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No. 96341-0

Court of Appeals No. 76708-9-I

SUPREME COURT
OF THE STATE OF WASHINGTON

MODUMETAL, INC.,

Respondent,

v.

XTALIC CORPORATION and JOHN HUNTER MARTIN,

Petitioners.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The petition seeks review of a unanimous Court of Appeals decision in a private dispute between Modumetal, a Washington-based nanoengineering company, and its former employee John Hunter Martin and the company that hired Mr. Martin away from Modumetal, Xtalic Corporation. The Court of Appeals, Division I, reversed the trial court's summary judgment in favor of Petitioners Xtalic and Mr. Martin and in doing so, rejected or declined to consider each of their arguments. The Court should decline review because no grounds support review under RAP 13.4(b) and the decision contains no errors.

The Court of Appeals decision applied established trade secret law, recognizing that Petitioners' prior use and disclosure of Modumetal's trade secrets in public patent applications is sufficient to constitute misappropriation. That Xtalic claimed in those applications technology Modumetal developed was not seriously disputed; nor did Xtalic offer undisputed evidence that it independently developed each trade secret identified. The court also refused to disregard binding precedent on when Washington's UTSA preempts common law claims and rejected Xtalic's belated attempt to rely on a lack of personal jurisdiction as a basis to "affirm" summary judgment. The court's decision is sound, correct, and not the type that warrants review.

II. STATEMENT OF THE CASE

A. Modumetal's Electrodeposition Research

Modumetal designs, develops, and manufactures nanolaminate materials and technology. Op. at 2. Its research has involved, among other things, the electrodeposition of metals, including aluminum, on various substrates. CP 4002 ¶2. “Electrodeposition” is a process by which thin metallic coatings are deposited on surfaces, or “substrates,” using electrochemical processes. It involves putting the substrate into a specially-developed “bath,” and modifying variables to optimize the deposit of the dissolved metal from the bath onto the substrate. Op. at 2.

Mr. Martin joined Modumetal in 2008 as an intern, and after graduating from the University of Washington, worked as a full-time employee until February 2011. *Id.*; CP 4003 ¶4. As part of his employment, Mr. Martin signed and was bound by the company’s “Assignment of Inventions, Non-Disclosures and Non-Solicitation Agreement” (“Confidentiality Agreement”). Op. at 1-2; CP 4130-32. That agreement required Mr. Martin to assign to Modumetal all inventions made while a Modumetal employee and that he “never disclose or use any of the Confidential Information [of Modumetal] for the benefit of [himself] or another, unless directed or authorized in writing by the Company to do so.” Op. at 2-3; CP 4130-32 ¶¶4-8, 10.

Modumetal began a new project in 2010, led by Mr. Martin, investigating the electrodeposition of aluminum from ionic liquids for use in coating products, such as consumer electronics devices. Op. at 3; CP 4003 ¶5; CP 4218 (32:11-14). That research was motivated, in part, by a specific third-party's need for a commercially scalable and viable process for electroplating aluminum onto their devices. Op. at 3; CP 4003 ¶5; *see also* CP 4346-47 ¶¶4-6. None existed at that time. CP 4003 ¶5; CP 4346-47 ¶¶4-6. Mr. Martin led that project from February through July 2010, after which he remained involved as a member of Modumetal's "Corrosion Team" and periodically reviewed and signed the confidential laboratory notebooks of the new project lead, Jesse Unger. Op. at 4; CP 4003 ¶¶5-7; *see, e.g.*, CP 3722-39, 4515.

Modumetal's research involved experimentation with different ionic bath chemistries, such as determining the effects of using certain additives and co-solvents to create optimal baths for use in electrodepositing aluminum. Op. at 3-4; CP 4004 ¶8; CP 4009-12; CP 4116-4119; CP 4349-4351 ¶¶13-15. Modumetal, and Mr. Martin and Mr. Unger in particular, also investigated varying experiment parameters such as temperature, wave form, agitation types, anode-cathode ratio, and shielding. Op. at 4; CP 4004 ¶8; CP 4009-4012; CP 4349-3458 ¶¶21-26; CP 4500-4508. As part of Modumetal's research, it worked

with BASF under a non-disclosure agreement to procure certain ionic liquids designed for electrodeposition of aluminum that consisted of chemical combinations with the particular additives Modumetal was researching. Op. at 3-4; CP 4004 ¶¶10, 13; CP 4353-54 ¶20; CP 4015-4016. Mr. Martin also conducted “surface preparation” research on treating substrates so as to enhance the adhesion of the aluminum. Op. at 4. As an example, he used “reverse current” to remove oxides from substrate surfaces before plating. *See* CP 4363-65, ¶¶37-42.

As mentioned above, like Mr. Martin, Mr. Unger was a member of the “Corrosion Team” at Modumetal. Op. at 4. Like Mr. Martin, Mr. Unger kept confidential lab notebooks related to his research on electrodeposition of aluminum. Some of those notebooks were reviewed and signed by Mr. Martin in a process called “witnessing” the notebook pages. *Id.*; *see* CP 3722-39, 4515. After Mr. Unger became team lead, Mr. Martin stayed apprised of Mr. Unger’s work at least through weekly team meetings. Op. at 4; CP 4003 ¶7. Ultimately, Modumetal was able to successfully plate aluminum onto device cases and other substrates with complex geometries. Op. at 4; CP 4004 ¶12; CP 4347 ¶6.

B. Xtallic Hires Mr. Martin and Attempts to Patent Technology Mr. Martin Worked on at Modumetal

Mr. Martin began seeking employment with Xtallic in late 2010.

Op. at 5. After submitting a CV that disclosed that he had experience at Modumetal with the electrodeposition of aluminum, which was itself confidential, Mr. Martin participated in numerous telephone calls and in-person interviews with Xtalic personnel, during which he discussed his familiarity with working with ionic liquids. Op. at 5-6; CP 4222 (62:22-63:16). Mr. Martin secretly accepted a job with Xtalic in February 2011, while still employed at Modumetal. Op. at 6; CP 4242 (312:16-21); CP 3445 ¶8. Approximately a month later, after he started at Xtalic in late March 2011, Mr. Martin contacted Christina Lomasney, Modumetal's CEO, and stated falsely, "*since I left* I have accepted a position at Xtalic." Op. at 6; CP 4152 (emphasis added)).

Modumetal wrote to Xtalic after learning of Mr. Martin's move, informing Xtalic of its concerns regarding Mr. Martin's potential use or disclosure of its confidential information. Op. at 6. The letter enclosed Mr. Martin's Confidentiality Agreement and noted that Mr. Martin should be "walled off from any involvement in the design of electroplating baths" given his knowledge of Modumetal's work in that area. Op. at 6; CP 4005 ¶14; CP 4033-34. Instead, Xtalic assigned Mr. Martin to work on its own aluminum electrodeposition project, which he worked on almost exclusively for the following two years. Op. at 6; CP 4221 (61:12-13); CP 4222 (62:14).

At Xtalic, Mr. Martin worked on a team with Dr. Shiyun Ruan and Dr. Witold Paw. Op. at 6-7; CP 4265 (29:16-18). Dr. Ruan had previously done research at MIT on the electrodeposition of aluminum manganese from ionic liquids, but had not worked with BASF or the specific additives in the BASF liquids. Op. at 7; CP 4297 (22:10-15); CP 4264 (9:5-25). Dr. Witold Paw was hired after Mr. Martin and conducted research regarding bath chemistry, though unlike Mr. Martin, he had no experience with electroplating or ionic liquids before joining Xtalic. CP 4284 (9:20-22); CP 4285-86 (10:24-11:4). As part of this small team, Mr. Martin designed and conducted his own experiments for electroplating aluminum and aluminum alloys using ionic liquids. Op. at 7; CP 4266 (38:2-12); CP 4298 (28:12-19). The team shared ideas, worked collaboratively, and met on a regular basis to share their ongoing research and results. *See* CP 4249 (28:8-16). Xtalic's team began using the same BASF additives that Mr. Martin used at Modumetal shortly after his arrival. CP 4166, 4171, 4174-75.

On March 14, 2013, Xtalic filed U.S. Patent Application Serial No. 13/830,531 ("the '531 Application"), which disclosed and claimed as Xtalic's inventions subject matter related to the electrodeposition of aluminum (among other things) from ionic liquids. Op. at 7; CP 4372; 4415-50 (original claims). Mr. Martin, Dr. Ruan, Dr. Paw, and Xtalic's

CEO, Dr. Alan Lund, were the named inventors. Op. at 7; CP 4372. The '531 Application disclosed and claimed subject matter that corresponds directly to Mr. Martin's work at Modumetal, which Modumetal had kept confidential. See CP 4347-62; CP 4005 ¶16. Each co-inventor executed a declaration attesting that they believed the claims to be directed to their inventions and that they were the "original and first inventor(s) of the subject matter which is claimed and for which a patent is sought" in the '531 Application. CP 4038 ¶8; CP 360-61. Xtalic then filed another patent application, U.S. Patent Application Serial No. 14/271,371 ("the '371 Application"), on May 6, 2014. Op. at 8; CP 4561. That application relates directly to the surface preparation work Mr. Martin performed at Modumetal. See CP 4362-65 ¶¶35-43.

C. Procedural History

Modumetal filed this lawsuit in April 2016. The Complaint asserts claims against Xtalic and Mr. Martin for trade secret misappropriation, breach of confidentiality obligations, and breach of contract. CP 6-11. Xtalic moved to dismiss on personal jurisdiction grounds, but the trial court denied that motion in July 2016. Op. at 9; CP 4994. The parties thereafter engaged in discovery.

During that process, Xtalic withheld documents and instructed witnesses not to answer questions relating to Mr. Martin's and others'

contributions to the '531 and '371 Applications on privilege grounds. Op. at 8-10; CP 4036 ¶3. Modumetal requested a privilege log so that it could determine what Xtalic was withholding and whether it was, in fact, privileged. Xtalic's counsel said that he would produce one, but never did. *Id.* Modumetal also issued a set of discovery requests relating to the '371 Application, but Xtalic refused to provide responsive documents or interrogatory responses to the extent they had not been produced in response to an earlier set of discovery. *Id.* ¶¶5-6. Modumetal was forced to file multiple motions to compel, the last of which remained pending when the trial court granted summary judgment. *Id.*; CP 1157.

Xtallic and Mr. Martin moved for summary judgment in March 2017, despite not having provided a privilege log or key discovery on the crucial issue of how Xtalic's patents came to include Modumetal's information. Op. at 10. Modumetal opposed the motion and provided supporting declarations from Charles Hozeska, Christina Lomasney, and Modumetal's counsel. *Id.*; CP 4059-4605. Mr. Hozeska's declaration confirmed that Xtalic's patent applications overlap directly with work done at Modumetal while Mr. Martin was employed there, and that Xtalic must have known the nature of Mr. Martin's work based on his CV and interviews. CP 4345-66. Modumetal identified disputed factual

issues and further requested a continuance under CR 56(f) in light of the numerous pending discovery issues, which were detailed in the declaration of Modumetal's counsel. *See* CP 3981-4000, 4035-38.

The trial court (Judge Mary Roberts) granted summary judgment to Xtalic and Mr. Martin from the bench. For the trade secret and contract claims, the court cited a lack of evidence on misappropriation. *Op.* at 11; *RP* 67. It further concluded Modumetal's breach of confidentiality claims were preempted under Washington's Trade Secret Act (RCW 19.108) and denied Modumetal's CR 56(f) request. *Op.* at 11; *RP* 64-65. Modumetal appealed. Xtalic did not, though in its responsive brief on appeal, it challenged the trial court's denial of its earlier personal jurisdiction motion under the guise that the lack of jurisdiction was an alternative basis to "affirm" summary judgment.

A unanimous Division I panel reversed the trial court on every issue. The court found that the trial court erred in dismissing Modumetal's trade secret claims because "Hozeska's testimony, along with the evidence in the record upon which he relied in reaching his conclusions, was sufficient for a reasonable jury to infer without conjecture or speculation that misappropriation of a trade secret occurred." *Op.* at 18-19; *see id.* at 11-17. The court held that Modumetal's common law confidentiality claims were not preempted

because the Supreme Court, in *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38 (1987), held that Washington’s UTSA does not displace common law claims for breach of confidential relationship or contract. Op. at 19. The court further held that summary judgment was improper for Modumetal’s contract claim. Op. at 20. Separately, the court held that the trial court abused its discretion in two respects by denying Modumetal’s CR 56(f) request. Op. at 22-24. The court declined to address Xtalic’s personal jurisdiction argument because Xtalic did not cross-appeal that issue. Op. at 24-27.

III. ARGUMENT

The Court should decline review. This is a fact-intensive trade secret case in which a unanimous Court of Appeals panel applied well-established law regarding misappropriation. The court also applied straightforward procedural rules—the requirement that a respondent file a cross-appeal when seeking affirmative relief, such as reversal of an earlier trial court decision—and followed Supreme Court precedent in reversing the trial court’s ruling on preemption.

For each aspect of the Court of Appeals’ ruling that Petitioners now challenge, they ask this Court to correct errors they believe to exist. But this Court reviews lower courts’ decisions only under limited circumstances. None of those circumstances exist here. Nor did the

Court of Appeals commit any error. The Court should deny Petitioners' request and allow this case to proceed to trial.¹

A. Review Is Not Warranted Under RAP 13.4(b)

The Supreme Court is not an error-correcting court to which parties may appeal as a matter of right. Instead, the Rules of Appellate Procedure provide that a the Court will accept a petition for review “only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b).

“Substantial public interest” refers to issues with “sweeping implications.” *State v. Watson*, 155 Wn.2d 574, 578 (2005). “A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common

¹ By failing to challenge the court's CR 56(f) abuse of discretion holding other than with a passing reference, *see* Pet. at 18, n. 7, Petitioners ask this Court to expend resources rendering a decision that is premature. Modumetal's claims should at least proceed until discovery is complete in light of the Court of Appeals holding that the trial court abused its discretion.

issue.” *In re Flippo*, 185 Wn.2d 1032 ¶2 (2016) (citing *Watson*, 155 Wn.2d at 577). The “substantial public interest” standard is consistent with the “substantial public importance” test for resolving standing issues, where an issue “is of substantial public importance, [if it] immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture.” See *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803 (2004) (quotes omitted).

Here, Petitioners request review of the Court of Appeals decision on three issues based on RAP 13.4(b)(1)-(2) and/or (4). The first is whether the Court of Appeals properly refused to consider Xtalic’s belated personal jurisdiction argument despite its failure to cross appeal. The second is whether the Court of Appeals properly concluded that Modumetal presented sufficient evidence to defeat summary judgment on its trade secret claim by showing that Xtalic *used and disclosed* Modumetal’s trade secrets in its patent applications and that Petitioners failed to present un rebutted evidence of independent development of each trade secret at issue. The third is whether the Court of Appeals properly followed the Court’s decision in *Boeing v. Sierracin*.

Review is not warranted. Petitioners complain that the Court of Appeals erred, but do not show that the court’s opinion in fact conflicts

with existing Supreme Court precedent or other Court of Appeals decisions. Nor do they meet the stringent standard of showing that the issues for review present questions of “substantial public interest.” Petitioners merely disagree with the Court of Appeals. Accordingly, the Court should decline to exercise its discretion to review that decision.

B. The Court’s Decision Applied Well-Understood Rules of Appellate Procedure That Require Cross-Appeals

The Court of Appeals holding that Xtalic could not rely on a lack of personal jurisdiction to seek affirmance of summary judgment was both correct and a routine application of the Rules of Appellate Procedure. Nonetheless, Xtalic asserts that this decision “conflicts with established precedent” and “involves an important issue of appellate procedure.” Pet. at 7-9 (relying on RAP 13.4(1)-(2), (4)). But Xtalic does not identify the “established precedent” that the Court of Appeals allegedly failed to follow. It instead cites cases reciting the undisputed rule that cross-appeals are required when a respondent seeks affirmative relief and discusses a decision from the Supreme Court of Guam. *See* Pet. at 7-8. In doing so, Petitioners necessarily fail to show that review is warranted under RAP 13.4(b)(1) or (2).

Moreover, Petitioners ignore that the standard under RAP 13.4(b)(4) is not whether a Court of Appeals decision “involves an

important issue of appellate procedure.” The standard is whether the decision raises an issue of substantial public interest, or as the Supreme Court has explained, is one with “sweeping implications” likely to affect numerous other identifiable proceedings. *Watson*, 155 Wn.2d at 578. Xtalic does not attempt to show that the governing standard is met beyond a conclusory reference to RAP 13.4(b)(4). And even if it had, such a contention is unpersuasive. The court’s routine application of an established rule of appellate procedure is not an issue with “sweeping implications” that will necessarily affect numerous other proceedings. This is not a case, for example, where there is an identifiable set of existing cases that would be immediately affected by the court’s ruling. *Cf. Watson*, 155 Wn.2d at 577-78 (issue involved question of substantial public interest where the Court of Appeals holding had “the potential to affect every sentencing proceeding in Pierce County ... where [the drug] sentence was or is at issue.”).

Ultimately, Xtalic implicitly asks this Court to act as an error-correcting Court and disregard the requirements of RAP 13.4(b). Even if considered, however, Petitioners’ substantive argument is without merit. As the Court of Appeals recognized, RAP 2.4(a) establishes the requirements for granting affirmative relief to a respondent on appeal. *Op.* at 24. A cross-appeal is one such requirement. *Id.* at 24-25 (citing

State v. Sims, 171 Wn.2d 436, 442-43 (2011)). The Supreme Court has held that a party seeks affirmative relief where it seeks reversal of a trial court order rather than merely offering alternative argument for affirming the trial court. *Sims*, 171 Wn.2d at 442-43; *see also In re Arbitration of Doyle*, 93 Wn. App. 120, 127 (1998) (holding that, when a respondent “requests a partial reversal of the trial court’s decision, he seeks affirmative relief”).

The only question here was whether Xtalic sought affirmative relief when it pressed personal jurisdiction as an “alternative basis” for “affirming” summary judgment. It did. The Supreme Court has already held that seeking reversal of a trial court decision is a request for affirmative relief, and here, Xtalic unquestionably sought a reversal of the trial court’s denial of its motion to dismiss on personal jurisdiction grounds. The court further addressed this question with the common-sense holding that a change of relief from a dismissal *with* prejudice (on summary judgment) to a dismissal *without* prejudice (which would be appropriate following reversal of the personal jurisdiction order) is a request for affirmative relief. *Op.* at 26-27.

In sum, Xtalic could have filed a cross appeal challenging the trial court’s earlier denial of its motion to dismiss, which would have preserved the issue and provided for the appropriate briefing schedule.

It declined to do so. Review is not warranted now under RAP 13.4(b)(1), (2), or (4). The court's application of well-understood appellate procedure rules is neither inconsistent with existing precedent, in conflict with other Court of Appeals decisions, nor an issue of substantial public interest.²

C. The Court's Routine Application of Established Trade Secret Law Does Not Justify Review

The Court of Appeals application of established trade secret principles to the facts in this case was likewise correct. Petitioners nonetheless seek review under RAP 13.4(b)(1) and (4) of the court's holding that there were disputed issues of fact precluding summary judgment on Modumetal's trade secret and contract claims. *See* Pet. at 10-11. Petitioners' argument distills to the assertion that trade secret plaintiffs must prove "actual use or disclosure" of trade secrets and that allowing anything less allows "former employers to wield trade secret litigation as an unbargained for noncompetition agreement, in conflict with this Court's precedent." Pet. at 11. According to Petitioners,

² To the extent review is accepted, the Court should limit review to the decision addressing the need to cross appeal. Xtalic asks in a footnote, with almost no support, that the Court go further and hold that Washington lacks personal jurisdiction even though the Court of Appeals did not address that question. That passing assertion is not sufficiently addressed to justify the Court's review. *See State v. Thomas*, 150 Wn.2d 821, 868-69 (2004) ("[T]his court will not review issues for which inadequate argument has been briefed or only passing treatment has been made").

“‘access,’ ‘overlap,’ and ‘similarity’ – standing alone – are insufficient to defeat summary judgment, where, as here, a defendant can establish (as Xtalic did with unrebutted evidence) that it independently developed the trade secret.” Pet. at 12. Petitioners then assert that the court adopted and applied the inevitable disclosure doctrine. Pet. at 16-17.

Petitioners fail to show that review is warranted under RAP 13.4(b)(1) or (4) and, more importantly, their argument highlights that there is no error in the Court of Appeals decision. Petitioners argue in vague terms that the Court of Appeals decision conflicts with the Supreme Court’s precedents requiring explicit non-competition agreements. Pet. at 16-17. But Petitioners’ argument depends on the false assertion that the Court of Appeals applied the inevitable disclosure doctrine and addressed non-competition agreements. The Court of Appeals decision rejected that argument, explaining, as *Modumetal* had, that no reliance on the inevitable disclosure doctrine is needed where actual misappropriation can be inferred from Xtalic’s patent applications. Op. at 18 (“[W]e need not and do not address the applicability of the inevitable disclosure doctrine.”). Indeed, the decision clarified that *Modumetal* never argued that disclosure was inevitable but had not yet occurred. As the court recognized, the evidence here, in the light most favorable to *Modumetal*, showed that

Xtallic *used* and *disclosed*—in the past—Modumetal’s trade secrets by using them, at least, in public patent applications. Op. at 14, 18. Modumetal has never argued that Mr. Martin could not work for Xtallic (or any other company), much less invoked the inevitable disclosure doctrine to enjoin future misappropriation.

It is beyond dispute that even if non-competition agreements are not permitted—a point not at issue in this case—Washington law prohibits trade secret misappropriation. And that is exactly what the Court of Appeals recognized here. Petitioners’ argument that the court’s decision conflicts with this Court’s precedent is accordingly misplaced. The Court of Appeals found that there were disputed issues of fact regarding actual misappropriation in the past. The Court of Appeals did not hold, as Petitioners now suggest, that Modumetal was entitled to enforce a non-compete agreement in a manner at odds with this Court’s precedent. Review is unwarranted under RAP 13.4(b)(1) and (4).

Nor is Petitioners’ argument correct as a matter of law or fact. As the Court of Appeals recognized, RCW 19.108.010(2)(b) defines misappropriation as the “disclosure or use of a trade secret of another” under statutorily-proscribed circumstances. Op. at 13. Petitioners’ inclusion of Modumetal’s trade secrets in its public patent applications is, by definition, a prior *use* and *disclosure* of those trade secrets. While

Xtalic’s counsel argued (and continues to argue) that Xtalic “independently developed” Modumetal’s trade secrets in conclusory fashion, Xtalic nowhere offered evidence of independent development of each trade secrets. Indeed, Modumetal’s Reply brief on appeal identified numerous exemplary trade secrets for which Petitioners offered no evidence regarding independent development. Reply at 11. Thus, contrary to Petitioners’ assertion, they did not present “unrebutted evidence of [Xtalic’s] independent research” for every trade secret. *See id.*; *Op.* at 17-18. Absent such evidence, a jury is entitled to find that Modumetal’s trade secrets were misappropriated when Xtalic used and disclosed them in its patent applications.³

D. The Court’s Application of Governing Supreme Court Authority Does Not Justify Review

Petitioners’ “preemption” argument likewise fails to provide a justification for review. As Petitioners acknowledge, the Court of Appeals applied *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38 (1987). *See Op.* at 20 (“Boeing has not been overruled, and it is still good law.”). The law is clear because the Supreme Court has addressed the issue in

³ Petitioners’ argument regarding independent development is particularly troublesome given its refusal to provide discovery on how Modumetal’s trade secrets ended up in its patents despite being different from work Xtalic previously performed. This is, among others, one more reason why the Court of Appeals properly concluded that the trial court abused its discretion in denying Modumetal’s CR 56(f) request.

an on-point decision that bound the Court of Appeals. The Court of Appeals decision here applied that holding. Op. at 21. Accordingly, review of the court's opinion under RAP 13.4(b)(1) is not warranted.

Nor is review warranted under RAP 13.4(b)(2) or (4). Contrary to Petitioners' characterization that the court recognized *Boeing's* holding as conflicting with Division 2's opinion in *Thola v. Henschell*, 140 Wn. App. 70 (2007) the court's opinion is clear: There was no basis to distinguish *Boeing*. Moreover, Division 2's decision in *Thola* failed to acknowledge *Boeing's* holding, did not analyze the appropriate test for preemption, and cannot supersede that decision. Op. at 20. Nor are they necessarily in conflict given that *Thola* did not reject *Boeing*; it simply did not address it. See *SEUI Healthcare Northwest Training P'Ship v. Evergreen Freedom Found.*, No. 76220-6-I, 2018 WL 4691593, at *4-6 (2018) (recognizing *Boeing* as the "leading case" on UTSA preemption). The Court of Appeals opinion in this case thus reflects the routine application of established precedent. Such a holding does not justify review as conflicting with existing precedent or as a question of substantial public interest. Petitioners simply do not like the rule laid out in *Boeing*. That is not a basis for obtaining review.

Respectfully submitted this 22nd
day of October 2018.

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CERTIFICATE OF SERVICE

On October 22, 2018 I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of Modumetal, Inc.’s Answer to Petition for Review.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington, on October 22, 2018.

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