

Nos. 119,563  
119,564

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

AEROFLEX WICHITA, INC.,  
*Appellee/Cross-Appellant,*

v.

KENNETH W. FILARDO, CHRIS ALLEN, and  
TEL-INSTRUMENT ELECTRONICS, CORP.,  
*Appellants/Cross-Appellees.*

SYLLABUS BY THE COURT

1.

Kansas courts use a two-part test when determining standing. To show standing, a party must show a cognizable injury and establish a causal connection between the injury and the challenged conduct. To show a cognizable injury, the injury must affect the party in a personal and individual way. A party must assert its own legal rights and interests and not base its claim for relief on the legal rights or interests of third parties.

2.

A substantial injury is an actionable injury. The statute of limitations starts to run when both the act and the resulting injury are reasonably ascertainable by the injured party. The injured party need not have knowledge of the full extent of the injury. But the injured party must have a sufficient ascertainable injury to justify an action for damages. When the evidence is disputed concerning when the injury became reasonably ascertainable, the trier of fact decides.

3.

Special verdict findings on essential issues must be certain and definite and not be conflicting or inconsistent. In determining whether jury findings are inconsistent, they are construed in the light of the circumstances and in connection with the pleadings, instructions, and issues submitted. When there is a view of the case that makes the findings consistent, they then must be resolved that way.

4.

Special verdict findings are to be liberally construed on appeal and interpreted in the light of the testimony with a view toward ascertaining their intended meaning. If a careful reading of the verdict form, coupled with the instructions, clearly establishes the intent of the jury and resolves a verdict's ambiguity, the verdict will be upheld on appellate review.

Appeal from Sedgwick District Court; WILLIAM S. WOOLLEY, judge. Opinion filed July 21, 2023. Affirmed.

*F. James Robinson Jr.*, of Hite, Fanning & Honeyman, LLP, of Wichita, for appellant/cross-appellee Tel-Instrument Electronics, Corp.

*Robert J. Bjerg*, of Law Office of Robert J. Bjerg, P.A., of Kansas City, Missouri, for appellants/cross-appellees Kenneth Filardo and Chris Allen.

*Holly A. Dyer, Jay F. Fowler, and Amy S. Lemley*, of Foulston Siefkin LLP, of Wichita, for appellee/cross-appellant Aeroflex Wichita, Inc.

Before HILL, P.J., BRUNS and WARNER, JJ.

HILL, J.: The nations of our world have not yet beaten their swords into plowshares. In fact, the competition to manufacture the machines of war is more intense

now than ever before. The technologically advanced nations seek engines of destruction with more speed, more stealth, and more power. Aircraft now approach each other at supersonic speeds—closing on each other at speeds of many kilometers per minute. A pilot needs to know if a friend or foe is approaching—any delay in finding out could be deadly—because the ancient law of the quick and the dead still rules in warfare.

For those who supply the tools of war, the competition between manufacturers seeking government contracts is fierce. Prove to the government that what you produce is faster, stealthier, and more powerful than the product of your competitors and any possible enemies, and your company will win that contract to produce your wares for deployment to our forces. Workable innovations in products or techniques of manufacture are at a premium—sought by both companies and governments. The fact remains, what is old is known and can eventually be defended against. What is new is unknown and old defenses are useless against it. Nations prepare to win, not to lose.

So, companies need to develop new products to satisfy this very real and very vital demand. They can develop those products themselves or hire people away from their competitors who can develop those products. That is what happened in this case.

Aeroflex Wichita, Inc. and Tel-Instrument Electronics, Corp. were competitors for a multimillion-dollar Army contract for the development of Identification-Friend-or-Foe technology test systems. In 2006, the Army gave notice that it was going to award Aeroflex a sole-source contract to upgrade its TS-4530 test set to Mode 5. Tel-Instrument protested the award, claiming it could compete with Aeroflex. Tel-Instrument recruited and hired two Aeroflex employees who were involved in the development of the TS-4530 for Aeroflex and Aeroflex's Mode 5 upgrade proposal: Chris Allen and Kenneth Filardo. Both had signed nondisclosure agreements with Aeroflex. In January 2009, the Army declared Tel-Instrument won the contract.

Aeroflex filed this suit, claiming that Tel-Instrument was only able to put together a technically sound, price-competitive proposal to upgrade the TS-4530 by wrongfully obtaining and using Aeroflex's confidential, proprietary, and trade secret information through Allen and Filardo. Aeroflex claimed misappropriation of trade secrets, tortious interference with prospective business advantage or relationship, breach of contract, and tortious interference with contract. The jury found in favor of the defendants on Aeroflex's claim for misappropriation of trade secrets. The jury found in favor of Aeroflex on its other claims. The defendants appeal, raising issues of standing, statute of limitations, errors concerning the verdict form, instructional errors, and evidentiary errors. Aeroflex makes a contingent cross-appeal.

#### TWO DEFENSE CONTRACTORS VIE FOR GOVERNMENT FUNDING

Aeroflex and Tel-Instrument competed for a multimillion-dollar Army contract for the development of Identification-Friend-or-Foe technology test systems. This IFF technology helps military air traffic control and planes so equipped to tell the difference between friendly and hostile aircraft. This device broadcasts a signal to the aircraft, and the approaching aircraft's IFF transponder responds.

In the 1990s, Litton Systems, Inc. (which later was acquired by Northrop Grumman) made the 424(v)2 IFF test set. In 2001, JcAIR, Inc. received an exclusive written license from Litton to "make, use, sell, and support" an upgraded test set called the 424(v)3. In exchange, Litton received a royalty payment for each test set sold. JcAIR replaced the electronics in the 424(v)2 with JcAIR-designed electronics to create the 424(v)3.

Then, in 2002, JcAIR won a contract to supply the Army with the 424(v)3 test sets. The test set was called the TS-4530 for the Army. That contract contemplated that the TS-4530 would have to be upgraded to Mode 5. JcAIR expected that it would

eventually supply the Army with the upgrade, which could make JcAIR the first IFF manufacturer to bring a Mode 5 product to the market. JcAIR began working on the upgrade. In 2005, Aeroflex bought JcAIR.

In March 2006, the Army gave notice that it was going to award Aeroflex a sole-source contract to upgrade the TS-4530 to Mode 5. Tel-Instrument protested the award, claiming it could compete with Aeroflex. Tel-Instrument explained that it would replace Aeroflex's electronics with technology based on Tel-Instrument's own Mode 5 test set that it was developing for the Navy. Aeroflex believed the protest was solely to delay the contract and that Tel-Instrument had no real plan or intent to submit a competitive proposal. Aeroflex submitted a proposal to the Army in September 2006, outlining the planned modifications to the TS-4530 for the upgrade. In November 2006, the Army cancelled the sole-source contract and announced there would be a competitive bid.

Meanwhile, Tel-Instrument hired two Aeroflex employees who were involved in the development of the TS-4530 and Aeroflex's Mode 5 upgrade proposal. Chris Allen was offered and accepted a position at Tel-Instrument in January 2007. Kenneth Filardo was offered a position at Tel-Instrument in March 2007 and began work there in April 2007. Both had signed nondisclosure agreements with Aeroflex.

According to Aeroflex, "no two JcAIR/Aeroflex employees were more crucial to the development and sale of the 4530 and the plan to upgrade it to Mode 5 . . . than Chris Allen and Kenneth Filardo." Allen was responsible for marketing and sales of the TS-4530, served as the TS-4530 program manager, and was the Army's point of contact. Filardo was a director of engineering and the chief designer of the TS-4530. Filardo was responsible for the development of the Mode 5 upgrade at Aeroflex. Both were involved in Aeroflex's proposal to the Army for the Mode 5 upgrade.

According to Aeroflex, Allen and Filardo were recruited by Tel-Instrument to work on Tel-Instrument's Mode 5 upgrade proposal and to harm Aeroflex. Allen took Aeroflex's confidential and proprietary documents and disclosed them to Tel-Instrument.

In May 2008, the Army officially solicited proposals for the contract to upgrade the TS-4530 to Mode 5. In January 2009, the Army declared Tel-Instrument won the contract. According to Aeroflex, Allen and Filardo changed Tel-Instrument's early design for the upgrade to a design that matched what Aeroflex was proposing. Tel-Instrument's bid was more than \$7 million lower than Aeroflex's bid.

In March 2009, Aeroflex filed this lawsuit, claiming that Tel-Instrument was only able to put together a technically sound, price-competitive proposal to upgrade the TS-4530 by wrongfully obtaining and using Aeroflex's confidential, proprietary, and trade secret information through Allen and Filardo.

Aeroflex claimed misappropriation of trade secrets, tortious interference with prospective business advantage or relationship, breach of contract, and tortious interference with contract. Aeroflex asserted actual damages in the range of \$19.8 million to \$30.1 million. Aeroflex also sought punitive damages.

After a lengthy trial, the jury found

- in favor of the defendants on Aeroflex's claims for misappropriation of trade secrets;
- in favor of Aeroflex on its claim of tortious interference with prospective business advantage or relationship against Tel-Instrument and awarded \$1.3 million to Aeroflex;

- in favor of Aeroflex on its claims against Allen and Filardo for breach of their nondisclosure agreements and awarded damages of \$100,000 against Filardo and \$400,000 against Allen; and
- in favor of Filardo on Aeroflex's claims for tortious interference of the nondisclosure agreements but found against Allen and Tel-Instrument on the same claims and awarded damages of \$25,000 against Allen and \$1.5 million against Tel-Instrument.

The jury also approved the award of punitive damages. The trial court assessed punitive damages against Tel-Instrument in the amount of \$2.1 million.

#### ISSUE I: STANDING

*Did Aeroflex, as a licensee, have standing to sue even though its license had expired?*

This issue of standing to sue arose before trial when Tel-Instrument moved for summary judgment claiming Aeroflex lacked standing to sue because Aeroflex merely had a license to make and sell the TS-4530. It argued that Northrop Grumman owned the test set, not Aeroflex. Citing cases that govern patent infringement claims, Tel-Instrument contended that Aeroflex, as a licensee, could not sue Tel-Instrument unless Northrop Grumman joined the suit (Northrop Grumman did not join the action.). Tel-Instrument also argued that even if Aeroflex did have standing to sue, it lost that standing on December 31, 2011, when the license agreement terminated.

In opposing the motion, Aeroflex argued that both the underlying design of the TS-4530 and the plans for the Mode 5 upgrade were proprietary and confidential information owned by Aeroflex, citing article 1.2 of the license agreement. And Aeroflex argued Tel-Instrument did not address Aeroflex's standing for its breach of contract and tortious interference claims.

The trial court denied the motion after deciding Aeroflex had standing to seek damages or obtain injunctive relief relating to any improvement or modification to the TS-4530 test set or the resulting technical data that had been accumulated. By its express terms, the license agreement between Litton and JcAIR plainly provided that all improvements and modifications to the test equipment or technical data "remain the property of JcAIR." Expiration of the license would not affect Aeroflex's right to bring an action to protect those improvements and modifications.

*Tel-Instrument maintains its position in this appeal.*

Citing a California federal district court decision applying federal patent law to a trade secret misappropriation case, Tel-Instrument argues the license agreement determines whether Aeroflex, as a licensee, has standing to sue in this case. Only an exclusive licensee that receives "all substantial rights" in a patent has standing to sue for infringement without joining the patent owner as a party. See *Memry Corp. v. Kentucky Oil Technology, N.V.*, No. C-04-03843 RMW, 2006 WL 3734384, at \*7 (N.D. Cal. 2006) (unpublished opinion). This is a prudential standing rule designed to avoid the potential for multiple litigations and multiple liabilities and recoveries against the same alleged infringer. *Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1340 (Fed. Cir. 2007).

Tel-Instrument argues that because Northrop Grumman owns the TS-4530 as the licensor, any alleged injury to Aeroflex due to the defendants' actions necessarily also injured Northrop Grumman. And because Northrop Grumman retained substantial rights to the TS-4530, including the right to sue third parties, Aeroflex is not the proper litigant to advance its claims. Tel-Instrument argues the license agreement contemplates that next generation 424 test sets are licensed products. And Tel-Instrument argues Aeroflex must have standing to sue for the relief sought common to all claims—damages based on lost profits for TS-4530 sales. Filardo and Allen join in Tel-Instrument's arguments.



Aeroflex argues that it has standing because it personally suffered a cognizable injury caused by the defendants; the license agreement has no bearing on standing. The Army intended to award a sole-source contract to Aeroflex. Tel-Instrument interfered. Filardo and Allen breached their nondisclosure agreements with Aeroflex. Aeroflex, not Northrop Grumman, lost the Mode 5 upgrade contract. Aeroflex further contends that even if the license agreement has some relevance to the standing inquiry, it does not deprive Aeroflex of the right to sue for breach of its own contracts, tortious interference with its own contracts or expectancies, or misappropriation of its own trade secrets.

In addition, Tel-Instrument argues in the alternative that Aeroflex lost standing to sue when the license ended on December 31, 2011. When the license ended, Aeroflex could no longer make and sell the licensed test sets.

Aeroflex responds that the license agreement has no place in the analysis. Aeroflex continues to have a personal stake in the controversy because this case involves Aeroflex's business expectancy, contracts, and intellectual property. Aeroflex did have to return certain information about the 424(v)2 to Northrop Grumman when the license agreement terminated, but it kept "vast amounts of its own intellectual property related to the [424](v)3, [TS-]4530, and the Mode 5 Upgrade."

After considering the licensing agreement, the claims of the parties, and the jury verdict, our understanding of what is being sought in this litigation differs from the position taken by the defendants. We decline their invitation to apply California law or federal patent law to resolve the issues raised here. We will rely upon Kansas law, instead.

The reasoning and logic found in the line of cases cited by Tel-Instrument works well when litigating patents. For the patent system to work efficiently, there can be only one patent and only one patent infringement suit in federal court to determine a patent's

scope. But we do not embrace the reasoning found in that line of cases because we are not dealing with any patent claim here. We are working with a license agreement where any improvements to the product created by the licensee remain the property of the creator. In other words, this is a contract question, not a patent claim.

Federal courts have created prudential standing requirements. Prudential standing requirements are self-imposed judicial restraints on the exercise of jurisdiction. Kansas courts have not adopted this federal model. *Kansas Bldg. Industry Workers Comp. Fund v. State*, 302 Kan. 656, 679-80, 359 P.3d 33 (2015). The burden to establish standing rests with the party asserting it. *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196 (2014).

*Kansas standing law equates with simple justice.*

We begin with the Kansas Constitution, the law that governs governments. Article 3, section 1 of the Kansas Constitution grants the "judicial power" of the state to the courts. Judicial power is the power to hear, consider, and determine "controversies" between litigants. For an actual controversy to exist, the petitioner must have standing. Standing "means the party must have a personal stake in the outcome." *Baker v. Hayden*, 313 Kan. 667, 672, 490 P.3d 1164 (2021). Standing is a component of subject matter jurisdiction. It presents a question of law and can be raised at any time. 313 Kan. at 673.

Kansas courts use a two-part test when determining standing. *Kansas Bldg. Industry Workers Comp. Fund*, 302 Kan. at 680. To demonstrate standing, a party "must show a cognizable injury and establish a causal connection between the injury and the challenged conduct." *State v. Stoll*, 312 Kan. 726, 734, 480 P.3d 158 (2021). To demonstrate a cognizable injury, the injury must affect the party in a "personal and individual way." *Peterson v. Ferrell*, 302 Kan. 99, 103, 349 P.3d 1269 (2015). A party must generally assert its own legal rights and interests and not base its claim for relief on

the legal rights or interests of third parties. 302 Kan. at 103. Harm to the party is the basis for any claim. No harm? No claim.

The evidence here shows harm to Aeroflex. Under Kansas' two-part standing test, Aeroflex suffered a cognizable injury. The loss of the Mode 5 upgrade contract was a personal and individual injury to Aeroflex. That contract was between the Army and Aeroflex—not the Army and Northrup Grumman. Tel-Instrument interfered with Aeroflex's expected Army contract and with Aeroflex's nondisclosure agreements protecting Aeroflex's confidential and proprietary information. The verdict shows that Filardo and Allen breached their nondisclosure agreements with Aeroflex and not Northrup Grumman. Aeroflex had standing to sue the defendants.

Tel-Instrument's argument concerning the license agreement is unconvincing. The license Aeroflex had obtained merely opened the gate so it could determine what it could produce. What it created and how it created its improvements was Aeroflex's property. This lawsuit concerns Tel-Instrument's interference with Aeroflex's ability to obtain a contract with the Army to supply the Army with a Mode 5 upgrade test set (what became the TS-4530A)—not lost opportunities to sell the TS-4530 or 424(v)3.

Even if Kansas had adopted the "all substantial rights" prudential standing rule, it would not affect Aeroflex's standing in this case. Tel-Instrument's argument gives no meaning to article 1.2 of the license agreement. Regardless of whether Aeroflex was given all substantial rights in the licensed test equipment and data as an exclusive licensee, Aeroflex could sue to protect whatever confidential material and trade secrets it owned as a result of article 1.2.

Article 1.2 of the license agreement reads: "1.2 Litton agrees that all improvements and modifications made by JcAIR to the Test Equipment or the technical data . . . will remain the property of JcAIR." The "Test Equipment" was described as the

424(v)3 and the 424(v)3 modification kit. When Litton and Aeroflex amended the license agreement in 2007 to contemplate derivatives of the IFF test set, "424(v)3 Modification Kit" was changed to "424(v)2 to (v)3 Modification Kit."

In our view, the trial court correctly found Aeroflex had standing to sue and that the expiration of the license agreement did not affect Aeroflex's standing to bring an action to protect its improvements and modifications.

## ISSUE II: STATUTE OF LIMITATIONS

*Did the two-year statute of limitations bar Aeroflex's tortious interference with business claim?*

During the trial, Tel-Instrument moved for judgment as a matter of law on the tortious interference with business claim based on the two-year tort statute of limitations, K.S.A. 60-513(a)(4). Tel-Instrument argued that the tort was reasonably ascertainable in November 2006, when the Army cancelled the sole-source contract and Aeroflex lost the \$1.3 million in funds to develop the Mode 5 technology. Aeroflex argued it had no damages until it lost the \$50 million production contract in 2009. Aeroflex argued that Tel-Instrument concealed its wrongful conduct that began in 2006. And the hiring of Allen and Filardo was what ultimately took the production contract from Aeroflex.

A brief review of the facts provides a context for this legal argument. In 2006, Aeroflex and the Army had negotiated a sole-source contract for the development of the Mode 5 upgrade. The contract would have provided Aeroflex \$1.3 million to develop the Mode 5 technology. Then Tel-Instrument protested the sole-source contract award. Aeroflex was given a copy of the protest letter in which Tel-Instrument explained it intended to replace all of the hardware in the TS-4530 with its own proprietary technology and would not need access to any proprietary Aeroflex technology. Aeroflex,

however, believed Tel-Instrument could not do the upgrade without Aeroflex's proprietary information.

When speaking about Tel-Instrument's protest, Aeroflex's general manager, Jeff Gillum, testified, "I don't know if we thought it was without merit. . . . I guess if I was to say my opinion I would say, yeah, it would be without merit, it was purely to delay the sole source award. That was my personal opinion." But he did not blame Tel-Instrument for the loss of the sole-source contract because "Tel-Instrument was just simply protesting it."

In November 2006, the Army cancelled the sole-source contract and announced there would be a competitive bid. The bidders would have to fund the development of the Mode 5 technology themselves. At that time, Allen and Filardo still worked for Aeroflex. When Allen and Filardo left Aeroflex in early 2007, they told colleagues they would not be working on Tel-Instrument's Mode 5 upgrade project.

In January 2009, the Army awarded Tel-Instrument the Mode 5 production contract. Aeroflex filed this suit in March 2009. Aeroflex claimed damages for "lost profits from the loss of the Mode 5 Upgrade contract."

On appeal, Tel-Instrument basically contends that the loss of the 2009 contract was a consequence of the interference in 2006. The fact that Aeroflex suspected wrongdoing in 2006 was sufficient to trigger the statute of limitations, and actual knowledge of any wrongdoing was unnecessary. The tortious interference with business claim merged with the tortious interference with contract claim, and any claim was time-barred. A continuing tort theory is unavailable in Kansas. The accrual date was a legal issue for the court.

*The rules that guide us are well-established.*

At any time before a case is submitted to the jury, if a party has been fully heard on an issue and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may resolve the issue against the party and grant a motion for judgment as a matter of law against the party. K.S.A. 2022 Supp. 60-250(a). Tel-Instrument asked for such relief in this trial.

A trial court's denial of a motion for judgment as a matter of law under K.S.A. 2022 Supp. 60-250 is reviewed de novo determining "whether evidence existed from which a reasonable jury 'could properly find a verdict for the nonmoving party.'" *Siruta v. Siruta*, 301 Kan. 757, 766, 348 P.3d 549 (2015).

When ruling on a motion for judgment as a matter of law, the trial court must resolve all facts and inferences that may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. The trial court must deny the motion if reasonable minds could reach different conclusions based on the evidence. An appellate court must apply a similar analysis when reviewing the grant or denial of a motion for judgment as a matter of law. *Dawson v. BNSF Railway Co.*, 309 Kan. 446, 454, 437 P.3d 929 (2019).

The statute of limitations for a tortious interference with business claim is two years under K.S.A. 60-513(a)(4). See *Taylor v. International Union of Electronic Workers, et al.*, 25 Kan. App. 2d 671, 674, 968 P.2d 685 (1998). The action must be commenced within two years "after the cause of action shall have accrued." K.S.A. 60-510. The cause of action accrues when "the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party." K.S.A. 60-513(b).

A "substantial injury" is an actionable injury. The statute of limitations starts to run when both the act and the resulting injury are reasonably ascertainable by the injured party. The injured party need not have knowledge of the full extent of the injury. But the injured party must have a sufficient ascertainable injury to justify an action for damages. When the evidence is disputed concerning when the injury became reasonably ascertainable, the trier of fact decides. *LCL v. Falen*, 308 Kan. 573, 582-84, 422 P.3d 1166 (2018).

*LCL* involved a negligence claim concerning a deed that wrongly omitted a mineral interest reservation. The seller immediately suffered a substantial injury when the deed was filed and recorded. But the court held the filing and recording of the deed was only one piece of relevant evidence to be considered by the fact-finder in deciding whether the injury was reasonably ascertainable. 308 Kan. at 587-88.

Following the guidance offered by *LCL*, we think that we must answer two questions to resolve this issue: (1) When did Aeroflex suffer actionable injury—in other words, when were all the elements of the cause of action in place? (2) When did the existence of that injury become reasonably ascertainable to Aeroflex? See 308 Kan. at 583. We begin with the first question.

*When did Aeroflex suffer an actionable injury?*

Aeroflex claimed that Tel-Instrument tortiously interfered with its prospective business advantage or relationship with the Army. To recover, Aeroflex had to prove:

- "1. The existence of a business relationship or expectancy with the probability of future economic benefit to Aeroflex;
- "2. Knowledge by Tel-Instrument of Aeroflex's business relationship or expectancy;

- "3. That, except for the conduct of Tel-Instrument, Aeroflex was reasonably certain to have continued the relationship or realized the expectancy;
- "4. Intentional misconduct by Tel-Instrument; and
- "5. Aeroflex suffered damages as a result of Tel-Instrument's misconduct."

Aeroflex also had to prove Tel-Instrument acted with malice.

Aeroflex's theory was that Tel-Instrument "acted intentionally, and maliciously used improper means to interfere with Aeroflex's prospective business relationship with the Army so that Tel-Instrument, rather than Aeroflex, would be awarded the Mode 5 Upgrade contract."

Aeroflex possibly could have claimed that Tel-Instrument committed misconduct when Tel-Instrument interfered in 2006 and sought damages for the loss of the development money. But Aeroflex did not know it was going to lose the competition for the contract until 2009.

The trial court decided this was a jury question because it was not clear that Aeroflex had sustained any damages from the loss of the 2006 sole-source award. That just opened the competition.

*When did the existence of that injury become reasonably ascertainable to Aeroflex?*

The parties are in opposition on this question. Aeroflex argues Tel-Instrument's tortious interference connected with the 2006 protest was not reasonably ascertainable as of November 2006. Tel-Instrument argues it was sufficient that Gillum suspected Tel-Instrument's wrongdoing to start the two-year clock because Aeroflex had an obligation to investigate. Tel-Instrument argues the evidence at trial was undisputed concerning



when the injury became reasonably ascertainable. Also, the parties interpret Gillum's testimony in opposing ways.

There are occasions when a trial court can determine as a matter of law when an injury became reasonably ascertainable. In *Friends University v. W.R. Grace & Co.*, 227 Kan. 559, 608 P.2d 936 (1980), the university brought a negligence action against the manufacturers of roofing materials that were used in the construction of the university's library building. About a year after the library roof was completed, it leaked. It continued to leak every time it rained. The roofing company's repairs did not work. About five years after it first leaked, an independent expert pinpointed the cause of the problem. The court held the subsequent suit was barred by the statute of limitations. The roof was "obviously defective" when the leaking occurred, i.e., the injury was reasonably ascertainable. 227 Kan. at 562. The cause of the leaking roof had to be defective design, materials, and/or work. The fact that the university had not determined the exact cause of the leaking did not toll the statute of limitations because the university could have obtained an expert opinion at any time. 227 Kan. at 562-65.

This is not a leaking roof case. The fact that Tel-Instrument protested the sole-source contract, by itself, does not establish there was any misconduct. It was possible for the jury to view Tel-Instrument's protest as reasonable competition in this highly specialized marketplace. Tel-Instrument protested in accordance with government contracting law, and the Army sustained the protest. That is not to say the misconduct was not reasonably ascertainable at that point; rather, it was a question for the jury considering all the facts.

Tel-Instrument relies on Gillum's suspicions that the purpose of Tel-Instrument's protest was merely to delay Aeroflex getting the contract. But that suspicion alone is insufficient to conclude as a matter of law that Tel-Instrument's misconduct was

reasonably ascertainable. See *Armstrong v. Bromley Quarry & Asphalt, Inc.*, 305 Kan. 16, 378 P.3d 1090 (2016).

In *Armstrong*, the plaintiffs brought a trespass and conversion action against Bromley Quarry for unauthorized subsurface mining of limestone. The court held plaintiffs' suspicion of mining alone was insufficient to conclude as a matter of law that the mining was reasonably ascertainable. The plaintiffs' house shaking and their suspicion of unauthorized mining based on previous dealings with Bromley triggered an obligation to investigate. Plaintiffs obtained maps which incorrectly showed there had been no mining on the property. A question remained what, if anything, could have been done to ascertain the fact of the injury, precluding summary judgment. 305 Kan. at 31.

Here, Aeroflex obtained a copy of Tel-Instrument's protest where Tel-Instrument stated it could accomplish the Mode 5 upgrade without access to Aeroflex's proprietary information. When Allen and Filardo left Aeroflex, they assured their colleagues they would not be working on the Mode 5 upgrade for Tel-Instrument. In other words, there were facts such that a jury could conclude Tel-Instrument's misconduct was not reasonably ascertainable in November 2006. This is true even though the jury award for tortious interference with a prospective business advantage or relationship equaled the value of the sole-source contract withdrawn by the Army in 2006.

It was a question for the jury to decide when Aeroflex could have ascertained the fact of injury. The trial court did not err by denying the motion for judgment as a matter of law.

### ISSUE III: DAMAGE AWARDS

*Did the trial court fail to reconcile the jury's damage awards?*

Tel-Instrument argues the jury's damage awards are inconsistent because they are in different amounts and duplicative because Aeroflex submitted alternate claims for the same lost profits. The company contends that Aeroflex can have only one recovery for breach of contract by Allen and Filardo and the inducement of the breach by Tel-Instrument under Restatement (Second) of Torts §§ 766 and 774A. It argues that the trial court improperly reconciled the inconsistent awards based on speculation that the jury apportioned damages. Tel-Instrument denies that any error was invited because it asked the court to instruct the jury not to award duplicative damages. Tel-Instrument argues it was error for the trial court to fail to reconcile the damage awards. Tel-Instrument admits the two awards against it can be reconciled as separate awards for successive injuries occurring in 2006 and 2009.

Aeroflex argues the defendants invited any error because they drafted the verdict form; they waived this issue by not objecting before the jury was discharged; the damage awards are not inconsistent because the jury followed the instructions; the jury consistently answered "no" when asked if the damages were duplicative; and the total damages are within the evidence presented at trial. Aeroflex contends Tel-Instrument's arguments invite improper speculation about how the jury reached its verdict.

We are mindful that the trial court used a special verdict for this trial. The jury was asked to answer specific questions and its answers to those questions constituted its verdict. More facts must be reviewed to explain this issue and our holding.

The jury was instructed that Aeroflex was claiming it sustained damages "in the form of lost profits from the loss of the Mode 5 Upgrade contract." Instruction No. 18

gave the jury a broad overview of the damages it was to consider by defining loss of profits:

"If you find for Aeroflex, then you should award Aeroflex the sum you find will fairly and justly compensate Aeroflex for the damages you find were sustained as a direct result of the conduct by the Defendants. In determining Aeroflex's damages you should consider any of the following elements of damage that you find were the result of the Defendants conduct: Loss of Profits.

"A loss of profits to a business caused by the wrongful act of another is compensable. You may award the amount of lost profits that Aeroflex proved with reasonable certainty.

"But lost profits need not be computed with mathematical certainty; they are hypothetical by definition. The 'reasonable certainty' test is a test of probability, and depends in large measure upon the circumstances of the particular case.

"You may return the same or a different amount of damages on any other claim. In addition, the same damages may have multiple causes.

"The Court will ask you to clearly indicate whether any of those damages have duplicate causes, that is, whether those same damages have already been awarded against that particular Defendant."

The jury was given a special verdict form that asked a series of questions. For each claim, the jury was asked whether it found each applicable defendant liable. Then the jury was asked what damages were sustained by Aeroflex as a result of that claim against each applicable defendant. For each claim, the jury was asked whether any of those damages were duplicative of the damages, if any, awarded in response to any other verdict question. And, if so, the jury was asked to state the amount of duplicated damages. The jury answered "No" to each duplication question.

The defendants proposed this format which required the jury to assess damages against each defendant for each claim. Aeroflex argued that individual allocation of damages within each claim was inappropriate.

The jury awarded damages as follows:

- \$1.3 million for tortious interference with prospective business advantage or relationship against Tel-Instrument;
- \$100,000 for breach of nondisclosure agreement against Filardo;
- \$400,000 for breach of nondisclosure agreement against Allen;
- \$25,000 for tortious interference with nondisclosure agreement against Allen;
- and
- \$1.5 million for tortious interference with nondisclosure agreement against Tel-Instrument.

In posttrial motions, the defendants challenged the damage awards in a motion for judgment as a matter of law under K.S.A. 60-250, to correct the special verdict under K.S.A. 60-249(a), and to alter or amend the judgment under K.S.A. 60-259(f). The trial court denied the motions, finding the total damage award was supported by the evidence. The total was well below the lost profits figure that Aeroflex's damage expert gave.

The trial court also found that any inconsistency in the specific damage awards was invited by the defendants because the defendants requested separate damage questions on the verdict form for each cause of action, while Aeroflex had asked for one blank line for damages. The court found the awards were not duplicative because the jury clearly and distinctly answered "No" on the verdict form to the questions asking if the awards were duplicative. "Any finding to the contrary is pure and impermissible speculation."

*If there are errors here, we are not sure that they were invited by the defendants.*

The more complex something is, there is a greater chance for error. Our Supreme Court has cautioned against the use of verdict forms like the one used here with multiple

places for the jury to award damages when the plaintiff seeks only one type of damage. See *Jenkins v. T.S.I. Holdings, Inc.*, 268 Kan. 623, 627, 630, 1 P.3d 891 (2000). Simply put, a duplicative damage award can be prevented by the proper drafting of the verdict form. *State ex rel. Stephan v. GAF Corp.*, 242 Kan. 152, 159, 747 P.2d 1326 (1987).

Basically, a party may not invite error and then complain of that error on appeal. *Siruta*, 301 Kan. at 774. There is no bright-line rule for applying the invited error doctrine. Context matters. For example, the invited error doctrine applies when a party "actively pursues" a faulty jury instruction. *State v. Cottrell*, 310 Kan. 150, 162, 445 P.3d 1132 (2019). But it does not apply when the trial court's instruction differs from what the party proposed. See *State v. Lewis*, 299 Kan. 828, 854-55, 326 P.3d 387 (2014).

In *Cott v. Peppermint Twist Mgmt. Co.*, 253 Kan. 452, 856 P.2d 906 (1993), the defendant claimed error on appeal from a special verdict form that failed to separate past and future damage awards. The Supreme Court ruled that the defendant invited the error because it agreed to lump together past and future damage awards. 253 Kan. at 459.

In contrast, in *Jenkins*, although the sellers had submitted a verdict form that provided blanks for two separate damage awards in accordance with the trial court's rulings, they had consistently argued that one of the claims was not an independent basis for damages. Thus, the Supreme Court found it was not a clear case of invited error. 268 Kan. at 626.

Here, the defendants proposed the verdict form with multiple blanks for damages on their own and over Aeroflex's objection. But the defendants also proposed telling the jury that "you cannot award compensatory damages more than once for the same loss, harm, or detriment," which the trial court did not give. The defendants do not argue on appeal the verdict form constituted error. Thus, we will not hold that the invited error doctrine precludes Tel-Instrument's argument on appeal.

*We cannot find that what the jury did was unreasonable.*

A party may pursue two claims but a jury can find only one valid. While the law permits a party to maintain an action for both tortious interference with contract against the person who induced the breach and the corresponding breach of that contract by a third person, only one recovery is permitted. Each is liable to the plaintiff for the harm caused by the loss of the contract. See Restatement (Second) of Torts § 766, comment v (1979).

"[A]n action or judgment against the one who causes the breach without satisfaction will not bar or reduce recovery from the one who breaks the contract; but to the extent that there is duplication of the damages any payments made by the tortfeasor must be credited in favor of one who has broken the contract." Restatement (Second) of Torts § 774A, comment e (1979).

Special verdict findings on essential issues "must be certain and definite, and must not be conflicting or inconsistent;" when determining whether the findings are inconsistent, they are "construed in the light of the surrounding circumstances and in connection with the pleadings, instructions, and issues submitted." *Rohr v. Henderson*, 207 Kan. 123, 130, 483 P.2d 1089 (1971). "Where there is a view of the case that makes the [findings] consistent, they must be resolved that way." 207 Kan. at 130. Special findings "are to be liberally construed on appeal and interpreted in the light of the testimony with the view toward ascertaining their intended meaning." *Brunner v. Jensen*, 215 Kan. 416, Syl. ¶ 5, 524 P.2d 1175 (1974). "If a careful reading of the form, coupled with the instructions[,] clearly establishes the intent of the jury and resolves the verdict's ambiguity, we may uphold the verdict." *Jenkins*, 268 Kan. at 629.

Our review of some caselaw is useful here. On appeal we will not speculate where the jury's intent is unclear. In *Reed v. Chaffin*, 205 Kan. 815, 820, 473 P.2d 102 (1970), the Supreme Court ordered a new trial because the jury's special verdict findings were

"patently inconsistent" such that the case "was left in the condition of actually being undecided." 205 Kan. at 820. The jury found both that the defendants had breached an agreement because they had fired the plaintiff from his position as manager and the plaintiff was not unlawfully ousted as manager.

Another example is *Hubbard v. Havlik's Estate*, 213 Kan. 594, 518 P.2d 352 (1974), which involved a wrongful death suit brought against the City of Pratt, Kansas, and the estate of a driver involved in a one-vehicle accident for damages for the death of the passengers in the vehicle. The jury was instructed: "If from the evidence you find that decedent Havlik's conduct was wanton and the defendant City of Pratt was guilty of negligence which was concurrent to the other, the degree of fault or culpability of each is immaterial, and each is liable for the entire damage." 213 Kan. at 601. The jury returned a verdict of \$12,000 separately against each defendant for one plaintiff and \$12,500 separately against each defendant for the other plaintiff. The trial court entered judgment accordingly. The plaintiffs argued the jury intended a total award of \$24,000 for one plaintiff and \$25,000 for the other. The defendants argued the jury assessed the full amount of the award against each defendant, which would cut the defendants' total liability in half. On appeal, the court ruled that its decision on the issue would be "nothing more than a speculative determination as to what the jury intended." 213 Kan. at 604. Thus, the verdict could not stand.

Also, in *ClearOne Communications, Inc. v. Biamp Systems*, 653 F.3d 1163, 1170-71 (10th Cir. 2011), in a suit for misappropriation of trade secrets, the jury assessed lost-profits damages in the amount of \$956,000 against Biamp and \$956,000 against WideBand. The district court concluded the two defendants were jointly and severally liable for the total of \$1,912,000. The defendants argued the jury assessed a total of \$956,000 against all defendants. The Tenth Circuit Court of Appeals agreed. The district court's interpretation of the verdict amounted to improper additur because, due to the wording of the verdict form, it was possible the jury intended a total damage award of



\$956,000. Where the jury's verdict is susceptible to two interpretations, the court cannot select an interpretation that possibly exceeds the intended award. There must be conclusive evidence the jury apportioned damages. The court ruled the district court erred because although it was "plausible" the jury apportioned damages, it was not "inescapable." 653 F.3d at 1180.

Here, the jury's special findings are not "patently inconsistent" as the cases require. See *Reed*, 205 Kan. at 820. The jury was instructed it could "return the same or a different amount of damages" on the claims. Though it is impossible to tell how the jury arrived at the differing damage awards, the answers on the verdict form are markedly consistent. The jury was not instructed against apportioning damages. Rather, the jury was instructed to "clearly indicate" whether any of the damages it awarded had "duplicate causes." That is the difference between this case and those cited by *Tel-Instrument*. Here, it is inescapable the jury apportioned damages because the jury stated each time that the damages were not duplicative of any other damages. As the trial court pointed out, the jury filled in 12 lines on the verdict form on the issue of duplicate damages. The jury consistently answered that it did not duplicate damages. Any speculation that the jury was confused or did not mean what it said is unfounded.

*Jenkins* provides support for the trial court's judgment totaling the damage awards. In *Jenkins*, the buyers claimed the sellers violated two provisions of a contract—a best efforts clause and a no-shop clause. The special verdict form had two blanks to indicate whether the sellers had breached the contract—one for each clause. The form also had two blanks for the jury to award damages caused by each breach. The jury found the sellers violated both provisions of the contract. The jury awarded the buyers \$1 million for breach of the best efforts clause and \$3 million for breach of the no-shop clause. The district court entered a \$4 million judgment against the sellers. On appeal, the sellers argued the verdict was inconsistent. Any breach of the contract caused the buyers to

sustain the same damage. Thus, different amounts could not be awarded for each violation.

The *Jenkins* court upheld the judgment. A \$4 million award was within the range supported by the evidence. The jury was instructed to award the plaintiffs the "sum" that would adequately compensate them. 268 Kan. at 629. A consistent reading of the form and instructions showed the jury determined the sellers breached both contract clauses and that the total benefit of the bargain lost due to the seller's breach was \$4 million, which the jurors allocated between the two damage blanks. 268 Kan. at 629.

Like the jury in *Jenkins*, the jury here was instructed: "[Y]ou should award Aeroflex the sum you find will fairly and justly compensate Aeroflex." The sum the jury awarded was \$3.325 million. That amount was within the range of evidence at trial. See *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1228 (10th Cir. 2000). The trial court did not err by denying the defendants' motion for judgment as a matter of law.

#### ISSUE IV: COMPETITOR'S PRIVILEGE

*Was it reversible error to refuse to give a jury instruction on competitor's privilege, a doctrine not yet accepted by Kansas courts?*

Citing some federal cases and predicting the Kansas Supreme Court would adopt the business competitor privilege found in Restatement (Second) of Torts § 768 (1979), Tel-Instrument contends the trial court erred by failing to instruct the jury on the privilege. Tel-Instrument admits that the Kansas appellate courts have not specifically adopted § 768 but contends the trial court should have because it did not fairly instruct the jury on the meaning of "wrongful" or "improper" means.

Aeroflex contends the instruction was not legally appropriate because § 768 is not Kansas law since it has not been adopted by the Kansas Supreme Court. Aeroflex argues that even if it were adopted, any error was harmless because the trial court gave the substance of the requested instruction.

Based on the Restatement (Second) of Torts § 768, the defendants asked the trial court to instruct the jury:

"The Court has found that the 'competitor's privilege' applies. One who intentionally causes a third person not to enter into prospective relation with another who is his competitor or not continue an existing contract terminable at will does not interfere improperly with the other's relation if:

1. The relation concerns a matter involved in the competition between the defendant and the plaintiff;
2. The defendant does not employ wrongful means;
3. defendant's action does not create or continue an unlawful restraint of trade; and
4. defendant's purpose is at least in part to advance his interest in competing with the plaintiff.

"'Wrongful means' includes acts equivalent to physical violence, fraud, civil suits and criminal prosecutions. Wrongful means does not include persuasion and the exertion of limited economic pressure. Conduct that is merely 'sharp' or 'unfair' does not qualify as 'wrongful means.'"

We note that the proposed instruction follows § 768, except the Restatement does not precisely define "wrongful means." It does give the examples of physical violence, fraud, civil suits, and criminal prosecutions in a comment. Restatement (Second) of Torts § 768, comment e.

*The law we follow on jury instructions is not complex.*

When reviewing jury instruction issues, we consider: (1) whether the issue was preserved below; (2) whether the instruction was legally and factually appropriate; and (3) if the instruction was appropriate, whether the error requires reversal. An instruction is legally appropriate if it fairly and accurately states the applicable law. *Reardon v. King*, 310 Kan. 897, 902-03, 452 P.3d 849 (2019). We have unlimited review over whether an instruction was legally appropriate. An instruction is factually appropriate if there is sufficient evidence, viewed in the light most favorable to the requesting party, that would support the instruction. *Burnette v. Eubanks*, 308 Kan. 838, 845, 425 P.3d 343 (2018). A jury instruction error is harmless when there is no reasonable probability the error affected the trial's outcome. *State v. Nunez*, 313 Kan. 540, 550, 486 P.3d 606 (2021).

All of the jury instructions are to be considered together and read as a whole. When they fairly instruct the jury on the law governing the case, an error in an isolated instruction may be disregarded as harmless. If the instructions are substantially correct and do not mislead the jury, the instructions may be approved on appeal. *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375, 383, 266 P.3d 516 (2011).

To prove tortious interference with a prospective business advantage or relationship, Aeroflex had to prove intentional misconduct by Tel-Instrument and that Tel-Instrument acted with malice, i.e., an intent to do harm without any reasonable justification or excuse.

*We cannot condemn the trial court's reasonable approach to this question.*

The trial court refused to give the requested instruction. Instead, it gave an instruction on justification that mirrored PIK Civ. 4th 124.93 (2020 Supp.), with the addition of an eighth factor concerning competition. The authority for PIK Civ. 4th

124.93 is *Turner v. Halliburton Co.*, 240 Kan. 1, 722 P.2d 1106 (1986), which cited the Restatement (Second) of Torts § 767.

The trial court told the jury:

"It is a defense to an action for tortious interference with existing or with prospective contractual relations that the interference was justified.

"Justification exists when the Defendant acts in the exercise of a right equal to or superior to that of the Plaintiff and uses fair means and good faith for some lawful interest or purpose.

"In determining whether the interference was justified, the following factors should be considered:

1. The nature of the Defendant's conduct;
2. The Defendant's motive;
3. The interests of the Plaintiff with which the Defendant's conduct interfered;
4. The interests sought to be advanced by the Defendant;
5. The social interests in protecting the freedom of action of the Defendant and the contractual interests of the Plaintiff;
6. The proximity or remoteness of the Defendant's conduct to the interference; and
7. The relations between the parties.
8. *The parties were in competition on the matter and the defendants did not employ improper means.*" (Emphasis added.)

The *Turner* court had recognized that "not all interference in present or future contractual relations is tortious. A person may be privileged or justified to interfere with contractual relations in certain situations." 240 Kan. at 12.

It is important to understand that the privilege stated in § 768 is "a special application of the factors determining whether an interference is improper or not, as

stated in § 767." Restatement (Second) of Torts § 768, comment b. The privilege is based on the belief that "competition is a necessary or desirable incident of free enterprise." Restatement (Second) of Torts § 768, comment e. "One's privilege to engage in business and to compete with others implies a privilege to induce third persons to do their business with him rather than with his competitors." Restatement (Second) of Torts § 768, comment b. "If the actor succeeds in diverting business from his competitor by virtue of superiority in matters relating to their competition, he serves the purposes for which competition is encouraged." Restatement (Second) of Torts § 768, comment e. The privilege does not apply to inducement of breach of contract. Restatement (Second) of Torts § 768, comment h. The privilege is lost when the competitor uses "wrongful means." Restatement (Second) of Torts § 768(1).

Tel-Instrument's prediction is not based on reading tea leaves. The Tenth Circuit predicted the Kansas Supreme Court would adopt § 768 in *DP-Tek, Inc. v. AT&T Global Information Solutions Co.*, 100 F.3d 828, 833-34 (10th Cir. 1996). The *DP-Tek* court held, where the claim is interference with a prospective contract, "wrongful means requires independently actionable conduct." 100 F.3d at 833. The court noted that some jurisdictions do not require the defendant's actions to be independently unlawful, but that the weight of authority supported its conclusion that wrongful means required independently actionable conduct. 100 F.3d at 834-35. The Tenth Circuit followed the *DP-Tek, Inc.* holding again later in *Utility Trailer Sales of Kansas City, Inc. v. MAC Trailer Manufacturing, Inc.*, 443 Fed. Appx. 337, 342 (10th Cir. 2011) (unpublished opinion).

Aeroflex offers no reason why the Kansas Supreme Court would not adopt § 768. After all, it is referred to in the comments to § 767, which our Supreme Court has adopted, and it provides further context for that section. It may be that the Kansas Supreme Court will adopt § 768 in some form, but we question whether such speculation

is useful in this case. Though the entirety of the requested instruction may not be legally appropriate, the Restatement does not give "wrongful means" a precise definition.

After all, the trial court did give the substance of the requested instruction by adding a competition factor to its justification instruction. The trial court's instruction was legally appropriate under the circumstances.

In denying Tel-Instrument's posttrial motion, even the trial court speculated the Kansas Supreme Court would adopt the majority view that wrongful means requires independently actionable conduct. But the court defended its approach to the instruction because § 767 comment c states that the fact-finder should consider all the factors, including motive:

"[T]he issue is not simply whether the actor is justified in causing the harm, but rather whether he is justified in causing it in the manner in which he does cause it. The propriety of the means is not, however, determined as a separate issue unrelated to the other factors. On the contrary, *the propriety is determined in the light of all the factors present.*" (Emphasis added.)

The trial court concluded the jury was not under-instructed; its instruction allowed both sides to argue the facts on competition and also allowed the jury to weigh all the justification factors. The trial court also detailed various evidence presented at trial that the jury could have found constituted "wrongful means."

Under the circumstances, the failure to give a more detailed competition instruction was not reversible error. We cannot fault a trial court for refraining from going out on a limb and trying to predict how the Supreme Court will rule. The duty of the trial court is to instruct the jury on the law as it is when the instruction is given, not what the law might be in the future. The jury was appropriately instructed. We see no reason to reverse on this point.

## ISSUE V: 49 ITEMS

*Was it reversible error not to require the jury to decide on the verdict form whether 49 items were trade secrets or confidential?*

Allen and Filardo contend the trial court was required to list the 49 items on the verdict form that Aeroflex claimed were trade secrets or confidential. In their view, the court should have instructed the jury to first determine whether any of the 49 items were trade secrets or confidential and, if so, determine whether any of the items were misappropriated or disclosed by the defendants. By failing to do so, they claim that the jury was left in a difficult position of not knowing what items Aeroflex claimed were trade secrets or confidential. They then complain that we do not know now which items the jury believed were protected by the nondisclosure agreements.

The defendants have been consistent on this point. In the pretrial order, Aeroflex had identified 49 pieces of information it claimed were confidential, proprietary, or trade secrets that were improperly retained, disclosed, acquired, or used by the defendants. The defendants asked the trial court to list the items in its contention instruction and on the verdict form. For each item, the defendants wanted the jury to first answer yes or no whether the item constituted a trade secret under the Kansas Uniform Trade Secrets Act, K.S.A. 60-3320 et seq., and if so, for each item, whether any of the defendants had misappropriated the trade secret. For the breach of contract claim, if the jury found Allen or Filardo breached Aeroflex's nondisclosure agreement, then the defendants wanted the jury to answer for each of the 49 items whether it was misappropriated by either defendant.

The trial court declined to include a list of the 49 items in the instructions or verdict form. On the verdict form, for the trade secret misappropriation claim, the court simply asked whether defendants misappropriated Aeroflex's trade secrets. For the breach



of contract claim, the court simply asked whether Allen or Filardo breached their contract with Aeroflex.

Later, when denying the posttrial motions on this point, the trial court found Aeroflex had presented sufficient evidence on its alleged confidential information for the jury to make the requisite determination.

The standard of review stated above for jury instruction issues applies equally to verdict form issues. *Unruh v. Purina Mills*, 289 Kan. 1185, 1197-98, 221 P.3d 1130 (2009).

Allen and Filardo rely on K.S.A. 60-249 and *LendingTools.com, Inc. v. Bankers' Bank*, No. 116,382, 2018 WL 4655902 (Kan. App. 2018) (unpublished opinion), to support their claim that the trial court was required to specifically identify the confidential items on the verdict form.

The statute concerning special verdict forms states: "The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. . . . The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue." K.S.A. 2022 Supp. 60-249(a)(1)-(2).

In *LendingTools*, LendingTools brought an action against Bankers' Bank for misappropriation of trade secrets, civil conspiracy, and tortious interference with contract. The district court granted summary judgment to Bankers' Bank on the tort claims, ruling that the Kansas Uniform Trade Secrets Act preempted those claims. The jury found in favor of the defense on the misappropriation of trade secrets claim, and LendingTools appealed. LendingTools argued the district court erred by granting summary judgment on the tort claims because the tort claims were an alternative theory of recovery in the event the jury determined the misappropriated information was not a

trade secret. A panel of this court agreed. The panel stated that on remand the first question the jury should be asked on the verdict form is whether any of the information LendingTools sought to protect was a trade secret. If the jury determined that any of the information was a trade secret, then the jury should be instructed to move on to the question concerning whether Bankers' Bank misappropriated any trade secret. 2018 WL 4655902, at \*19.

In its cross-appeal, Bankers' Bank argued the district court erred by denying its motion to dismiss and motion for judgment as a matter of law based on LendingTools' failure to identify the specific trade secrets that it claimed were misappropriated. The panel held that by the time a case reaches the final pretrial conference, the plaintiff should be required to concisely identify the trade secrets alleged to have been misappropriated. Sufficient disclosure of trade secrets is necessary for the defendant to have a fair opportunity to prepare. The panel then noted that because the verdict form did not ask the jury to determine the existence of any trade secrets but instead jumped directly to the question of whether Bankers' Bank misappropriated any trade secrets, it was unclear whether the jury found any of the information to be a trade secret. But the panel found the district court did not err by denying the motions. 2018 WL 4655902, at \*20-22.

We hold that neither K.S.A. 2022 Supp. 60-249(a)(1)-(2) nor *LendingTools* supports the defendants' contention here that the trial court was required to itemize the claimed trade secret and confidential information in the instructions to prevent jury confusion. *LendingTools* was about preemption and disclosure of information in advance of trial.

Aeroflex did itemize its claims prior to trial. The defendants are now merely speculating that the jury may have been confused. They complain that we do not know what information the jury considered confidential, without explaining why we need to know that. The defendants do not argue there was insufficient evidence for the jury to

find that Allen and Filardo disclosed confidential information in violation of their nondisclosure agreements. We see no reason in this record to believe the jury did not follow the instructions. The defendants have not shown the trial court erred. There is no reason to reverse on this point.

#### ISSUE VI: DECLINED INSTRUCTION

*Was the refusal to give an instruction on industry secrets reversible error?*

Allen and Filardo contend the trial court erred by failing to give their requested jury instruction that information is not secret if it is generally known to the public at large or to people in the trade or business. They list several items of Aeroflex's alleged proprietary information which they maintain are in the public domain. They complain now that the jury was never simply told that information cannot be secret or confidential if it is available to the general public or if it is known within the industry.

The defendants asked the trial court to give this jury instruction:

"To determine that a trade secret exists you must first decide whether the information was indeed secret when any of the defendant's allegedly wrongful conduct occurred. Matters that are generally known to the public at large or to people in a trade or business are not trade secrets. Nor can information be considered a trade secret if it would be ascertainable with reasonable ease from publicly available information. In addition, a trade secret must possess enough originality so that it can be distinguished from everyday knowledge.

"Absolute secrecy is not necessary for information to qualify as a trade secret. There is no requirement that no one else in the world possess the information. Rather, a plaintiff must demonstrate that the information was known only to it or to a few others who have also treated the information as a trade secret."

The trial court refused to give that instruction.

When deciding an issue such as this, we must read all of the jury instructions together as a whole. *Wolfe Electric*, 293 Kan. at 383. Notice that the proposed jury instruction mentions only "trade secrets," and not other confidential information. In its jury instructions, the trial court had told the jury there is a difference between trade secret information and confidential information: "For purposes of this case, 'confidential, protected information' is any information defined and covered by the Non-Disclosure Agreement but does not meet the definition of a 'Trade Secret' as stated in this instruction."

The jury was also instructed that Aeroflex's breach of contract claim concerned information covered by the nondisclosure agreements "not already available to the public." The trial court also differentiated between trade secret information and confidential information on the verdict form for both liability and damages. The jury found that none of the defendants misappropriated trade secrets and awarded no damages for disclosure of trade secret information on any of the other claims.

The jury found for the defendants on all trade secret matters. That means that it is unnecessary to decide whether the requested jury instruction on the meaning of a trade secret was legally appropriate because we can definitively say any error in failing to give this instruction was harmless.

#### ISSUE VII: CURATIVE INSTRUCTION

*Should the trial court have given a curative instruction?*

Allen and Filardo argue the trial court erred by failing to give a curative instruction after counsel for Aeroflex stated in closing that Tel-Instrument made more

than \$11.4 million from the TS-4530 upgrade contract. They contend that there was no evidence to support the comment, and it was prejudicial because Tel-Instrument was not permitted to argue it had actually lost more than \$2 million on the contract.

A quick review of what happened at trial is helpful at this point. During trial, the court stopped a witness, Jeff O'Hara, from testifying that Tel-Instrument lost money on the contract. The court ruled the witness could testify about Tel-Instrument's revenues but not profits. The issue at trial was Aeroflex's lost profits, not Tel-Instrument's. The court reasoned, "[W]hether you make \$50,000 or whether you make \$5,000 all depends on what your costs are associated with getting it to market. And those are different and specific."

Then in the first part of his closing argument, when discussing Aeroflex's damages, Aeroflex's counsel stated,

"And we know that there are future Mode 5 sales. We know the sales are going on right now. Right now in their Mode 5 sales outside of the Army, the third parties. And that figure, that has not been challenged in the evidence in this case at all, is \$11,418,047. That's the damages that have been argued, go unchallenged, and that's what we're ultimately going to ask for in this case."

The next day, in the final closing argument, Aeroflex's counsel argued:

"We were criticized by Mr. Bjerg yesterday about dropping this right-side column. Well, you know, this right-side column is the expectancy described by Mr. O'Hara. The left-side column is what Tel-Instrument actually got. They got \$27 million from the Army contract, according to Mr. O'Hara. And they also had some additional sales. That's what this figure adds up to. This takes their revenue figures for the contract that they got, applies them to the costs that would have been incurred by Aeroflex, because Aeroflex knows what those costs were because they were able to do the project, and if you ignore price erosion, it's \$11,418,047. That's what they got. That's the benefit of this contract

using Aeroflex's costs and Tel-Instrument's revenues. That proposition cannot legitimately be challenged."

After Aeroflex's closing, Tel-Instrument's counsel objected that Aeroflex's counsel made an improper argument by suggesting that Tel-Instrument had an \$11 million profit from the contract, though there was actually a loss. Tel-Instrument asked for a correction. The court overruled the objection.

In civil cases, counsel have latitude in making arguments. Courts will not impose narrow and unreasonable limitations on the arguments of counsel made to the jury. But if counsel exceeds that latitude, the court must determine whether the error prejudiced a party's right to a fair trial. "The test is whether "there is a reasonable probability that the error will or did affect the outcome of the trial in light of the entire record."" *Castleberry v. Debrot*, 308 Kan. 791, 807, 424 P.3d 495 (2018).

From this record, it appears that Aeroflex was making an argument concerning the amount of its lost profit damages using Tel-Instrument's revenue figure and its own cost figure. That is, Tel-Instrument's revenues and Aeroflex's costs. It is true that O'Hara did testify that Tel-Instrument's gross revenues were around \$27 million. And counsel's statement, "That's what they got," could be construed as a statement about Tel-Instrument's profit. But counsel clarified that the figure was derived using Tel-Instrument's revenues and Aeroflex's costs. Thus, the statement was not clearly outside the latitude given to attorneys in closing arguments.

We frankly do not see that this claimed error affected the outcome of this lengthy trial. We will not reverse on this point.

## ISSUE VIII: PRIOR AGREEMENT

*Was it reversible error to admit a confidentiality agreement with a former employer?*

Filardo and Allen contend the trial court erred by admitting into evidence Filardo's JcAIR confidentiality agreement because it was irrelevant and prejudicial. Filardo's retention of the dissertation documents alone was not a violation of the Aeroflex nondisclosure agreement. But the jury may have based its breach of contract finding on the retained dissertation materials because the JcAIR agreement was admitted into evidence.

In response, Aeroflex contends there was no contemporaneous objection to the admission of the agreement at trial, the agreement was relevant to show JcAIR's information was considered confidential prior to the merger, and Aeroflex never argued at trial that Filardo breached the JcAIR agreement.

To understand this argument, some case history is important for context. Before JcAIR and Aeroflex merged, Filardo and Allen worked for JcAIR and had signed confidentiality agreements with JcAIR. After the merger, they signed new confidentiality agreements with Aeroflex.

Prior to trial, the defendants sought to exclude Filardo's and Allen's JcAIR confidentiality agreements from trial. They argued the Aeroflex confidentiality agreements replaced and superseded the earlier agreements. The sticking point was that the JcAIR agreements contained a provision not contained in the Aeroflex confidentiality agreements. That provision required Filardo and Allen to return all materials in their possession upon their termination. The trial court denied the motion to exclude evidence.

But the trial court did grant summary judgment to Filardo and Allen on Aeroflex's claim for breach of the JcAIR confidentiality agreement. The court ruled Aeroflex could not directly state or imply the defendants breached or tortiously interfered with the JcAIR confidentiality agreements.

At trial, Aeroflex offered Filardo's JcAIR confidentiality agreement into evidence. The defendants objected to "make sure" the agreement was only admitted for a limited purpose and not to serve as a basis for the breach of contract claim. The court ruled the agreement could be admitted, but Aeroflex could not imply that Filardo breached that agreement.

Filardo testified at trial that he kept the backup documentation he used for his Ph.D. dissertation that was proprietary to Aeroflex after his employment with Aeroflex ended. Filardo testified he never disclosed those documents to anyone at Tel-Instrument.

The trial court directed a verdict on this point. The court instructed the jury: "On the Aeroflex claims for misappropriation of trade secrets, breach of nondisclosure agreement or tortious interference with existing contractual relations, you must not find in favor of Aeroflex and must find in favor of Dr. Filardo on the claim that . . . Dr. Filardo improperly held onto his dissertation materials."

Jury instruction Nos. 8 and 15 concerning Aeroflex's breach of contract claim each referred to and used language from the Aeroflex nondisclosure agreement which prohibited disclosure "either directly or indirectly . . . intellectual property not already available to the public." The jury was instructed, "Aeroflex claims that Defendants Allen and Filardo each breached their individual contracts (Non-disclosure Agreements) with Aeroflex by directly or indirectly disclosing intellectual property not already available to the public."



Evidence is relevant if it has "any tendency in reason to prove any material fact." K.S.A. 60-401(b); *Nauheim v. City of Topeka*, 309 Kan. 145, 153, 432 P.3d 647 (2019). A material fact is one in dispute or in issue. Materiality presents a question of law subject to unlimited review. Evidence is probative if it tends to prove a material fact. We review whether evidence is probative for abuse of discretion. *Kansas City Power & Light Co. v. Strong*, 302 Kan. 712, 729, 356 P.3d 1064 (2015). Even if evidence is relevant, the trial court has discretion to exclude it where the court finds its probative value is outweighed by its potential for producing undue prejudice. See K.S.A. 60-445; *Wendt v. University of Kansas Med. Center*, 274 Kan. 966, 979-80, 59 P.3d 325 (2002). The erroneous admission of evidence is reviewed for harmless error under K.S.A. 2022 Supp. 60-261. The party benefiting from the error must persuade the court that there is no reasonable probability that the error affected the trial's outcome in light of the entire record. *State v. McCullough*, 293 Kan. 970, 983, 270 P.3d 1142 (2012).

The defendants did not object on the basis of relevance at trial. K.S.A. 60-404 generally precludes an appellate court from reviewing an evidentiary challenge absent a timely and specific objection at trial. We will not review this claim.

But even if the JcAIR confidentiality agreement was irrelevant, its admission could not have affected the trial's outcome in light of the entire record. The jury was instructed not to find for Aeroflex on the fact that Filardo retained his dissertation materials. The jury was instructed the breach of contract claim concerned the nondisclosure agreements Allen and Filardo signed with Aeroflex and their disclosure of Aeroflex's intellectual property.

This claimed error is not reversible error.

*We need not address the cross-appeal.*

Because we are not granting the defendants a new trial, Aeroflex's cross-appeal is moot and we will not address those claims. See *Rodarte v. Kansas Dept. of Transportation*, 30 Kan. App. 2d 172, 182-83, 39 P.3d 675 (2002).

#### CONCLUSION

To sum up, we must conclude that this was a well-trying case with skilled advocates on all sides and a judge that made some insightful decisions. It reflected the fierce competition between two companies striving for government contracts in an important market—the machinery of war, the working tools of a nation's defense. While the jury found in favor of the defendants on Aeroflex's claim of misappropriation of trade secrets, it found in favor of Aeroflex on all other claims. Neither side got everything they sought. While we cannot say that this was a perfect trial—indeed a perfect trial is not within the experience of any judge on this panel—we can say this was a fair trial. Justice was done.

The issues raised in this appeal—standing, statute of limitations, errors concerning the verdict form, instructional errors, and evidentiary errors—do not rise to the level that persuades us to reverse the judgments of the trial court.

Affirmed.