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A Recent Case: Four Helpful Reminders for Trade Secret Litigators

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In the recent case of *Erlach Protection Systems, Inc. v David E. Flint*, the Michigan Court of Appeals addressed the following four points, which are helpful reminders for all litigators, particularly those handling trade secret cases.

First, the Court of Appeals acknowledged that, although motions under MCR 2.116(C)(10) “must be supported [and may be overcome only] by admissible evidence, that evidence does not have to be in admissible form” when presented on motion.

The defendant in *Erlach* moved for summary disposition of the plaintiff’s trade secret claims under MCR 2.116(C)(10), arguing that the plaintiff failed to specify the actual trade secrets at issue as required under Michigan’s Uniform Trade Secrets Act (MUTSA). In response, the plaintiff commissioned two reports for the purpose of identifying and describing the trade secrets allegedly misappropriated by the defendant. Neither report was signed by its respective author, however. Therefore, in granting the defendant’s motion, the trial court accepted the defendant’s argument that both reports were hearsay and thus insufficient for overcoming the defendant’s motion.

Reversing the trial court, the Court of Appeals disagreed, noting that, although the plaintiff’s reports did not constitute evidence in admissible form, they were “plausibly admissible” because “it was possible that the authors of the reports could have testified as to their content.” The Court of Appeals further added that “courts may consider statements in reports that would be plausibly admissible at trial, even where a foundation for their admission has yet to be laid.”

Second, to prevail on a motion for summary disposition under MCR 2.116(C)(10), the moving party need not submit affirmative evidence negating an essential element of the other party’s claim. As an alternative, the moving party may simply show that the other party’s evidence is insufficient to support the claim.

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Phillip C. Korovesis
Of Counsel

Ivonne M. Soler
Senior Attorney

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Although it ultimately reversed the trial court's grant of summary disposition for the defendant, the Court of Appeals in *Erlich* rejected the plaintiff's argument that the moving defendant failed to meet its initial burden by not having provided affirmative evidence that the plaintiff's MUTSA claims failed as a matter of law. As the Court of Appeals noted, the defendant did not have to make such an affirmative showing, but rather met its initial burden, thereby shifting the burden to the plaintiff, when the defendant pointed to "statements made during the deposition of plaintiff's president that tended to emphasize the scope of defendant's alleged misappropriation rather than the specific nature of the alleged trade secrets," while further indicating "that plaintiff's belief that defendant stole trade secrets was a presumption based on the sheer amount of information contained within the data defendant copied," and that the plaintiff had "an overly broad idea of what information qualifies as a trade secret under MUTSA."

Therefore, even though the defendant in *Erlich* did not provide affirmative evidence in an attempt to overcome the plaintiff's MUTSA claims, the defendant met its initial burden under MCR 2.116(C)(10) through evidence supporting its contention that the record established by the plaintiff was insufficient to sustain those claims as a matter of law.

Third, in every trade secret case, the trade secret claimant "must particularize and identify" the trade secrets at issue "with specificity." Accordingly, the Court of Appeals in *Erlich* rejected the plaintiff's argument that, in light of the sheer huge volume of information allegedly taken from the plaintiff by the defendant, it was a forgone conclusion that there were trade secrets within that information, and therefore, it was unnecessary for the plaintiff to have to specify the trade secrets stolen along with that information. Further noting that "Michigan has not yet adopted the more forgiving 'inevitable disclosure' doctrine," the Court of Appeals affirmed the plaintiff's requirement "to identify the trade secrets with particularity and specificity."

Fourth, unlike the common law, MUTSA does not require a claimant to establish unauthorized use of the subject trade secret by the defendant. MUTSA requires the claimant to show only "that the trade secret was [wrongfully] disclosed or acquired" by the defendant. Accordingly, the Court of Appeals in *Erlich* determined that "defendant's argument that plaintiff was required to show an unauthorized 'use' to move forward with its case is without merit."

Donald V. Orlandoni

313.225.5314

orlandoni@butzel.com