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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PARCELL STEEL COMPANY, INC.,

Plaintiff and Appellant,

v.

JAMES G. SAUER et al.,

Defendants and Respondents.

G043444

(Super. Ct. No. 07CC11744)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Affirmed.

Nada L. Edwards; Palacio & Associates, and Jose A. Palacio for Plaintiff and Appellant.

Law Office of James Bruce Minton, and Russell J. Kiner for Defendants and Respondents James G. Sauer, Peter Duran, and Badger State Rebar.

Paul, Plevin, Sullivan & Connaughton, Michael C. Sullivan and Martina M. Nagle for Defendant and Respondent Gary Bethke.

Arias & Lockwood and Christopher D. Lockwood for Defendants and Respondents.

Parcell Steel Company, Inc. (Parcell Steel), appeals from a judgment in favor of its former employees, James G. Sauer, Gary Bethke, and Peter Duran, and Badger State Rebar (Badger), a company Sauer owned. Parcell Steel sued the former employees after they quit Parcell Steel and went to work for Badger. Parcell Steel contended the employees breached duties owed to Parcell Steel while still employed, and they thereafter misused Parcell Steel's confidential information to compete with it and interfered with Parcell Steel's ongoing economic relationships with clients. On appeal, Parcell Steel contends the trial court: improperly granted summary adjudication of its breach of contract and negligence causes of action; abused its discretion by denying Parcell Steel's request made on the first day of trial to amend its complaint to state a cause of action for violation of California's Uniform Trade Secrets Act (UTSA) (Civ. Code, § 3426 et seq.); abused its discretion by excluding evidence concerning bid proposals prepared for Badger after the individual defendants left Parcell Steel's employment; made numerous errors in its jury instructions; and erred by awarding the defendants their attorney fees under Corporations Code section 317. We reject Parcell Steel's contentions and affirm the judgment.

FACTS & PROCEDURE

Parcell Steel, owned by Ronald Parcell and his wife Terry Parcell, fabricates and installs reinforcing steel (i.e., rebar) on commercial construction projects. At the relevant times, Terry Parcell was Parcell Steel's president, and she oversaw daily activities. Dan Winters, operations manager, ran the day-to-day operations. Parcell Steel obtains business through competitive bidding. Sauer, Bethke, and Duran were three of Parcell Steel's longtime employees and were collectively in charge of preparing bid estimates and purchasing steel. At various times in May 2007, each of the three men quit Parcell Steel and began working for Sauer's company, Badger.

Original Complaint

Parcell Steel's original complaint contained 14 causes of action, including one for misappropriation of trade secrets in violation of the UTSA, alleging its business

practices and procedures were confidential information to which the individual defendants had access. It alleged the individual defendants breached duties and obligations owed to Parcell Steel by utilizing that confidential information and by soliciting Parcell Steel's existing and prospective clients so as to establish business relationships with them after their employment with Parcell Steel ended. The original complaint also contained causes of action for common law "misappropriation of ideas," statutory unfair competition (Bus. & Prof. Code, § 17200) and common law unfair competition, breach of duty of loyalty, intentional and negligent interference with contract/prospective economic advantage, defamation and trade libel, fraud, conversion, and declaratory relief. The trial court sustained demurrers as to most of the complaint's causes of action with leave to amend but overruled the demurrer as to the UTSA cause of action.

*Operative Complaint: Second Amended Complaint*¹

Parcell Steel filed a first amended complaint, and then after additional demurrers were sustained with leave to amend, a second amended complaint, which is the operative complaint. Parcell Steel abandoned the misappropriation of trade secrets causes of action but added seven new causes of action including for breach of contract and negligence.

The second amended complaint alleged Sauer and Duran were estimators for Parcell Steel. Bethke was Parcell Steel's general manager, Sauer and Duran's supervisor, and responsible for supervising field crews, rebar fabrication facilities, and purchasing steel.

¹ While on a demurrer we assume all the well-pleaded allegations of the complaint to be true (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318), that is not the case on review of a summary judgment/adjudication motion (see *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 599-600, fn. 1 ["demurrer challenges the sufficiency of the pleading whereas the motion for summary judgment assumes sufficiency of the pleadings and requires the introduction of evidence to determine whether or not the allegations have any basis of fact"]). Nonetheless, because the issues to be addressed in a summary judgment/adjudication motion are framed by the pleadings (*Wattenbarger v. Cincinnati Reds, Inc.* (1994) 28 Cal.App.4th 746, 750), we begin by setting forth the allegations of the operative complaint.

Parcell Steel alleged information concerning its products, bids, clients, and suppliers was confidential and proprietary. Sauer, Duran, and Bethke had access to this confidential information and acknowledged and agreed such information would not be misused, disclosed, or removed from Parcell Steel other than in connection with their job duties. The defendants breached their duties and obligations to Parcell Steel and interfered with Parcell Steel's contractual relations with its employees, customers, and suppliers by: soliciting business from Parcell Steel's existing and prospective clients and suppliers; misappropriating and disclosing Parcell Steel's private information; and removing confidential and proprietary information from Parcell Steel. Parcell Steel alleged that while still employed by Parcell Steel, the defendants deliberately overbid jobs on Parcell Steel's behalf and then produced lower bids on those jobs for Badger.

The second amended complaint alleged Bethke poorly performed his job in the months before he left Parcell Steel. He refused to discuss another employee's misfeasance with Winters; tried to sell a surplus forklift for \$4,000 "as is," but authorized \$3,600 in repairs to be made before the sale was completed; failed to return clients' telephone calls for months; misrepresented that Parcell Steel had enough "backlog" (i.e., pending future jobs) to last them through 2007, when in fact it did not; over purchased steel; failed to submit change orders for billing; and performed unauthorized side jobs.

The second amended complaint alleged Duran breached his employment obligations to Parcell Steel on several occasions including by making representations Parcell Steel had sufficient backlog to last through the year and overbidding jobs for Parcell Steel. Parcell Steel alleged Sauer breached his employment obligations to Parcell Steel by reactivating his own contractor's license; telling Terry Parcell when he resigned that he was retiring from the rebar industry; overbidding jobs for Parcell Steel, only to then bid them at lower prices on behalf of Badger by using Parcell Steel's proprietary information; and telling Winters all construction plans had been returned to Parcell Steel when he resigned, when they had not been.

The second amended complaint contained a cause of action for breach of contract alleging Sauer, Duran, and Bethke were employed by Parcell Steel “pursuant to an oral employment contract.” The “essential terms” of the oral contract were that in exchange for being paid the defendants (1) would provide “their best efforts, knowledge and expertise” in performing their job duties, (2) would not act contrary to “[Parcell Steel’s] best interests, business, well-being, or that of [Parcell Steel’s] clients;” and (3) would not misuse Parcell Steel’s private information while employed and after leaving employment with Parcell Steel. The defendants had “breached their oral contract with [Parcell Steel]” by failing to abide by “the terms of their oral contract and perform in accordance with their employment with [Parcell Steel].” Parcell Steel alleged the defendants’ conduct also constituted a breach of the implied covenant of good faith and fair dealing contained in their “oral contract for employment with [Parcell Steel.]”

The second amended complaint contained a negligence cause of action, alleging that as employees of Parcell Steel, the individual defendants owed a duty to provide and apply their best efforts, knowledge, and expertise in the performance of their job duties; to act in Parcell Steel’s best interests, business, and well-being; and to not misuse Parcell Steel’s private information while employed by Parcell Steel or upon leaving their employment. The defendants breached their employment duties by carelessly performing their job duties causing economic and reputational harm to Parcell Steel.

The second amended complaint also contained causes of action for unfair competition in violation of Business and Professions Code, section 17200 et seq., and common law unfair competition; breach of duty of loyalty; intentional and negligent interference with contractual relations; intentional and negligent interference with prospective economic relations; inducing breach of contract; trade libel and slander; defamation; fraud and conspiracy to commit fraud; intentional and negligent misrepresentation; declaratory relief [seeking a declaration of the parties duties arising out of their fiduciary relationship]; and conversion.

Summary Adjudication Motions

Bethke filed a summary judgment/adjudication motion. Sauer, Duran and Badger, jointly filed a separate motion raising the same basic arguments. As to the breach of oral contract cause of action, the defendants collectively asserted: there could be no oral contract because the parties agreed any employment agreement must be in writing; no oral employment contract existed; the alleged oral contract was too vague to be enforced; and Parcell Steel had waived any breach. As to most of the tort causes of action (including negligence) and the unfair competition causes of action, they asserted among other grounds, the causes of action were preempted by the UTSA, and Parcell Steel abandoned that cause of action. As to the negligence cause of action, they asserted Parcell Steel had waived any breach of duty and lacked competent evidence of any breach of duty.

The Defendants' Separate Statements & Declarations

Bethke's separate statement of material facts set forth the following undisputed facts as to the breach of contract cause of action. Bethke's written employment application signed when he was first hired by Parcell Steel in 1994 stated, "I . . . understand and agree that no representative of the company has any authority to enter into any agreement for any specified period of time, or to make any agreement contrary to the foregoing, unless it is in writing and signed by an authorized company representative." In her deposition, Terry Parcell, Parcell Steel's person most knowledgeable, testified she "ha[d] no knowledge of any specific oral agreement between Parcell and Bethke, or what exactly was said, to whom or when." The only terms of the alleged oral agreement Terry Parcell or Winters (operations manager) could identify at their depositions were that Bethke would "represent [Parcell Steel] to the best of his ability, [¶] work 100 [percent] for [Parcell Steel], [¶] do whatever he could to do his daily duties, and [¶] work for [Parcell Steel] on a daily capacity to fulfill his job." Bethke was never disciplined for any alleged misconduct.

As to the negligence cause of action, Bethke asserted Parcell Steel had no evidence Bethke breached any duty owed to Parcell Steel. Winters testified at his

deposition that he had spoken with Bethke about the incident in which another employee was disciplined and Bethke was not disciplined for his own conduct in the matter. Parcell Steel produced no evidence Bethke lacked permission to sell the forklift. Bethke e-mailed Terry Parcell in advance about selling the forklift, and she agreed the price was fair. Parcell Steel was not harmed because the forklift sale was cancelled. Winters testified Bethke bought the surplus steel at his direction, and Parcell Steel made a profit on the steel.

Sauer, Duran, and Badger's separate statement added that Terry Parcell testified the oral employment agreement was that employees would perform their duties efficiently and "at 100 [percent]" and only employees who did not comply were reprimanded. Sauer and Duran were never reprimanded or fired. Winters agreed in his deposition that what constituted "100 percent" was not defined for employees and "[o]nly God knows" if an employee was not giving 100 percent to the job. Winters testified the confidential information the defendants obtained in their jobs was knowledge of Parcell Steel's clients and suppliers and how to price and bid jobs. Parcell Steel did not ask employees to sign noncompetition agreements.

Sauer declared he was the owner and operator of Badger. He worked for Parcell Steel for 15 years, beginning as a field worker and ultimately he was promoted to estimator. He never entered into any oral agreement with anyone at Parcell Steel, nor did he have any discussions with anyone at Parcell Steel about the alleged terms of the oral employment agreement. He was simply hired, told his pay rate, and each time he was promoted told his new pay rate. Sauer did everything in his power to perform his job duties to the highest possible standard and was never disciplined or reprimanded.

As an estimator, Sauer would "dissect" the construction plans provided by contractors to determine the size and weight of rebar necessary for the job. He would use a "take off" sheet to estimate the pounds of steel necessary for each size of rebar required, and apply the current cost of steel to estimate the total cost for rebar for the project. He then would mark up the bid by 25 to 35 percent, as required by Parcell Steel, and give the "take

off” to the front office. The front office would type up the bid, which Sauer would sign, and the bid would be submitted to the contractor. If the contractor awarded the job to Parcell Steel, the front office would add the job to the “job log.”

During his employment at Parcell Steel, Ronald Parcell permitted Sauer to occasionally bid and handle very small side jobs too small to be of interest to Parcell Steel. Those side jobs were done using a contractor’s license Sauer had obtained in 1992 under the name of James Sauer dba Badger. Sauer would buy rebar for his side jobs from Parcell Steel, and his declaration attached copies of cancelled checks he wrote to Parcell Steel over the years for rebar purchases. In 2006, Sauer realized he needed to renew his expired contractor’s license and enrolled in appropriate courses. He never used company time or resources in renewing his contractor’s license or on side jobs.

Sauer declared that in his experience with Parcell Steel, there was never a set list of clients, nor were there any clients who were exclusive to Parcell Steel. Projects were obtained through open bidding. Contractors would communicate to “the rebar installation community” they were accepting bids and send each interested company a set of plans to bid from. Parcell Steel would submit its bid along with the rest of the public. The contractor would decide which bid to accept.

Sauer resigned from Parcell Steel because he was ill and needed a change. Although he intended to take a break, it was not possible, so he started conducting business as Badger full-time. Sauer denied soliciting employees of Parcell Steel, although several contacted him for employment after they quit working for Parcell Steel. He denied actively seeking out jobs that were already awarded to Parcell Steel.

While working for Parcell Steel, Sauer either bid or oversaw bidding by Duran on: (1) the H&H Construction Empire Business Center project; (2) the Prizio Construction Nutrilite Building 5A project; (3) the Guy Yocom Construction Rockefeller Professional Center project; and (4) the Hakanson Construction Canyon Medical Plaza project. The projects were properly and accurately bid, and neither Sauer nor Duran inflated the Parcell

Steel bids. Beginning in early 2007, Sauer began working primarily from home, going to the office once or twice a week to pick up or drop off plans. Upon resigning, Sauer returned all items and supplies belonging to Parcell Steel. He did not keep the plans for any of the four projects; he returned them to Parcell Steel.

After he started working as Badger, Sauer was requested by the contractors to submit bids on the four projects. Sauer asked the contractors if the jobs had already been awarded to another business because he would not bid jobs that were already awarded. He was told the jobs had not been awarded, so he prepared bids. Two of Badger's bids were higher than the Parcell Steel bids. Sauer never took products, materials, steel, or accessories from Parcell Steel to be used on non-Parcell Steel jobsites, other than steel he bought from Parcell Steel for his side jobs. Sauer was never told any information he was provided from Parcell Steel was confidential information.

Duran's declaration contained essentially the same information as Sauer's. Duran had worked for Parcell Steel for 26 years and never entered into any oral employment agreement or discussed the alleged terms of the agreement with anyone at Parcell Steel. He was never disciplined or reprimanded. He was not terminated—he resigned after Ronald Parcell called him a “motherfucker.” After leaving Parcell Steel, Duran called Sauer looking for work.

Bethke declared he began working for Parcell Steel in 1994. His last day working for Parcell Steel was May 30, 2007. Bethke never entered into an oral employment agreement with anyone at Parcell Steel. He was never disciplined or reprimanded. Bethke had no knowledge Sauer was leaving Parcell Steel until he announced his retirement in mid-May 2007.

In May 2007, Winters asked Bethke to sell one of Parcell Steel's forklifts that had been unsuccessfully sent to auction. On May 21, 2007, Bethke struck a deal to sell the forklift at a good price, and he sent Terry Parcell an e-mail concerning the sale. On May 30, 2007, Ronald Parcell telephoned Bethke and was furious and cursing at him for selling the

forklift. Bethke tried to explain Winters had directed him to sell it, but Ronald Parcell was angry and hung up on him. When Bethke arrived at his office later that day, his computer had been removed from his desk. Winters accused him of stealing Parcell Steel information. Bethke left the office, leaving his company keys, credit card, and phone on his desk to avoid any other false accusations.

In mid-June 2007, Bethke went to work part time for Badger; he did not work for Badger prior to that time. In late July 2007, Bethke found a full-time job and left Badger. Bethke never solicited any Parcell Steel employees to work for Badger. He was not involved in bidding any of the four projects. He did sign the initial Badger bid for the H & H Construction Empire Business Center project at Sauer's request because Sauer was not in the office that day. Bethke never took Parcell Steel's rebar for use on a non-Parcell Steel jobsite. He did sell a regular Parcell Steel customer a small amount of rebar for use on his home remodeling project, but the customer paid Parcell Steel for the product.

Bethke denied ever telling anyone at Parcell Steel it had job backlog to last it through 2007. He did enter into purchase orders for steel with vendors Shamrock and BlueLinx, to protect Parcell Steel's future need for the steel when there were problems with availability and prices were volatile. When he departed from Parcell Steel, he was current on change orders and customer calls.

Parcell Steel's Opposition

Parcell Steel's opposition purported to dispute many of the defendants' facts. As to language in Bethke's written employment application requiring all employment agreements be in writing, Parcell Steel asserted the employment application was not a contract so it had no relevance. It asserted its separate statement contained sufficient evidence to establish "an oral contract existed between [the defendants] and [Parcell Steel]." The terms of the oral contract were that the individual defendants would "to the best of [their] ability, work 100 [percent] for [Parcell Steel], do whatever [they] could to perform [their] daily duties, and work for [Parcell Steel] to fulfill [their] job[s]."

As to the defendants' argument various tort causes of action were preempted by the UTSA, Parcell Steel argued none of its confidential information constituted a trade secret, and thus it had no trade secret cause of action. But the opposition stated in passing if the court concluded the UTSA preempted the tort causes of action it requested leave to amend to add a trade secrets claim.

Parcell Steel's Separate Statement & Declarations

Terry Parcell declared the fact Badger got contracts with some of the contractors with whom Parcell Steel had prior relationships demonstrated the defendants took confidential information from Parcell Steel when they left. She recalled that Parcell Steel received a request for preliminary information on a job it bid for Guy Yocom Construction Rockefeller Professional Center project, which indicated to her that Parcell Steel's bid had been accepted, but she later learned Badger got the job, and Badger's "bid and format" appeared identical to Parcell Steel's. Terry Parcell stated the individual defendants had access to what she considered to be Parcell Steel's confidential information, including how to identify leads, prepare a bid, procure and deliver products, and manage financial transactions; the identities of current and prospective customers and suppliers; information concerning its operations, profit margins, business opportunities, proposals, and acceptances; and specific forms for tasks such as bidding.

Terry Parcell declared the defendants were at-will employees. They were hired pursuant to "oral offers for work . . . in exchange for compensation and benefits," which offers were "orally accept[ed]" Employees were not authorized to do side jobs, except once Sauer was authorized by Ronald Parcell to perform a small job.

Terry Parcell declared Bethke was responsible for ordering steel for Parcell Steel's jobs and supervised Sauer and Duran. Bethke "continuously reported" to her there was "plenty of backlog . . . to justify purchases of steel." In the three months before he quit, Bethke over ordered steel at above market rate prices cash-strapping the company. Terry Parcell did not authorize Bethke to sell a forklift or to have repairs made to the forklift.

While Bethke was employed by Parcell Steel, Terry Parcell believed he was doing his job properly, and she never reprimanded him. After the defendants left Parcell Steel, she learned of “the wrongful conduct.”

Ronald Parcell declared he never authorized any employees to do side jobs, except on one occasion when he allowed Sauer to do a small job and sold him the steel for it. He was unaware Sauer was doing other side jobs. He did not authorize Bethke to sell the forklift and ordered the sale stopped. On May 30, 2007, Ronald Parcell and Winters went through Bethke’s desk and “found numerous change orders” that had not been turned in for billing.

Winters declared that after Bethke quit, Winters reviewed the job log and pending steel purchases and determined Bethke had over purchased steel and in two cases (Shamrock and BlueLinx) purchased steel at above market rates. He did not instruct Bethke to purchase excess steel and cautioned him to only order enough for pending jobs. Winters heard Bethke tell Terry Parcell there was enough backlog to carry the company through 2007. After Bethke quit, Winters learned from customers that Bethke failed to return telephone calls. He learned of four specific projects for which the defendants had prepared bids for Parcell Steel but later rebid for Badger at a lower price. The Badger bids looked similar to the Parcell Steel bids. Winters never authorized Bethke to sell the forklift or to have repairs made to it. After Sauer quit, Winters and Regina Spring (the office manager) searched for plans he had taken home to work on, and one set was missing.

Spring declared that after Bethke quit, she discovered change orders in his desk he had not been turned in for billing. Two Parcell Steel yard employees declared Bethke frequently gave them directions for rebar fabrication without job numbers attached, and they had no idea where the product was taken.

Ruling

On June 30, 2009, the trial court issued its order denying summary judgment but granting summary adjudication as to the following causes of action: breach of oral

contract and breach of implied covenant of good faith and fair dealing; statutory and common law unfair competition; trade libel and defamation; conspiracy to commit fraud and fraud; intentional and negligent misrepresentation; and negligence.

As to the breach of oral contract cause of action, the court concluded there were no material issues of fact because Bethke's employment application required any employment agreement to be in writing, Parcell Steel's person most knowledgeable had no knowledge of any specific oral agreement, and the alleged agreement to "work efficiently and at 100 [percent]" was too ambiguous to be enforced. The breach of implied covenant of good faith and fair dealing cause of action fell with the contract cause of action. As to the negligence cause of action, the court concluded no cause of action had been stated. The court granted summary adjudication on the unfair competition and declaratory relief causes of action because they were preempted by the UTSA.

The court denied the motions as to Parcell Steel's causes of action for breach of duty of loyalty, intentional and negligent interference with contractual relations, intentional and negligent interference with prospective economic advantage, and inducing breach of contract. It concluded those cause of action were based on different facts than the misappropriation of trade secrets claims.

Trial

At the beginning of the jury trial on November 2, 2009, the trial court explained that in view of its ruling on the summary adjudication motions, particularly its UTSA preemption ruling as to the unfair competition claims, the scope of the trial was limited to violations of duties the defendants owed Parcell Steel while still employed by Parcell Steel. The court observed that if there was evidence the defendants intentionally overbid jobs for Parcell Steel, or were giving Parcell Steel information to third parties while still employed, that would be relevant as a breach of their fiduciary duties to Parcell Steel. But evidence that once working for Badger the defendants were able to bid jobs at lower

prices than Parcell Steel was not relevant. Accordingly, the court ruled documents pertaining to bids prepared by Badger were inadmissible.

Parcell Steel's attorney conceded it had no evidence the defendants intentionally overbid jobs for Parcell Steel. Rather, he argued, the defendants were able prepare lower bids for Badger because of confidential information they obtained from Parcell Steel, in particular knowledge of how Parcell Steel prepared bids and priced jobs. The court surmised the evidence went to "a trade secret-type claim" and was not relevant to the remaining causes of action. Parcell Steel argued the evidence would be relevant to conversion i.e., that the defendants stole Parcell Steel's private information. Parcell Steel's counsel repeatedly stated to the court that information did not rise to the level of a protected trade secret. After the trial court again ruled anything post-Parcell Steel employment was not relevant to conversion unless it involved theft of a trade secret, and counsel again asserted the information was not trade secret, Parcell Steel asked for leave to amend its complaint to state a UTSA cause of action. The trial court denied the request, noting the trade secrets cause of action was voluntarily withdrawn, Parcell Steel made no motion to reinstate after summary adjudication motion was granted, and it was now the first day of trial. The court clarified the trial was about the defendants' fiduciary duties owed as employees of Parcell Steel and whether they violated their duties by misappropriating steel, over ordering steel to place Parcell Steel in precarious financial condition, or doing things that were inconsistent with their duty of loyalty.

The jury returned special verdicts finding in the defendants' favor on all causes of action. The court subsequently granted the defendants' motions for costs and attorney fees, the details of which are discussed *post*.

Trial Evidence

Parcell Steel does not challenge the sufficiency of the evidence to support the jury's verdicts. Indeed, in its appellate brief, it makes little reference to the trial evidence, citing almost exclusively to the evidence it put forth in opposition to the summary

judgment/adjudication motions. Needless to say, the trial evidence largely tracked the evidence already submitted by the parties on the summary judgment/adjudication motions. To avoid repetition, we will endeavor to only set forth the necessary additional or different facts.

Parcell Steel obtains its business through competitive bidding, and bids hundreds of projects every year. Only the lowest bid wins and only about 25 percent of the projects Parcell Steel bids on are awarded to it. While employed by Parcell Steel, each of the defendants worked long hours and performed all required job duties. Sauer resigned on May 4, 2007; his last day at work was May 18, and he went home after going to lunch with his co-workers. Bethke quit on May 30, 2007, after the forklift incident. It was not until after he left Parcell Steel that Bethke accepted a position with Badger. Duran resigned from Parcell Steel on May 31, 2007, due to the verbal abuse from Ronald Parcell and stress. Duran had no discussions with Sauer or anyone else about Badger before he left his employment at Parcell Steel. He did not discuss any bids with Sauer in the two weeks between the date Sauer left Parcell Steel and the date Duran left Parcell Steel.

Sauer formed Badger in 1992, but it became inactive. In 2006, a friend asked him to do some work for him and Sauer realized his license had expired. Sauer went to night school for the classes, and took the contractor's license examination to renew his contractor's license under the same name, i.e., Badger, in April 2007. At the time he had no intention of forming a competing business. Sauer testified the only thing he did with regard to Badger while employed by Parcell Steel was to take the test to renew his contractor's license. He did not get his contractor's license until June 14, 2007.

As to specific allegations of the defendants' wrongdoing as employees of Parcell Steel, the trial evidence was as follows:

a. Side Jobs

Terry Parcell testified Parcell Steel had no policy prohibiting side jobs. Sauer did one small weekend project done for a contractor friend in 1995 and a small church job in

2006. The steel was ordered from Parcell Steel and it was paid for the steel. Ronald Parcell approved both projects. Sauer testified when the same friend contacted him about another larger job, he told him the job was large enough to interest Parcell Steel, and Parcell Steel did in fact obtain that job.

b. Over Ordering Steel

The trial evidence was that steel prices fluctuate and can consume over 60 percent of sales revenue. In the summer of 2007, steel prices were rapidly rising and Parcell Steel's steel supply was low. Terry Parcell directed Bethke to "stockpile" steel, and she even discussed renting other property to store the surplus. Parcell Steel contended two specific purchases made by Bethke in April 2007 (Shamrock and BlueLinx) were at above market price. Terry Parcell admitted she had conversations with Bethke about the purchase price at the time the orders went in, and she made notes about the price being paid. Terry Parcell testified she believed the going market price was lower at the time, but Parcell Steel introduced no documents showing a lower market price. Bethke testified the price was consistent with what other rebar contractors paid during the same time period. Terry Parcell testified all the steel ordered was for standard sizes. Winters testified at his deposition all the steel was used by Parcell Steel.

c. Change Orders

Change orders generally represent proposals for additional work or a request the customer pay extra due to fluctuations in material costs—either of which could be accepted or rejected by the customer. Sometimes change orders sought reimbursement for work outside the contract that was already done, but the practice was not to do extra work unless there was an advance agreement to the change order. Terry and Ronald Parcell had no idea if the change order proposals found in Bethke's desk after he left Parcell Steel were merely proposals or represented additional work that had already been performed. Winters never confirmed with the customers if the change order proposals were ever actually accepted by the customer. Bethke testified the proposed work referred to on the change

orders was never performed—i.e., the customers did not accept the proposals for additional work.

d. Taking Steel

Terry Parcell testified there was no evidence Sauer ever took any steel from Parcell Steel—her contention he was stealing steel was based solely on her belief he was doing side jobs and therefore was getting his steel from somewhere. The only “wrongdoing” by Duran she could identify was his abrupt resignation.

Parcell Steel sold steel product to other companies occasionally. Bethke arranged for a sale to Coast Rebar of steel product Parcell Steel had obtained at a discount but did not need. Parcell Steel would have made a profit on the sale, but it cancelled the sale after the defendants left. Another sale was made to Jon Eagan for a small project at his house. Although Parcell Steel contended the steel was not paid for, Eagan testified he gave the delivery driver a check for the steel. He subsequently received a telephone call from Parcell Steel’s office manager, Spring, saying she had received the check but had lost it. Spring asked him to write a new check, which he did.

e. Fix-It Tickets

Parcell Steel claimed when Bethke resigned, there were unaddressed “fix-it tickets” for one of Parcell Steel’s trucks resulting in fines, but it produced no documents concerning tickets or payment of fines. Bethke testified he was not aware of any outstanding “fix it tickets,” as the company’s mechanic was responsible for them.

f. Backlog

Backlog is the list of awarded contracts not yet performed. Terry Parcell testified Bethke misrepresented the backlog when at the company Christmas party in 2006 he said there was enough backlog to take the company through 2007, and “things were looking great.” On cross-examination, Terry Parcell testified the company kept a written log (the job log) of all awarded projects and the job log was available to all senior Parcell Steel employees. She reviewed the job log regularly because she had to report backlog to

banks. When the statement about backlog was made Parcell Steel was so busy it was running three shifts, and its sales went up, not down, in 2007.

g. Forklift Sale

Bethke testified about the dispute over the sale of the forklift that precipitated his resignation from Parcell Steel. Winters had directed that three pieces of equipment, including the forklift, be registered for auction, but it never happened. Bethke sold one of the items (a trailer) and Terry Parcell seemed happy with the sale. On May 21, 2007, a truck delivery driver offered Bethke \$4,000 for the forklift “as is” and Bethke agreed. The buyer gave Bethke a \$2,000 deposit and Bethke promptly sent an e-mail to Terry Parcell about the sale. Terry Parcell admitted \$4,000 was a good price for the forklift. Bethke then learned from Parcell Steel’s mechanic the forklift needed a new starter. Bethke called the buyer and explained the forklift was going to need repairs. The buyer wanted Parcell Steel to make the repairs and said he would pay Parcell Steel for them. The new starter plus labor was going to cost \$3,600. Bethke directed the mechanic to make the repairs. He never got a chance to explain to Winters or the Parcells that the buyer was going to pay for the repairs because of the angry telephone conversation with Ronald Parcell. Parcell Steel cancelled the forklift sale and the repairs were not made.

Although Parcell Steel contended the defendants had interfered with contracts it had with clients, at trial only two were addressed. Ron Parcell could not identify any contracts that were disrupted.

h. Existing Contracts

Terry Parcell testified Parcell Steel had been awarded a contract from Guy Yocom Construction for the Rockefeller Professional Center project, which was later rebid and awarded to Badger. Parcell Steel could not produce any written contract for the job. At his deposition, Winters testified Parcell Steel was not awarded the job and there was no contract. Terry Parcell believed there was an awarded contract and believed Sauer had prepared Parcell Steel’s bid because his name was typewritten on the proposal. The

employee from Guy Yocom Construction responsible for awarding contracts testified Parcell Steel was never awarded the Rockefeller contract and the project was awarded to Badger after defendants left Parcell Steel.

Sauer testified he did not prepare the Parcell Steel bid on the Rockefeller project. After he arrived at home after his last day at Parcell Steel on May 18, 2007, he found a set of plans sent to his home by Guy Yocom Construction. Sauer called the contractor to tell him he had quit Parcell Steel. The contractor said he knew that fact but wanted Sauer to prepare his own bid. Sauer prepared a bid and submitted it to the contractor on May 24, 2007.

The other contract Parcell Steel identified was for the Watson project, another Guy Yocom Construction job. Sauer submitted a Badger bid on the Watson project on May 25, 2007, after he left Parcell Steel. Duran prepared a bid on the Watson project for Parcell Steel, which was submitted on May 30, 2007. Neither company was awarded the project. Sauer and Duran never spoke about the bids.

Sauer testified he returned all plans to Parcell Steel when he left work. Parcell Steel did not have a list of missing items, and Terry Parcell could not identify any documents that were not returned.

DISCUSSION

A. *Summary Adjudication Motions*

The trial court granted summary adjudication on Parcell Steel's causes of action for breach of contract and implied covenant of good faith and fair dealing; statutory and common law unfair competition; trade libel/slander and defamation; fraud and misrepresentation; declaratory relief; and negligence. On appeal, Parcell Steel addresses the court's ruling only as to two of those causes of action—breach of contract and negligence; the others are therefore deemed abandoned. (See *Bagley v. International Harvester Co.* (1949) 91 Cal.App.2d 922, 924 [failure to advance arguments in connection with dismissed cause of action deemed abandonment of such cause of action].)

1. Standard of Review

Our standard of review is well established. “In order to establish entitlement to summary adjudication of a cause of action, the moving party defendant must establish that the cause of action is without merit by negating an essential element or by establishing a complete defense. [Citations.] A motion for summary adjudication proceeds in all procedural respects as a motion for summary judgment. [Citations.] On appeal, our review is de novo. [Citations.]” (*Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1726-1727.) But even when our review is de novo, it is an appellant’s responsibility when challenging a summary adjudication to demonstrate error (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 369), and to demonstrate the error is reversible because appellant suffered prejudice (Cal. Const., art. VI, § 13).

2. Breach of Contract Cause of Action

Parcell Steel contends there was a material issue of fact as to whether the individual defendants breached employment contracts with Parcell Steel. We find no error.

The second amended complaint alleged Sauer, Duran, and Bethke were employed by Parcell Steel “pursuant to an oral employment contract.” The “essential terms” of the oral contracts were that in exchange for being paid the defendants would do the following: (1) provide “their best efforts, knowledge and expertise” in performing their job duties; (2) not act “contrary to [Parcell Steel’s] best interests, business, well-being, or that of [Parcell Steel’s] clients;” and (3) not misuse Parcell Steel’s private information while employed and after leaving employment with Parcell Steel. It alleged the defendants had “breached their oral contract” by not adequately performing their jobs while employed, and by thereafter using Parcell Steel’s information to compete with it.

The trial court concluded there were no triable issues of fact as to whether there was an enforceable oral employment contract. Sauer, Duran, and Bethke each declared no terms of an employment contract were ever discussed—they were simply hired and told their pay rate. Terry Parcell stated in her declaration the three men were at-will

employees. Terry Parcell testified in her deposition she had no knowledge of any specific oral agreements with any of the defendants, and she and Winters could only identify the contract terms as being that while employed the defendants would “represent [Parcell Steel] to the best of [their] ability, [¶] work 100 [percent] for [Parcell Steel], [¶] do whatever [they] could to do [their] daily duties, and [¶] work for [Parcell Steel] on a daily capacity to fulfill [their] job.”

Parcell Steel asserts for the first time on appeal there were material issues of fact as to whether the individual defendants breached an employment contract that was “partly oral, partly implied-in-fact or by law, or partly written.” Relying primarily on wrongful termination cases in which the courts were faced with whether the presumption of at-will employment was overcome by evidence of an express or implied-in-fact contract to not be terminated except for good cause (see *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317; *Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654; *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137), Parcell Steel argues the defendants were bound by an employment contract the terms of which are to be implied by the Labor Code provisions setting forth employees’ obligations to their employers, and clarified by Parcell Steel’s written employee rules and regulations.

Parcell Steel cannot raise this new legal theory for the first time on appeal. (*Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 920.) The issues on summary adjudication are framed by the pleadings. (*Dang v. Smith* (2010) 190 Cal.App.4th 646, 664.) Parcell Steel’s second amended complaint alleged an oral contract, it made no allegations concerning an implied-in-fact or written contract premised upon the company handbook. Parcell Steel’s bold assertion the defendants misled the court by erroneously characterizing the cause of action as one for breach of oral contract is frivolous. Its opposition to the summary adjudication motions made no mention of an implied-in-fact or written contract.

The trial court could rightly conclude the alleged oral contract terms, which were essentially that the employees would do the best they could for their employer while employed, were simply too vague and indefinite to be enforceable. (See *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1328-1329 [no oral contract where evidence showed only vague and uncertain promises].) Parcell Steel's breach of contract cause of action was little more than an attempt at elevating common sense rules of employment and established statutory obligations of at-will employees to their employer such as that an employee must use ordinary care and diligence while employed (Lab. Code, § 2854), comply with employer's directions (Lab. Code, § 2856), exercise a reasonable degree of skill (Lab. Code, § 2858), use the skills he possesses (Lab. Code, § 2859), into a contractual obligation onto which it would then graft a duty to not compete with a former employer. While those rules and obligations are arguably relevant to Parcell Steel's cause of action or breach of duty of loyalty, which was tried and rejected, they do not suffice to turn the matter into a breach of contract. As no material issue of fact existed as to breach of an enforceable employment contract, the trial court correctly granted summary adjudication on that cause of action.

3. Negligence Cause of Action

Parcell Steel contends the trial court erred by granting summary adjudication of its negligence cause of action. Again, we find no error.

The second amended complaint alleged that as employees of Parcell Steel, the individual defendants owed and breached a duty to provide and apply their best efforts, knowledge, and expertise in the performance of their job duties; to act in Parcell Steel's best interests, business, and well-being; and to not misuse Parcell Steel's private information while employed by Parcell Steel or upon leaving their employment. The defendants asserted Parcell Steel lacked competent evidence of any breach of duty.

On appeal, Parcell Steel contends there were triable issues of fact as to whether the defendants were negligent. It asserts an employee may be held liable to his

employer for negligence. (Lab. Code, § 2865.) Parcell Steel argues an employee's duties are established by the Labor Code and include: the duty to use ordinary care and diligence while employed (Lab. Code, § 2854), to comply with employer's directions (Lab. Code, § 2856), to exercise a reasonable degree of skill (Lab. Code, § 2858), and to use the skills he possesses (Lab. Code, § 2859). Parcell Steel argues there were triable issues of fact as to whether the defendants breached a duty owed Parcell Steel by over ordering steel and buying steel at above market rate; misrepresenting backlog; ordering fabricating jobs without proper paperwork; selling rebar to competitors; failing to submit change orders and return customer telephone calls; trying to sell the forklift; and doing side jobs while employed by Parcell Steel.

We need not decide whether these alleged acts of the individual defendants constituted actionable negligence. It is well settled that a judgment entered after trial will not be set aside on the basis of a prior, erroneous denial of a motion for summary judgment/adjudication, unless that error resulted in prejudice to the defendant. (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833.) The reasoning underlying the rule is that, "When the trial court commits error in ruling on matters relating to pleadings, procedures, or other preliminary matters, reversal can generally be predicated thereon only if the appellant can show resulting prejudice, and the probability of a more favorable outcome, *at trial*. Article VI, section 13 [of the California Constitution], admonishes us that error may lead to reversal only if we are persuaded 'upon an examination of the entire cause' that there has been a miscarriage of justice. In other words, we are not to look to the particular ruling complained of in isolation, but rather must consider the full record in deciding whether a judgment should be set aside. Since we are enjoined to presume that the trial itself was fair and that the verdict in plaintiffs' favor was supported by the evidence, we cannot find that an erroneous pretrial ruling based on declarations and exhibits renders the ultimate result unjust." (*Ibid.*)

Although this rule might not ordinarily apply in the context of the erroneous *granting* of a motion for summary adjudication where the losing party was prevented from litigating the issue, that is not the case here. Here, the allegedly negligent acts are the very same acts that formed the basis of Parcell Steel's breach of duty of loyalty cause of action that were fully litigated, went to the jury, and were resolved *against* Parcell Steel.

In its reply brief, Parcell Steel argues the issues underpinning the negligence theory were not necessarily resolved by the breach of loyalty cause of action. “[A]n employer is entitled to its employees’ ‘undivided loyalty’” during the term of employment. (*Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 41.) “The duty of loyalty is breached . . . when the employee takes action which is inimical to the best interests of the employer.” (*Stokes v. Dole Nut Co.* (1995) 41 Cal.App.4th 285, 295.) The jury was instructed with Parcell Steel’s proposed instruction stating an employee’s duty of loyalty is breached when he “takes action which is against to [*sic*] the best interests of the employer” and it was also instructed with Bethke’s proposed instruction stating an employee’s duty of loyalty is breached when he “takes action which is hostile and adverse to the best interests of the employer.”

Parcell Steel argues the jury could have found the alleged acts of employee misfeasance were not “adverse or hostile” (or contrary to Parcell Steel’s best interests), but nonetheless constituted negligence. It offers no reasoned legal analysis as to how the causes of action would have differed. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*) [when appellant raises issue “but fails to support it with reasoned argument and citations to authority, we treat the point as waived”] see also *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) The factual claims were tried. The jury found the defendants had not engaged in any conduct during their employment that constituted a breach of their employment duties owed to Parcell Steel. Parcell Steel does not argue the jury’s findings are not supported by substantial evidence, and we are, accordingly, bound by them.

B. Motion to Amend Complaint

Parcell Steel contends the trial court abused its discretion by denying leave to amend its complaint at the beginning of trial to add a cause of action for violation of the UTSA. We find no error.

“The trial court, ‘in the furtherance of justice,’ may allow amendment of a pleading. ([Code Civ. Proc.], § 473.) Although there is a strong policy in favor of liberal allowance of amendments, the trial court’s discretion will not be disturbed on appeal unless it clearly has been abused. [Citation.]” (*Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230.) “In denying leave to amend, the trial court may properly consider whether the subject matter of the amendment is objectionable, the conduct of the moving party, and the belated presentation of the amendment. [Citation.]” (*Del Mar Beach Club Owners Assn. v. Imperial Contracting Co.* (1981) 123 Cal.App.3d 898, 914.) ““The trial court is entitled to be “skeptical of late claims” [citation]; and long-deferred presentation of a proposed amendment, without a showing of excuse for the delay, is a significant factor in support of the trial court’s discretionary denial of leave to amend. [Citation.]’ [Citations.]” (*Id.* at p. 915, fn. 4.) “Where inexcusable delay and probable prejudice to the opposing party is indicated, the trial court’s exercise of discretion in denying a proposed amendment should not be disturbed. [Citations.]” (*Estate of Murphy* (1978) 82 Cal.App.3d 304, 311.)

We cannot say the trial court abused its discretion. Here, Parcell Steel’s original complaint alleged a UTSA cause of action, which it abandoned in its amended complaints. Parcell Steel repeatedly stated its position was that none of its business information constituted protectable trade secrets. In its amended complaints Parcell Steel instead alleged a variety of common law tort claims, contract claims, and unfair competition under Business and Professions Code section 17200 and common law. The unfair competition and declaratory relief causes of action were premised on allegations the defendants misappropriated Parcell Steel’s information which they then used to compete with Parcell Steel.

The trial court granted summary adjudication of the unfair competition and declaratory relief causes of action concluding they were preempted by the UTSA. The UTSA preempts common law claims that are ““based on the same nucleus of facts as the misappropriation of trade secrets claim for relief.”” (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 958 (*K.C. Multimedia*)).) But the UTSA does not preempt “contractual remedies, whether or not based upon misappropriation of a trade secret,” or “other civil remedies that are not based upon misappropriation of a trade secret” (Civ. Code, § 3426.7, subd. (b); *K.C. Multimedia, supra*, 171 Cal.App.4th at p. 958.) Parcell Steel does not challenge the trial court’s ruling with regard to the unfair competition and declaratory relief causes of action, i.e., it makes no argument it should have been allowed to proceed with an unfair competition cause of action based on use of information that is not otherwise entitled to protection as a trade secret.

Four months after the trial court dismissed the unfair competition causes of action as being preempted by the UTSA, and on the first day of trial, Parcell Steel made an oral motion to amend the complaint to add the UTSA cause of action back into the action. The trial court could reasonably conclude the request to amend made on the morning of trial was untimely and prejudicial.

Moreover, Parcell Steel has made no effort to demonstrate on appeal that it had a viable trade secrets cause of action.² Nowhere in its opening brief does it cite the UTSA or discuss any of the requirements for establishing a trade secrets cause of action. Its argument on appeal is premised on its assertion that because the court found the unfair competition causes of action preempted by the UTSA, then it necessarily had established a trade secrets cause of action. But to proceed with a trade secrets case, the plaintiff must

² A trade secret is defined as “information, including a formula, pattern, compilation, program, device, method, technique, or process, that: [¶] (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” (Civ. Code, § 3426.1, subd. (d).)

“‘identify the trade secret with reasonable particularity.’” (Code Civ. Proc., § 2019.210; see M. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights* (2008) 61 Stan.L.Rev. 311, 344 [plaintiff should be required to ‘clearly define[] what it claims to own, rather than (as happens all too often in practice) falling back on vague hand waving’].)” (*Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 221, disapproved on other grounds in *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 337.) Parcell Steel has not done so.

C. Exclusion of Bid Evidence

Parcell Steel argues the trial court erred by excluding from evidence documents relating to Badger’s competing bids. We find no reversible error.

At the beginning of trial, Sauer, Duran and Badger filed a motion in limine to exclude evidence of any competing bids prepared by Sauer or Duran for Badger after leaving their employment with Parcell Steel. The trial court agreed the evidence was not relevant to remaining causes of action.

The trial court’s ruling on a motion in limine to exclude evidence is reviewed for abuse of discretion. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1493.) “Even where a trial court improperly excludes evidence, the error does not require reversal of the judgment unless the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.)” (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 332.) The complaining party “has the burden to demonstrate it is reasonably probable a more favorable result would have been reached absent the error. [Citations.]” (*Ibid.*)

At trial, Parcell Steel asserted that of the 186 projects on which Badger bid during its existence, there were 13 on which either Sauer or Duran had prepared a bid for Parcell Steel before leaving its employment, and then later prepared a bid for Badger. Although Parcell Steel did not specifically identify any of the documents it wanted to introduce or the projects to which they pertained, it offered that it would introduce its own bid proposal (or other documents relating to its bid proposal) for those 13 projects (prepared

by Sauer or Duran), and Badger's bid proposals for the same projects. Parcell Steel asserted that similarities between the sets of proposals would demonstrate the defendants stole Parcell Steel's bid documents when they quit and used them to prepare Badger's competing bids. On appeal, in its opening brief, Parcell Steel discusses only documents relating to six projects. Accordingly, we limit our discussion to those documents.

Two of the sets of the bids documents contain identical or virtually identical numbers. Exhibit 3 was a bid prepared by Sauer for Parcell Steel for the H & H Construction Empire Business Center project dated April 12, 2007. The bid total was \$306,150 comprised of six buildings each with five bid components (footings, screenwall, panels, pour strip, and slab). Exhibit 4 was Parcell Steel's add-on bid for interior footings prepared by Duran dated May 11, 2007, in the amount of \$31,200. Parcell Steel argues there was an obvious typographical error on Duran's April 12, 2007, bid in that a component bid at \$6,100 (building panels for one of the buildings) should have been bid at \$61,000, and absent the error Parcell Steel's true bid amount (main bid plus add-on) should have been \$392,250. Exhibit 70 was the Badger bid prepared by Sauer dated June 6, 2007, using the same set of construction plans. It contained the same numbers for all components as the Parcell Steel bid, except that the \$6,100/\$61,000 mistake was corrected, bidding the job at \$392,250.

Exhibit 68 was a bid prepared by Badger on June 5, 2007, for a Santa Ana Unified School District warehouse. Exhibit 93 was a handwritten worksheet dated May 16, 2007, prepared by Duran for Parcell Steel. The Badger bid amount and its components were the same as the bid amount and components shown on the Parcell Steel worksheet.

The documents pertaining to the four other projects showed overall *lower* bids by Badger. Exhibit 7 was a bid prepared by Duran for Parcell Steel for the Hakanson Construction Canyon Medical Plaza project dated May 17, 2007. Exhibit 67 was the bid proposal prepared by Badger dated June 21, 2007, using the same plans. The Parcell Steel bid was for \$303,600; the Badger bid was for \$294,000. The Badger bid priced four of the

six bid components (encompassing about 13 percent of the total bid price) at the same amount as the Parcell Steel bid; two components (over 85 percent of the bid amount) were for less.

Exhibit 8, which was admitted into evidence, was a bid prepared by Sauer for Parcell Steel dated March 28, 2007, for the Foothill Home Center. The bid was for \$180,200, covering two buildings each with four bid components. Exhibit 9, which was Badger's bid prepared by Sauer for the project dated July 30, 2007. The Badger bid was for \$165,200. It covered the same two buildings each with four bid components, but each of those components was a different price than the Parcell Steel bid (most were lower, one was higher).

Exhibit 94 was Parcell Steel's bid for the Industrial Building Gardenia project dated May 16, 2007, prepared by Duran; Exhibit 64 was Badger's bid dated August 22, 2007. Exhibit 97 was Parcell Steel's bid for the Hesperia Commercial Industrial Park project dated May 21, 2007, prepared by Duran. Exhibit 65 was Badger's bid dated September 13, 2007. On each project, the Badger bid was lower and each of the bid component amounts was different.

We need not decide whether in general evidence that the defendants took documents from Parcell Steel and used them in preparing Badger's bids on those projects would be relevant to a breach of duty of loyalty cause of action. (See Lab. Code, § 2860 ["everything which an employee acquires by virtue of his employment . . . belongs to the employer"]; see also Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2007) ¶ 14:455, p. 14-50 ["It is not settled whether a former employee's use of a former employer's confidential information that is not protected as a trade secret constitutes unfair competition"].) Even if there was some relevance to such evidence in general, we cannot say Parcell Steel was prejudiced by exclusion of the specific documents to which it refers.

Parcell Steel argues the bid documents were relevant to prove the defendants took Parcell Steel's documents. Referring to evidence from the summary judgment/adjudication motions, it argues that preparing a project bid would have required Sauer and Duran to review the contractor's construction plans to determine the size and weight of rebar necessary for each component part of the project, estimate the pounds necessary for each size of rebar needed, and apply the current cost of steel to estimate the cost for rebar. They then had to create a bid worksheet on which they estimated the tonnage required, fabrication costs, sales tax, freight, and labor. Parcell Steel argues it is "statistically impossible" that the defendants could have come up with the same or similar numbers when bidding the jobs for Badger that they had previously estimated for Parcell Steel. Therefore, it asserts the only reasonable explanation for the similarities in the bids is that the defendants took Parcell Steel's documents (e.g., the actual Parcell Steel bid proposal and/or the various worksheets used to prepare them) to prepare the bids. Not only is the assertion unsupported, but it defies common sense to say the same person looking at the same construction plans would not come up with the same numbers. That some of the Badger bid numbers looked similar to the Parcell Steel bid numbers does not tend to prove the defendants stole Parcell Steel's documents to calculate those numbers.

Parcell Steel also complains about another document it was unable to present due to the trial court's ruling on the motion in limine. Exhibit 57 was a set of "cut sheets" (instructions given to fabricators as to the lengths and bends of rebar needed), related to the H & H Construction Empire Business Center project. In discovery, Badger produced its cut sheets for that project. All of the sheets are on an identical form; many of sheets bear Parcell Steel's name and address, while others bear Badger's name and address. The cut sheets are all dated June 2 and June 5, and are initialed "G.B.". Parcell Steel argues the presence of Parcell Steel's cut sheets in Badger's possession is further proof the defendants took its documents. But given that these sheets are dated *after* the defendants all left Parcell

Steel's employment, all it demonstrates is that they might have used the same blank form in preparing the cut sheets.

In reply to the defendants' one-paragraph response to the bid evidence argument, Parcell Steel's reply brief contains another 14 pages of argument raising several new points. Not only are the points improperly raised (see *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 [“[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument”]; *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8 [“[T]he rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before”]), they are without merit.

Parcell Steel argues the bid evidence was relevant to damages, but it offers no cogent explanation as to how. Parcell Steel argues the evidence was relevant to impeach the defendants. In particular, Parcell Steel urges the documents would have shown Duran was lying when he testified Sauer had returned all documents to Parcell Steel on his last day of work. Parcell Steel asserts the Empire Business Center cut sheets initialed “G.B.” and dated June 2 or June 5 would have shown Bethke's testimony he started working for Badger in mid-June was untrue. Parcell Steel also argues the Empire Business Center cut sheets were relevant to prove its interference with contract causes of action because the cut sheets would not have been prepared by Parcell Steel if it did not already have that job. Parcell Steel made no offer of proof the evidence was relevant for this purpose. (*In re Mark C.* (1992) 7 Cal.App.4th 433, 444 [failure to make an adequate offer of proof precludes consideration of the alleged error on appeal].)

Finally, citing *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 26-28, Parcell Steel asserts that when trial court engages in wholesale exclusion of evidence relevant to a particular claim its tantamount to a motion for judgment on the pleadings or nonsuit on that cause of action. Accordingly, we must consider the evidence in

the light most favorable to Parcell Steel and apply the demurrer/judgment on the pleadings standard in reviewing the ruling. Unfortunately, it does not explain which of the causes of action that were tried (e.g., breach of duty of loyalty, interference with contract/prospective economic advantage) was effectively adjudicated by the evidentiary ruling.

D. Instructional Error

Parcell Steel contends the trial court made numerous errors when instructing the jury. We find no reversible error.

“A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence.” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) “The trial court’s ‘duty to instruct the jury is discharged if its instructions embrace all points of law necessary to a decision.’ [Citation.] ‘A party is not entitled to have the jury instructed in any particular fashion or phraseology, and may not complain if the court correctly gives the substance of the applicable law.’ [Citation.]” (*Crisler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82.) On appeal, we ““review the evidence most favorable to the contention that the requested instruction is applicable”” (*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1157), but there is no rule of automatic reversal or “inherent” prejudice applicable to any category of civil instructional error, whether of commission or omission. “The burden is on the appellant in every case affirmatively to show error and to show further that the error is prejudicial.” (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 601; see also *Santina v. General Petroleum Corp.* (1940) 41 Cal.App.2d 74, 77 [“Where any error is relied on for a reversal it is not sufficient for appellant to point to the error and rest there”].)

Prior to addressing Parcell Steel’s specific arguments, we observe the jury instructions were discussed off the record. After those discussions, the trial court went on the record commenting “we worked really hard among ourselves” on the jury instructions and the court was back on the record so counsel could state their objections to the instructions. Parcell Steel’s counsel did not raise any objections to any of the instructions

being given, stating only he reserved objections to the instructions Parcell Steel submitted that were not given. Thus to the extent Parcell Steel acquiesced in the instructions, the arguments are waived. (See *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 856-857 [party acquiesces in instruction when he says “I guess not” when asked if he objects to the instruction and cannot then appeal the giving of that instruction].)

Additionally, with only a few exceptions, the record does not indicate whether instructions were requested by Parcell Steel or the defendants. When the record does not indicate who requested challenged instructions, or that they were given by the court *sua sponte*, the appellant is presumed to have requested the challenged instruction and the doctrine of invited error precludes an appellant’s claim it was erroneous. (See *Lynch v. Birdwell* (1955) 44 Cal.2d 839, 847; Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2009) ¶ 14:277, p. 14-70.)

Because Parcell Steel objected to its proposed instructions that were *not* given, we begin there. The clerk’s transcript contains six instructions submitted by Parcell Steel that were not given. One was CACI No. 2204 on negligent interference with prospective economic relations. Four were special instructions pertaining to the duty of loyalty. Special Instruction No. 3 stated, “Appropriation of an employer’s business opportunities by an employee amounts to a breach of the employee’s duty of loyalty.” Special Instruction No. 4 stated, “Unless otherwise agreed, the agent has a duty to the principal not to take advantage of a still subsisting confidential relation created during the prior agency.” Special Instruction No. 5 was based on Labor Code section 2860 stating, “Everything acquired by an employee by virtue of his employment, except his . . . compensation, belongs to the employer.” And Special Instruction No. 6 was based on Civil Code section 2322, stating “if an agent makes secret profits from the agency, the principal may recover them.”

Among the instructions contained in the clerk’s transcript that *were* given, is a different Special Instruction No. 3 on breach of duty of loyalty, this one also apparently

prepared by Parcell Steel. This instruction encompassed some of the material that was contained in the above instructions that were not given, including the same language tracking Labor Code section 2860, but much of the language in the instruction was crossed out. As given, Special Instruction No. 3 told the jury, “All employees owe a duty of loyalty to their employers. The duty of loyalty requires an employee to act loyally for the employer’s benefit in all matters connected with the employment relationship. [¶] An employee is permitted to seek other employment and even to make some preparations to compete before resigning, but the law does not authorize an employee to transfer his loyalty to a competitor; the duty of loyalty is breached, and the breach may give rise to a cause of action in the employer, when the employee takes action which is against to [sic] the best interests of the employer.”

In addition, the jury was given Special Instruction No. 18 on duty of loyalty that provided, “The employee’s duty of loyalty embraces several subsidiary obligations including duty to refrain from competing with their employer while employed, and from taking action on behalf of or otherwise assisting their employer’s competitors to compete with their employer.”

Parcell Steel first argues the trial court erred by rejecting its proposed instructions on Labor Code sections 2860 (everything an employee acquires by virtue of employment belongs to employer), 2863 (employee who transacts business similar to employers must give preference to employer’s business), and Civil Code section 2322 (limits agent’s authority to act in his own name). It argues the instructions were appropriate because there was evidence Sauer bid on the Guy Yocom Construction Rockefeller Professional Center project using plans that belonged to Parcell Steel and there was evidence the defendants were engaged in side jobs while employed by Parcell Steel. But Parcell Steel has not shown it was prejudiced by omission of these instructions.

As to the omitted Labor Code section 2860 language, the evidence did not support such an instruction. The evidence concerning the Guy Yocom Construction

Rockefeller Professional Center project was that the plans were directly sent to Sauer's home by the contractor and the contractor knew Sauer had resigned from Parcell Steel. Sauer did not get the plans until he returned home from his last day of work. There was simply no basis for the jury to find the plans belonged to Parcell Steel. Furthermore, with regard to the defendants doing side jobs, the jury was instructed on an employee's duty to refrain from competing with his employer while employed. Parcell Steel has made no attempt at showing a different result would have been reached had the jury been given instruction specifically on Labor Code section 2863 (employee who transacts business similar to employers must give preference to employer's business), and Civil Code section 2322 (limits agent's authority to act in his own name).

Parcell Steel next contends the trial court erred by refusing to give CACI No. 2204, negligent interference with prospective economic relations. It claims it was prejudiced because without the instruction, the jury was limited to considering only intentional interference with prospective economic relations. But Parcell Steel has not demonstrated evidence supporting the proposed instruction.

Parcell Steel argues the written version of the instructions on the duty of loyalty that would have been made available to the jury during deliberations was defective because text was crossed out "in a manner such that the jury could read the underlying text" being omitted. It argues this sloppy editing could have led the jury to conclude not only that the crossed out statements did not apply but were erroneous as well. But the court also instructed the jury that as to the written instructions, "[m]ost of the instructions are typed. However, some handwritten or typewritten words may have been added, and some words may have been deleted. *Do not discuss or consider why words have been added or deleted.*" (Italics added.) Absent anything in the record suggesting the contrary, we must presume the jury followed this instruction. (*People v. Morales* (2001) 25 Cal.4th 34, 47 (*Morales*).

Parcell Steel argues the jury instruction on duty of loyalty was an improper "patchwork" instruction resulting from the court's directive (in response to the multitude of

proposed duty of loyalty instructions) the attorneys endeavor to craft a single loyalty instruction. Parcell Steel does not tell us *which* instruction it believes was incorrect (the record contains six jury instructions that were given relating to the duty of loyalty), nor does it identify any incorrect statements in any particular instruction. Accordingly, we decline to consider the point further.

Parcell Steel argues the jury instructions were repetitive because several made reference to an employee's right to *prepare* to compete with his employer. Parcell Steel asserts this repetition unfairly emphasized the defense theory. Parcell Steel has not suggested any of the references were incorrect statements of the law. "[R]epetition of a correct instruction rarely constitutes reversible error. Moreover, where repetitious instructions were given with a cautionary instruction that repetition did not imply emphasis, were repeated in a different context than first stated, and served a purpose, repetition will not be considered prejudicial error. [Citation.]" (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1047.) Here, the court specifically instructed the jury "[i]f I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or rules are more important than the others are." Again, we presume the jury followed this instruction. (*Morales, supra*, 25 Cal.4th at p. 47.)

Finally, Parcell Steel argues Bethke's Special Instruction No. 3 on duty of loyalty contained an incorrect statement of the law. The instruction states, "The duty of loyalty is breached when the employee takes an action which is hostile and adverse to the best interests of the employer." It was based on a statement found in *Stokes v. Dole Nut Co.* (1995) 41 Cal.App.4th 285, 295, that "the duty of loyalty is breached, and may give rise to a cause of action in the employer, when the employee takes action which is *inimical* to the best interests of the employer." (Italics added.) The term "hostile and adverse" is part of the dictionary definition the word "inimical." (See Webster's 10th New Collegiate Dictionary (2001) p. 600, col. 2 [inimical: "being adverse often by reason of hostility or malevolence"].) Parcell Steel argues the instruction improperly suggests there must be

intent to harm the employer to find a breach of duty of loyalty. It does not. The instruction suggests only there must be an action by the employee that is contrary to his employer's best interests. Indeed, we note Parcell Steel used the very same language in its own instruction, Special Instruction No. 3: "[T]he duty of loyalty is breached, and may give rise to a cause of action in the employer, when the employee takes action which is *against* to the best interests of the employer." (Italics added.) We find no error in the instruction.

E. Attorney Fees

Parcell Steel contends the trial court erred by awarding the defendants their attorneys fees under Corporations Code section 317. We find no error.

We begin with some background. Bethke had filed and served a cross-complaint against Parcell Steel for indemnification for his defense costs under Labor Code section 2802, which requires an employer to indemnify "employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties" (Lab. Code, § 2802, subd. (a).) At a hearing on June 18, 2009, five months before trial, the parties' counsel discussed Bethke's indemnification cross-complaint with the trial court. The trial court expressed its doubts that Labor Code section 2802 applied in actions by the employer against its employee.³ At that time, Bethke's counsel observed if Bethke was successful on the merits of the litigation, he would nonetheless be entitled to pursue indemnification under Corporations Code section 317.

At the beginning of trial, the court ordered Bethke's cross-complaint bifurcated. Following the jury's defense verdict, when the court set a briefing schedule on the Labor Code section 2802 cross-complaint, Bethke's counsel and counsel for Sauer, Duran, and Badger indicated they would both be filing motions for indemnification under

³ The trial court's doubts were recently confirmed by this court in *Nicholas Laboratories, LLC v. Chen* (2011) 199 Cal.App.4th 1240, 1243, footnote omitted, in which we held Labor Code section 2802 does not require an employer to reimburse its employee for attorney fees incurred in the employee's successful defense of the employer's action against the employee.

Corporations Code section 317. In granting the subsequent motions, the court ruled the defendants were sued for acts performed in connection with their functions as corporate employees and not with respect to purely personal matters. The jury had found the defendants did not breach their employment duties while employed by Parcell Steel. Bethke was awarded \$30,611.27 in costs and \$272,109.50 in attorney fees. Sauer, Duran, and Badger were awarded \$14,496.46 in costs and \$214,270 in attorney fees.

1. Entitlement to Attorney Fees

Parcell Steel argues the defendants were not entitled to recover attorney fees under Corporations Code section 317, which governs the indemnification of corporate agents, including employees, in litigation. Relevant here is Corporations Code section 317, subdivisions (c) and (d). Corporations Code section 317, subdivision (c), provides, “A corporation shall have power to indemnify any person who was or is a party . . . to any threatened, pending, or completed action *by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was an agent of the corporation*, against expenses actually and reasonably incurred by that person in connection with the defense or settlement of the action if the person acted in good faith, in a manner the person believed to be in the best interests of the corporation and its shareholders. . . .” (Italics added.) Corporations Code section 317, subdivision (d), provides, “To the extent that an agent of a corporation *has been successful on the merits* in defense of any proceeding referred to in subdivision . . . (c) or in defense of any claim, issue, or matter therein, the agent *shall* be indemnified against expenses actually and reasonably incurred by the agent in connection therewith.” (Italics added.)

Indemnification under Corporations Code section 317 is not limited to third party lawsuits—it is appropriate even when the corporate agent is sued by his own corporation. (*Wilshire-Doheny Associates, Ltd. v. Shapiro* (2000) 83 Cal.App.4th 1380, 1390 (*Wilshire-Doheny*)). However, it does not provide for an award of attorney fees “whenever an agent is successful in litigation with a corporate principal.” (*Channel Lumber*

Co. v. Porter Simon (2000) 78 Cal.App.4th 1222, 1230-1231.) Rather, indemnification is restricted “to situations in which liability is sought to be imposed upon an individual by reason of the fact the person was an agent of a corporation, i.e., based upon acts or omissions in which, under general principles of agency law, the person was charged with acting for and in the place of the corporation.” (*Ibid.*)

With those principles in mind, we turn to Parcell Steel’s specific arguments. It first argues the defendants waived, or should be estopped to assert, any claim for attorney fees under Corporations Code section 317 because they did not plead it in their answers. Parcell Steel essentially argues that because Corporations Code section 317 was not mentioned by the defendants earlier, it had no reason to suspect there was a basis on which it could be required to indemnify the defendants for their attorney fees if they prevailed. Thus, Parcell Steel asserts it was unfairly deprived the opportunity to fully understand the risk and exposures of proceeding with this action against its former employees. The contention is without merit. “There is no requirement that a party plead that it is seeking attorney fees, and there is no requirement that the ground for a fee award be specified in the pleadings. [Citations.]” (*Yassin v. Solis* (2010) 184 Cal.App.4th 524, 533; see also *Washburn v. City of Berkeley* (1987) 195 Cal.App.3d 578, 583 [no requirement intent to seek private attorney general attorney fees must be pleaded in underlying action].) Furthermore, Parcell Steel cannot claim it was unaware of the potential risk—potential indemnification under Corporations Code section 317 was discussed in open court five months before trial.

Parcell Steel also asserts that absent the defendants having pleaded their claim for attorney fees under Corporations Code section 317, subdivision (c), it was deprived of a trial on necessary factual underpinnings for such a claim—namely, that the defendants were acting “in good faith, in a manner [they] believed to be in the best interests of the corporation and its shareholders.” Those are not requirements for an award of attorney fees under Corporations Code section 317, subdivision (d). Under Corporations Code

section 317, subdivision (d), if the corporate agent is sued because of acts or omissions in connection with its corporate function, and not because of purely personal matters, and wins a judgment on the merits in defense of the action, indemnification is *mandatory*. (*American Nat. Bank & Trust Co. v. Schigur* (1978) 83 Cal.App.3d 790, 793; accord, *Wilshire-Doheny, supra*, 83 Cal.App.4th at p. 1391.)

Parcell Steel’s reliance on *Wilshire-Doheny, supra*, 83 Cal.App.4th 1380, in support of its argument is misplaced. Parcell Steel cites to that opinion’s discussion of the availability of attorney fees under Corporations Code section 317, subdivision (c) [discretionary indemnification], only if good faith has been shown. But the court specifically noted there is no good faith requirement under subdivision (d), the subdivision at issue here. (*Wilshire-Doheny, supra*, 83 Cal.App.4th at p. 1394 [“[s]ubdivision (d) of [Corporations Code] section 317 does not require a finding of good faith, only a finding of success on the merits. Thus, appellants were not required to establish good faith before being entitled to indemnification under that subdivision”].)

Parcell Steel correctly notes *Wilshire-Doheny, supra*, 83 Cal.App.4th at page 1394, states a successful defendant moving for attorney fees under Corporations Code section 317, subdivision (d), must establish “the alleged acts, for which they were made parties to the lawsuit were, “performed in connection with [their] corporate functions and not with respect to purely personal matters.” [Citation.]” In *Wilshire*, the trial court refused to consider the attorney fees request so agency had not yet been established. Here, the trial court considered and granted the attorney fees motion, finding the defendants were sued for alleged acts performed in connection with their corporate employment—Bethke, Sauer, and Duran were sued by Parcell Steel based on allegations they breached duties owed to the corporation while carrying out their specific duties as employees. That determination is a factual question for the trial court, and its findings must be upheld if supported by substantial evidence. (*Plate v. Sun-Diamond Growers* (1990) 225 Cal.App.3d 1115, 1125;

Fed-Mart Corp. v. Pell Enterprises, Inc. (1980) 111 Cal.App.3d 215, 221.) It is, and we will not disturb it on appeal.

2. Amount of Attorney Fees

Parcell Steel's remaining attacks on the amount of the attorney fees award are without merit. Both motions were supported by declarations from the defendants' attorneys detailing the number of hours worked and billed on specific tasks. "An attorney's testimony as to the number of hours worked is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records. [Citation.]" (*Steiny & Co. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285, 293; see also *Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559.) The trial court's minute order stated it found "[i]n light of the heavily litigated nature of this lawsuit . . . the attorney[] fees sought [are] reasonable in terms of rate and number of houses expended."

Parcell Steel's attack consists of several unsupported and unanalyzed assertions on appeal. It makes a vague reference to the declarations' utilization of "block billing," which Parcell Steel readily agrees is not prohibited, but which it asserts "obscured" the time attributable to "tasks" for which attorney fees were not allowed. It offers no suggestion as to what tasks those are. Parcell Steel asserts that because it opposed the attorney fees request, it should have been allowed to conduct discovery. Although its opposition made a similar assertion, it did not serve any discovery requests and offers no suggestions as to what discovery it wanted.

Parcell Steel states the "absurdity" of the award is highlighted by the fact Badger was awarded fees, when it was not an agent of Parcell Steel. To the extent it is suggesting attorney fees should have been allocated between Sauer, Duran and Badger, who were all represented by the same counsel, we note "[a]llocation of fees incurred in representing multiple parties is not required when the liability of the parties is 'so factually interrelated that it would have been impossible to separate the activities . . . into

compensable and noncompensable time units. . . . [Citation.]” (Cruz v. Ayromloo (2007) 155 Cal.App.4th 1270, 1277, fn. omitted.)

The only thing approaching a challenge to any specific part of the attorney fees award is the argument contained in the last paragraph of Parcell Steel’s opening brief. It suggests fees related to declarations, exhibits, and separate statements prepared by the defendants in reply to the oppositions to the summary judgment/adjudication motions were not recoverable because generally additional evidence is not allowed in the reply. This argument was not raised below. Furthermore, the additional declarations and exhibits were allowed and Parcell Steel has not shown the attorney fees related to those items were unreasonable.

3. Attorney Fees on Appeal

As defendants point out a party who successfully defends an award of attorney fees is entitled to appellate attorney fees as well. (Sebago, Inc. v. City of Alameda (1989) 211 Cal.App.3d 1372, 1388.) Parcell Steel does not challenge that assertion.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs and attorney fees on appeal.

O’LEARY, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.