

813.90 MISAPPROPRIATION OF TRADE SECRET<sup>1</sup> - ISSUE OF EXISTENCE  
OF TRADE SECRET.

The (*state number*) issue reads:

"Was (*specify alleged trade secret*) a trade secret of the plaintiff?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things:

First, that (*specify alleged trade secret*) derives independent commercial value, whether actual or potential, from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use.<sup>2</sup> In determining whether (*specify alleged trade secret*) meets this requirement, you may consider<sup>3</sup>

[the extent to which (*specify alleged trade secret*) is known outside the plaintiff's business;]

[the extent to which (*specify alleged trade secret*) is known to the plaintiff's employees and others involved in the plaintiff's business;]

[the value of (*specify alleged trade secret*) to the plaintiff's business;]

[the value of (*specify alleged trade secret*) to the plaintiff's competitors;]

[the amount of money or effort expended by the plaintiff to develop (*specify alleged trade secret*);] [and]

[the ease or difficulty with which (*specify alleged trade secret*) could be lawfully acquired or duplicated by others;] [and]

[*State other considerations supported by the evidence*].

(A trade secret does not have to be a specific formula or a defined process. Negative, inconclusive or merely suggestive data may be a trade secret if it would provide a competitor with an advantage that it would not otherwise have but for the research investment of the owner.)<sup>4</sup>

(Information is not disqualified from being a trade secret solely because it is [developed, used or owned independently by more than one person] [licensed to other persons].)<sup>5</sup>

And Second, that (*specify alleged trade secret*) has been the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>6</sup> In determining whether (*specify alleged trade secret*) meets this requirement, you may consider the extent of the measures used by the plaintiff to guard its secrecy.<sup>7</sup> (*State any other considerations supported by the evidence.*)

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that (*specify alleged trade secret*) was a trade secret of the plaintiff, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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1. Trade Secrets Protection Act, N.C. Gen. Stat. § 66-152 *et. seq.*

2. N.C. Gen. Stat. § 66-152(3)a. *See generally Washburn v. Yadkin Valley Bank & Trust Co.*, 190 N.C. App. 315, 327, 660 S.E.2d 577, 586 (2008) (holding that, in order to state a claim under the Trade Secrets Protection Act, a plaintiff must “identify with sufficient specificity either the trade secrets [ ] allegedly misappropriated or the acts by which the alleged misappropriation were accomplished”); *Barbarino v. Cappuccine, Inc.*, 2012 N.C. App. Lexis 305, \*14-15, 722 S.E.2d 211 (2012) (unpublished) (holding that *Washburn* test controls), *aff’d per curiam*, \_\_\_ N.C. \_\_\_, 734 S.E.2d 570 (Dec. 14, 2012).

3. These factors are stated in *State ex rel Utils. Comm’n. v. MCI Telecomm. Corp.*, 132 N.C. App. 625, 633, 514 S.E.2d 276, 282 (1999) and *Wilmington Star-News, Inc. v. New Hanover Reg’l Med. Ctr., Inc.*, 125 N.C. App. 174, 180-181, 480 S.E.2d 53, 56 (1997), and *Sunbelt Rentals, Inc. v. Head & Engquist Equip. L.L.C.*, 174 N.C. App. 49, 53, 620 S.E.2d 222, 226 (2005).

4. *Glaxo, Inc. v. Novopharm, Ltd.*, 931 F. Supp. 1280 (E.D.N.C. 1996), *aff’d*, 110 F.3d 1562 (Fed. Cir. 1997). Historical cost records, operating and pricing policies can constitute trade secrets. *Byrd’s Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 375-76, 542 S.E.2d 689, 692-93 (2001).

5. N.C. Gen. Stat. § 66-152.

6. N.C. Gen. Stat. § 66-152(3)b.

7. *State ex rel Utils. Comm’n.*, 132 N.C. App. at 634, 514 S.E.2d at 282; *Wilmington Star News, Inc.*, 125 N.C. App. at 181, 480 S.E.2d at 56.