for trial regarding the existence of trade secrets.

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[27] Id. at 4014-26.

[28] RCW 19.108.010(4)(a).

[29] Id. at 3980.

[30] Id. at 3988-89.

Below, Fluke also cited several cases to support its claim that the items it alleges are trade secrets qualify under the statute. Citation to those cases does not establish that, in this case, Fluke has met its burden to show the existence of a genuine issue of material fact for trial. The establishment of the existence of a trade secret is fact and case specific.[31] Fluke simply did not bear its burden below to show the existence of a genuine issue of material fact for trial.

On appeal, Fluke argues that it identified 13 specific trade secrets during discovery, and that the trial court failed to address any of them in its oral ruling.[32] But Fluke expressly limited its claim to 12 numbered alleged trade secrets in response to the joint motion for summary judgment, as we have just explained in our analysis. Fluke fails to explain why we should consider 13 alleged secrets on appeal when it failed to preserve below any claim for more than 12 alleged trade secrets at the time of the summary judgment motion now under review. What Fluke claimed in discovery before its express limitation of its claim is irrelevant.

Fluke also argues that it presented substantial evidence to the trial court in opposition to the joint motion. But a careful review of its listing of trade secrets on appeal[33] shows that this list differs from the list it presented in

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[31] West v. Port of Olympia,146 Wn. App. 108, 120, 192 P.3d 926 (2008) ("The definition of a 'trade secret' is a matter of law under the UTSA, but the determination of whether specific information is a trade secret is a factual question.").

[32] Appellants' Opening Brief at 21.

[33] Id. at 22-25.

opposition to the summary judgment motion.[34] For example, the "Dashboard Report" mentioned in its opening brief on appeal, was not among those alleged trade secrets that Fluke identified in its response to the summary judgment motion.[35] Moreover, the listing on appeal of the specific numbered items does not exactly match what Fluke identified and argued below. We have no reason to consider on appeal different material than Fluke submitted to the trial court below.

In any event, even if we were to consider new evidence on appeal, there is no reasoned explanation why the information presented on appeal meets the definition of trade secret. As we have already discussed, the failure to explain why documents that Fluke claims to be trade secrets meet the statutory definition is fatal to the requirement that it show the existence of a genuine issue of material fact for trial.

To summarize, Fluke has failed to establish the existence of any genuine issue of material fact whether any of the 12 numbered items that it identified below meet the definition of trade secret. Thus, we need not decide whether there are any genuine factual issues regarding misappropriation because such issues are not material to the outcome of the motion. MET and Morrow were entitled to summary dismissal of the trade secrets misappropriation claim.

Morrow's Noncompetition Agreement

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[34] Clerk's Papers at 1207-08.

[35] See id.

Fluke argues that there were genuine issues of material fact whether Jacobs Chuck equitably assigned Morrow's noncompetition agreement to Fluke. It also contends there were issues whether MET tortiously interfered with that noncompetition agreement. We hold that there were no genuine issues of material fact regarding either claim. Both moving parties were entitled to judgment as a matter of law.

Under South Carolina law, which controls here, three elements are needed for an assignment: (1) an assignor; (2) an assignee; and (3) transfer of control of the thing assigned from the assignor to the assignee.[36] "'An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.'"[37] South Carolina jurisprudence has long recognized that the right to recover money by legal action can be validly assigned in either law or equity.[38] In such an action, the assignee stands in the shoes of its assignor.[39]

> An equitable assignment is such an assignment as gives the assignee a title which, though not cognizable at law, will be recognized and protected in equity. . . .

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[36] Moore v. Weinberg, 373 S.C. 209, 219, 644 S.E.2d 740 (2007) (citing Donahue v. Multimedia, Inc., 362 S.C. 331, 338, 608 S.E.2d 162 (2005)).

[37] Id. at 219-20 (quoting Restatement (Second) of Contracts § 317(1) (1981)).

[38] Id. at 220 (citing Slater Corp. v. S.C. Tax Comm'n, 280 S.C. 584, 587, 314 S.E.2d 31 (1984)).

[39] Id. (citing Twelfth RMA Partners, L.P. v. Nat'l Safe Corp., 335 S.C. 635, 639-40, 518 S.E.2d 44 (1999)).

> . . . No particular form is necessary to constitute an equitable assignment, and any words or transactions which show an intention on the one side to assign and an intention on the other to receive, if there is a valuable consideration, will operate as an effective equitable assignment . . . .[40]

Here, there was an effective choice of law by the parties to the noncompetition agreement that South Carolina substantive law would apply. This court previously granted discretionary review of the trial court's preliminary injunction against Morrow and MET in favor of Fluke on the basis of this noncompetition agreement.[41] In reversing the preliminary injunction, this court held that Fluke has no legal rights under the agreement:

> In conclusion, the Agreement provided for a 12-month period of noncompetition and nonsolicitation following Morrow's termination from Jacobs Chuck. The 12-month period began upon Morrow's termination from Jacobs Chuck and expired long before Milwaukee Electric Tool Company employed Morrow.[42]

On remand, Fluke sought to avoid Morrow and MET's joint motion for summary judgment by arguing that the agreement was equitably assigned. This court also previously rejected this argument on the basis of the record at that time.

Fluke now argues that the more fully developed record and the different procedural posture of the case during the joint motion for summary judgment

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[40] Player v. Player, 240 S.C. 274, 278, 125 S.E.2d 636 (1962) (internal quotation marks and citations omitted).

[41] Fluke, 2009 WL 376801, at *3.

[42] Id. at *6.

compel a different result. We are not persuaded by these arguments.

Based primarily on new declarations from representatives of Fluke and Jacobs Chuck, Fluke argues that there are genuine issues of material fact whether there was an equitable assignment of this noncompetition agreement to Fluke. We disagree.

Even if we assumed that this record evidences a factual issue whether there was an equitable assignment of the agreement to Fluke, that fact is not material to the outcome of this case. As South Carolina law makes clear, Fluke received no greater rights by the assignment than those held by Jacobs Chuck.[43] As this court decided in the prior opinion, any noncompetition provisions expired 12 months after Morrow's termination from "the Company," which was defined as Jacobs Chuck.[44] "Morrow's transfer to Fluke was a termination for purposes of the noncompetition provisions of the Agreement . . . ."[45] According to Fluke, Morrow's transfer was in November 2004. Thus, the noncompetition provisions expired in the fall of 2005, long before Morrow accepted employment with MET in early 2008. Accordingly, Fluke had no right to seek to enforce the agreement in this action, which it commenced in 2008.

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[43] Trancik v. USAA Ins. Co., 354 S.C. 549, 555, 581 S.E.2d 858 (2003) (citing Singletary v. Aetna Cas. & Sur. Co., 316 S.C. 199, 201, 447 S.E.2d 869 (1994) (holding an "assignee . . . stands in the shoes of its assignor"); Rosemond v. Campbell, 288 S.C. 516, 522, 343 S.E.2d 641 (1986) ("At common law, an assignee's rights can be no greater than those of his assignor.")).

[44] Fluke, 2009 WL 376801, at *4.

[45] Id.

Nowhere in its briefing does Fluke persuasively address this shortcoming in its case. We must assume that it has no response to the fact that this agreement expired of its own terms well before commencement of this action.

In short, Fluke fails to show a genuine issue of material fact regarding its ability to enforce the noncompetition agreement against Morrow on either legal or equitable grounds. Summary dismissal of this claim was proper.

In order to survive summary judgment on a tortious interference claim, a plaintiff must present evidence of a valid contractual relationship or business expectancy.[46] Here, because Fluke fails to show the existence of any valid and enforceable noncompetition agreement, there is no basis for a claim against MET based on tortious interference with a contract. Summary dismissal of this claim was also proper.

BREACH OF fiduciary Duties

Fluke argues that there are genuine issues of material fact regarding its claims against Morrow for breach of the common law fiduciary duties of loyalty and confidentiality. We disagree.

Breach of a fiduciary duty requires the plaintiff to prove: "(1) the existence of a duty owed . . . ; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the proximate cause of the injury."[47]

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[46] See Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 351, 144 P.3d 276 (2006) (existence of a valid contractual relationship or business expectancy is an element of tortious interference) (quoting Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (1997)).

[47] Miller v. U.S. Bank of Wash., N.A., 72 Wn. App. 416, 426, 865 P.2d 536 (1994) (citing Hansen v. Friend, 118 Wn.2d 476, 479, 824 P.2d 483 (1992)).

Here, Fluke points to no evidence creating a genuine issue of material fact that Morrow breached any duty, other than to state that "there is ample record evidence." But, Fluke's brief to the trial court is also devoid of citation to evidence supporting Morrow's breach. Although Fluke cites authority for the existence of an employee's duty of confidentiality and loyalty, there is no discussion of how Morrow actually breached either of these duties. Mere allegations, unsupported by evidence, do not establish a genuine issue of material fact.[48] Because Fluke fails to show a genuine issue of material fact on the essential element of breach, summary judgment was proper.

Fluke argues that the trial court improperly applied the UTSA to preempt the breach of duty claims. But, even assuming the claims were not preempted, summary judgment was proper for the above reason. Therefore, we need not reach this argument.[49]

Nguyen's Non-solicitation Agreement

Fluke argues that there are genuine issues of material fact regarding its breach of contract claim against Nguyen and tortious interference claim against MET. We disagree.

The first issue is whether the consideration received by Nguyen was legally sufficient. "Consideration is 'any act, forbearance, creation, modification

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[48] Baldwin, 112 Wn.2d at 132.

[49] See State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004) ("This court may affirm a lower court's ruling on any grounds adequately supported in the record.").

or destruction of a legal relationship, or return promise given in exchange.'"[50] In essence, it is a bargained-for exchange of promises.[51] Consideration is defined by the Restatement (Second) of Contracts as follows:

> (1) To constitute consideration, a performance or a return promise must be bargained for.
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> (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
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> (3) The performance may consist of
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> (a) an act other than a promise, or
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> (b) a forbearance, or
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> (c) the creation, modification, or destruction of a legal relation.[52]

Generally, courts do not inquire into the adequacy of consideration and instead utilize a legal sufficiency test, which is concerned with what will support a promise rather than the comparative value of the promise.[53]

Here, although we do not consider whether Nguyen's eligibility for stock options was adequate consideration in comparison to his promise of non-solicitation, we must address the legal sufficiency of this consideration.

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[50] Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 833, 100 P.3d 791 (2004) (quoting King v. Riveland, 125 Wn.2d 500, 505, 886 P.2d 160 (1994)).

[51] Id. (citing Williams Fruit Co. v. Hanover Ins. Co., 3 Wn. App. 276, 281, 474 P.2d 577 (1970)).

[52] Restatement (Second) of Contracts § 71(1)-(3) (1981).

[53] Labriola, 152 Wn.2d at 834 (quoting Browning v. Johnson, 70 Wn.2d 145, 147, 422 P.2d 314 (1967)).

A contract must be supported by consideration.[54] But, if a promise is illusory, there is no consideration and no enforceable contract.[55] A promise is illusory if its performance is optional or discretionary.[56] Whether a contract is supported by consideration is a question of law.[57] We may affirm the lower court on any ground supported by the record even if not considered by that court.[58]

Here, Nguyen signed a non-solicitation agreement with Fluke long after his employment commenced. Under it, Nguyen agreed not to solicit any Fluke employees within one year of his termination. Paragraph 7 of the agreement states:

> Consideration. The Associate acknowledges and agrees that this Agreement is supported by the Associate's eligibility to be considered for recommendation of annual option grants.[59]

A comparison of Fluke's status before and after the non-solicitation agreement confirms that Fluke's promise was illusory. Fluke did not incur additional duties or obligations from the non-solicitation agreement. Before its

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[54] Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 178, 94 P.3d 945 (2004) (citing King, 125 Wn.2d at 505).

[55] Omni Group, Inc. v. Seattle-First Nat. Bank, 32 Wn. App. 22, 24-25, 645 P.2d 727 (1982).

[56] Metro. Park Dist. of Tacoma v. Griffith, 106 Wn.2d 425, 434, 723 P.2d 1093 (1986).

[57] Emberson v. Hartley, 52 Wn. App. 597, 600, 762 P.2d 364 (1988).

[58] King County v. Seawest Inv. Assoc., LLC, 141 Wn. App. 304, 310, 170 P.3d 53 (2007) (citing LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989)), review denied, 163 Wn.2d 1054 (2008).

[59] Clerk's Papers at 266.

execution, Nguyen was eligible for and received option grants at Fluke's discretion. After Nguyen executed the non-solicitation agreement, he remained eligible for option grants at Fluke's discretion.

Although not cited by either party, Metropolitan Park District of Tacoma v. Griffith[60] appears to be instructive on illusory promises in Washington. There, Griffith entered into a contract with Metropolitan Park District ("the District") to provide concessions for several parks and attractions in Tacoma.[61] The District sought a declaratory judgment that it could cancel the contract.[62] The trial court held the contract unenforceable.[63] The supreme court affirmed, explaining that two of the contract's terms were illusory because the District's performance was optional or discretionary:

> Section 5 of the agreement provides that "[i]n the event that the District shall decide that additional concessions should be opened", Griffith has the right of first refusal to install and operate them. ***This provision gives the District complete discretion to open additional concessions. Thus, the claimed promise to open additional concessions is illusory and, therefore, unenforceable.*** Section 9 of the agreement provides that "[a]ll . . . alterations or improvements shall be approved by the District in writing before Concessionaire proceeds therewith." ***The District is not obliged to allow improvements under this provision. Again, any supposed promise to make improvements is illusory***, and the trial court correctly held that there was no enforceable promise on the part of the District to allow improvements.[64]

[60] 106 Wn.2d 425, 723 P.2d 1093 (1986).

[61] Id. at 427-28.

[62] Id. at 429-30.

[63] Id. at 433-34.

[64] Id. at 434 (emphasis added).

Although the contract in Metropolitan Park is not similar in subject matter or language to the non-solicitation agreement here, the same principle applies. Fluke's stated consideration is "the Associate's ***eligibility to be considered for recommendation*** of annual option grants." Under this language, Fluke is not obliged to provide Nguyen with option grants, recommend him for option grants, or even consider him for option grants. All Fluke promised to do is to make Nguyen eligible for consideration. Fluke retains all discretion to take any action, making the promise illusory and the contract unenforceable.

Because the non-solicitation agreement was not enforceable, Fluke cannot raise a genuine issue of material fact that Nguyen breached it. Additionally, MET cannot have tortiously interfered with such an unenforceable agreement.[65] Summary judgment on these claims was proper.

Fluke argues that Labriola v. Pollard Group, Inc.[66] is inapplicable to this case and that the trial court erred in applying it. In Labriola, the supreme court held that if an employee signs a covenant not to compete after he or she begins employment, continued at-will employment cannot serve as consideration for the agreement.[67] To the extent that Labriola held that consideration is legally

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[65] See Pac. Nw. Shooting Park, 158 Wn.2d at 351 (existence of a valid contractual relationship or business expectancy is an element of tortious interference) (quoting Leingang, 131 Wn.2d at 157).

[66] 152 Wn.2d 828, 100 P.3d 791 (2004).

[67] Id. at 836.

insufficient where an employer does not incur any additional duties or obligations in an agreement with an employee,[68] it is applicable. As described above, Fluke's promise did not obligate it to consider Nguyen for any awards he was not already eligible to receive. Therefore, it was legally insufficient consideration to support the non-solicitation agreement.

CR 56(f) MOTION TO CONTINUE

Fluke argues that the trial court erred in denying its CR 56(f) motion for a continuance because MET failed to produce requested documents during discovery. We disagree.

A court may deny a continuance under CR 56(f) if: (1) the requesting party fails to offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party fails to state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.[69] "Only one of the qualifying grounds is needed for denial."[70]

This court reviews the denial of a motion for continuance for abuse of

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[68] Id.

[69] Gross v. Sunding, 139 Wn. App. 54, 68, 161 P.3d 380 (2007) (citing Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989)).

[70] Id. (citing Pelton v. Tri-State Mem'l Hosp., 66 Wn. App. 350, 356, 831 P.2d 1147 (1992)).

discretion.[71] "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons."[72]

Here, Fluke requested a CR 56(f) continuance because "MET ha[d] yet to produce key material long sought by plaintiffs." But, Fluke failed to state what evidence would be established through the additional discovery. That was sufficient for the trial court to deny the motion.

On appeal, Fluke identifies specific evidence that the additional discovery would have produced. Because these arguments were not presented to the trial court, we need not review them.[73]

The trial court did not abuse its discretion by denying this motion.

AMENDMENT OF COMPLAINT

Fluke argues that the trial court abused its discretion when it denied Fluke leave to amend its complaint. We disagree.

A party may amend its pleading by leave of the court and leave shall be freely given when justice so requires.[74] "The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the

[71] Id. at 67-68 (citing Turner, 54 Wn. App. at 693).

[72] In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

[73] RAP 2.5(a).

[74] CR 15(a); see Caruso v. Local Union No. 690 Int'l Bhd. of Teamsters, 100 Wn.2d 343, 349, 670 P.2d 240 (1983) (leave to amend should be freely given except where prejudice to the opposing party would result).

nonmoving party."[75] A trial court's denial of a motion to amend pleadings is reviewed for an abuse of discretion.[76]

On the day of the final summary judgment hearing and four days before the close of discovery, Fluke sought to add several new claims to its complaint. These included entirely new claims against Nguyen for trade secret misappropriation and breach of common law fiduciary duties and against MET for aiding and abetting Morrow and Nguyen's breach of their fiduciary duties.

Due to the impending close of discovery and the approaching trial date, the trial court did not abuse its discretion in denying the motion.

CROSS-APPEAL: ATTORNEY FEES

MET and Morrow argue that the trial court erred by failing to award them attorney fees incurred in obtaining a dissolution of the preliminary injunction and in defending against the tortious interference and trade secret claims. They also argue that they are entitled to fees on appeal. We disagree.

Washington allows parties to recover attorney fees under a statute, contract, or some well-recognized principle of equity.[77] Attorney fees on appeal are authorized under RAP 18.1 if applicable law grants a party the right to

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[75] Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999).

[76] Del Guzzi Constr. Co. v. Global Nw. Ltd., Inc., 105 Wn.2d 878, 888, 719 P.2d 120 (1986).

[77] Torgerson v. One Lincoln Tower, LLC, 166 Wn.2d 510, 525, 210 P.3d 318 (2009) (citing Quality Food Ctrs. v. Mary Jewell T, LLC, 134 Wn. App. 814, 817, 142 P.3d 206 (2006)).

recover attorney fees.[78] Whether a party is entitled to attorney fees is a question of law reviewed de novo.[79]

Preliminary Injunction

MET and Morrow argue that the trial court erred in denying them attorney fees incurred in obtaining the dissolution of the preliminary injunction on appeal. We disagree.

The trial court, in exercising its discretion, may award attorney fees when a party prevails in dissolving a wrongfully issued injunction.[80] But, RAP 18.1 requires that a party seeking fees on appeal must clearly set forth the request and the basis for that request before the appellate court.[81] "A party's failure to comply with the rule's provisions warrants denial of [its] fee request."[82]

Here, neither MET nor Morrow requested attorney fees at the appeal of the preliminary injunction. Therefore, the trial did not abuse its discretion in denying attorney fees to MET and Morrow on remand.

MET and Morrow argue that denial of attorney fees on this basis is improper because Fluke did not raise this argument at the trial court level. But,

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[78] RAP 18.1(a).

[79] Sanders v. State, 169 Wn.2d 827, 866, 240 P.3d 120 (2010) (citing Spokane Research & Def. Fund v. City of Spokane, 155 Wn.2d 89, 103-04 & n.10, 117 P.3d 1117 (2005)).

[80] Cornell Pump Co. v. City of Bellingham, 123 Wn. App. 226, 232, 98 P.3d 84 (2004).

[81] Thompson v. Lennox, 151 Wn. App. 479, 485, 212 P.3d 597 (2009).

[82] Id.

they cite no authority supporting this argument and we assume that they found none.[83] They also argue that the award of fees is mandatory, not discretionary. But, because they did not properly request fees on appeal, as required by RAP 18.1, this distinction is immaterial.

Noncompetition Agreement

Morrow and MET argue that the trial court erred in applying South Carolina law to deny their motion for attorney fees in defense of claims related to Morrow's noncompetition agreement with Jacobs Chuck. We disagree.

This court reviews de novo choice of law questions.[84] A choice of law contract provision should be disregarded if, (1) without the provision, Washington law would apply; (2) the chosen state's law violates a fundamental public policy of Washington; and (3) Washington's interest in the determination of the issue materially outweighs the chosen state's interest.[85] Each of these conditions must be met before a choice of law provision is disregarded.[86]

In Washington, RCW 4.84.330 permits recovery of attorney fees:

> In any action on a contract . . . where such contract . . . specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract . . . , shall be awarded to one of the parties, the prevailing party, whether he is the party

[83] State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (courts may assume that where no authority is cited, counsel has found none after search).

[84] McKee v. AT & T Corp., 164 Wn.2d 372, 384, 191 P.3d 845 (2008) (citing Erwin v. Cotter Health Ctrs., 161 Wn.2d 676, 690-91, 167 P.3d 1112 (2007)).

[85] Id. (citing Erwin, 161 Wn.2d at 694-95).

[86] Id. (citing Erwin, 161 Wn.2d at 696).

> specified in the contract . . . or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

South Carolina law does not have a comparable statute that requires unilateral fee-shifting provisions in contracts to apply bilaterally.

Here, the noncompetition agreement specifies that it will be governed by South Carolina law. It included the following unilateral fee-shifting provision:

> [I]n any civil action brought for a breach of this Agreement, the Company shall be entitled to recover from the Associate all reasonable attorneys' fees, litigation expenses, and costs incurred by the Company if the Company prevails in that action.[87]

Applying the choice of law analysis above, the trial court correctly applied South Carolina law because the first factor—that Washington law would apply in the absence of the choice of law provision—is not met.

To determine what law governs in the absence of a choice of law provision, Washington courts apply the "most significant relationship" test.[88] Under that test, the court weighs five factors: (a) the place of contracting, (b) the place of negotiating the contract, (c) the place of performance of the contract, (d) the location of the subject matter of the contract, and (e) the domicile, residence, or place of incorporation of the parties.[89]

Here, the contract was negotiated and executed in South Carolina. It was performed partially in Washington and partially in South Carolina. The location

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[87] Clerk's Papers at 258.

[88] McKee, 164 Wn.2d at 384.

[89] Id. at 384-85.

of the subject matter—arguably Jacobs Chuck's proprietary information—was in South Carolina. And, while Morrow is now domiciled in Washington, Jacobs Chuck is domiciled in South Carolina. Given these factors, South Carolina, not Washington, has the most significant relationship to the contract.

Because the first factor of the choice of law analysis is not satisfied, we need not consider whether the other factors are met. Accordingly, the trial court properly relied on South Carolina law to deny attorney fees to Met and Morrow.

Non-solicitation Agreement

MET argues that the trial court erred in denying its motion for fees incurred in its defense of Fluke's claim that it tortiously interfered with Nguyen's non-solicitation agreement. We disagree.

Here, the fee provision included in the non-solicitation agreement between Nguyen and Fluke states:

> [I]n any civil action brought for a breach of this Agreement, the Company shall be entitled to recover from the Associate all reasonable attorneys' fees, litigation expenses, and costs incurred by Company if the Company prevails in that action.[90]

MET was not a party to this agreement. Therefore, it has no contractual right to attorney fees. MET offers no persuasive argument or authority to the contrary. Because MET was not entitled to fees at the trial court level, it is not

[90] Clerk's Papers at 266.

authorized to receive fees on appeal.

MET relies on MP Medical, Inc. v. Wegman[91] and Deep Water Brewing, LLC v. Fairway Resources Ltd.[92] to argue that tortious interference is "on the contract" for purposes of RCW 4.84.330. But, because MET was not a party to the agreement, it is immaterial whether tortious interference is on the contract.

MET also argues that attorney fees are awardable because the fees incurred by Nguyen and MET in defending against the breach of contract and tortious interference claims cannot be segregated. But, segregation goes to the issue of the amount of an attorney fee award, not whether attorney fees are awardable.[93] MET cites no persuasive authority that the inability to segregate claims is a valid legal basis for the award of fees.[94]

Trade Secret Claims

MET and Morrow argue that the trial court abused its discretion in denying them attorney fees incurred in defending against the trade secret misappropriation claims. We disagree.

Attorney fees are recoverable for trade secret misappropriation claims

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[91] 151 Wn. App. 409, 213 P.3d 931 (2009).

[92] 152 Wn. App. 229, 215 P.3d 990 (2009), review denied, 168 Wn.2d 1024 (2010).

[93] See Dice v. City of Montesano, 131 Wn. App. 675, 690, 128 P.3d 1253 (where attorney fees are recoverable on some of a party's claims, the award must reflect a segregation of the time spent on the varying claims), review denied, 158 Wn.2d 1017 (2006).

[94] See Young, 89 Wn.2d at 625.

brought in bad faith, as provided by RCW 19.108.040: "If a claim of misappropriation is made in bad faith . . . the court may award reasonable attorney's fees to the prevailing party." "A trial court's decision to award exemplary damages and fees under the UTSA is discretionary, and we will not reverse the amount unless the trial court clearly abused its discretion."[95]

Here, the trial court did not abuse its discretion in denying attorney fees. Although Fluke failed to meet its burden on summary judgment, that is not equivalent to making claims in bad faith. Because MET and Morrow were not entitled to fees at the trial court level, they are not entitled to fees on appeal.

MET and Morrow argue that there is evidence of Fluke's bad faith. They claim that Fluke made an inflammatory settlement offer, failed to identify the trade secrets at issue, made "grossly overbroad" discovery requests, and pursued claims despite a lack of evidence. But, they cite no authority that these actions are evidence of bad faith.[96]

They also argue that this court should adopt the definition of bad faith set forth in FLIR Systems, Inc. v. Parrish.[97] There, the California Court of Appeals interpreted the term "bad faith" in the California Uniform Trade Secrets Act.[98] It

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[95] Thola v. Henschell, 140 Wn. App. 70, 89, 164 P.3d 524 (2007) (citing Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 61-62, 738 P.2d 665 (1987)); Ed Nowogroski Ins., Inc. v. Rucker, 88 Wn. App. 350, 360, 944 P.2d 1093 (1997).

[96] See Young, 89 Wn.2d at 625.

[97] 174 Cal. App. 4th 1270, 95 Cal. Rptr. 3d 307 (2009).

[98] Id. at 1275.

held that bad faith includes “objective speciousness of the claim,” meaning that “the action superficially appears to have merit but there is a complete lack of evidence to support the claim.”[99] Even if this court accepted that definition of bad faith, Fluke did provide some evidence in support of its claims. Application of this standard does not require a different result.

We affirm the summary dismissal of the claims of Fluke and the denial of attorney fees of MET and Morrow.

Cox, J.

WE CONCUR:

[99] Id. at 1276.