

No. 66257-1-I

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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ALAN G. WARNER,

Appellant,

v.

AESTHETIC LITETOUCH, INC., P.S.,

Respondent.

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BRIEF OF RESPONDENT  
AESTHETIC LITETOUCH, INC., P.S.

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## **I. INTRODUCTION**

In a prior appeal, this Court affirmed Jean E. Trost's liability for willfully and maliciously misappropriating trade secrets belonging to her former employer, Respondent Aesthetic Litetouch, Inc. P.S. ("ALT"). The Court reversed as to her husband, Appellant Alan G. Warner's individual liability. Warner conceded the liability of his marital community on that appeal. In this second appeal, Warner now seeks to relitigate this issue, claiming that the original judgment did not reach his marital community, and seeking to vacate a superseding judgment that clarified that liability was against his marital community, but not him individually. Warner's position is without legal or factual support. Warner's unsupported claim that he later separated from Trost has no legal significance for the liability of his marital community.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court correctly apply the holding in this Court's previous Opinion that the Original Judgment entered against Warner does not impose liability on his marital community?
2. Did Warner waive his claim that the Original Judgment does not impose liability on his marital community by failing to raise the claim before this Court in his first appeal?

3. Did the trial court properly exercise its discretion in entering the Revised Judgment to clarify that liability was imposed against Warner's marital community but not against him individually, and to reflect the award of legal fees by this Court on Warner's initial appeal?

4. Should Warner's argument that he is separated from Trost be stricken for failure to provide record citations supporting the assertion?

5. Did the trial court correctly conclude that Warner's claimed separation did not preclude entry of judgment against his marital community?

6. Did Warner fail to preserve the claim that he was entitled to an accounting of funds recovered through garnishment?

7. Did the trial court correctly decline to order an accounting based on Warner's claim that he was not married to Trost at the time of her tortious misconduct and that the Original Judgment did not apply to his marital community?

### **III. COUNTER-STATEMENT OF THE CASE**

#### **A. Trost's removal of ALT's patient list.**

In 1999, John Paul Isbell, M.D. formed Aesthetic LiteTouch, Inc., P.S., ("ALT"), a high-end, cosmetic skincare medical practice. Opinion filed July 6, 2009 (under cause No. 61956-0-1) ("Op.") 2 (copy attached at

Appendix (“App.”) 1). ALT hired Jean E. Trost, a registered nurse, to run the practice and treat ALT’s patients under Dr. Isbell’s supervision. *Id.*

In August, 2005, Trost attempted to obtain a controlling interest in ALT, informing Dr. Isbell that one of ALT’s competitors, Bella Tu, Inc., had offered her a 50 percent ownership interest. *Id.* On Friday, August 12, 2005, Dr. Isbell rejected Trost’s demand and terminated Trost’s employment. *Id.* Dr. Isbell informed Trost that “she was ‘not to take any patient records or copy down any patient information on a chart.’” *Id.*

The following weekend, Trost “gathered computer discs containing lists of patient contact information and treatment histories.” *Id.* at 2-3. By the end of August, Trost was overseeing operations and treating patients at Bella Tu. *Id.* at 3.

**B. Trost’s solicitation of ALT’s patients for Bella Tu.**

“In September 2005, Trost used ALT’s patient lists to solicit business from individuals who had previously received treatment at ALT.”

Op. 3. The solicitation was by means of a letter that Trost sent in September 2005 to all 800 of ALT’s patients soliciting their business for Bella Tu. CP 1929-30; CP 182, 138. The letter was prepared sometime between September 6 and the middle of September, 2005, after Trost and Warner were married. CP 1929-30. 145 of ALT’s patients received treatment from Bella Tu over the next 16 months. Op. 3.

**C. Trost's marriage to Warner.**

Warner and Trost were married on August 24, 2005, before her solicitation of ALT's patients. CP 1921; CP 1695. In Appellant's Opening Brief ("Br."), Warner asserts, without record citation, that he and Trost have been "living separate and apart after the 9th day of May, 2009." Br. 4. Elsewhere in his brief, Warner asserts, again without record citation, that "Trost and Warner have been living separate and apart since September 2009." Br. 7. The record does not reflect that Warner has ever formally separated from Trost.

**D. Procedural History.**

**1. ALT's claims against Warner.**

In an ensuing lawsuit, ALT asserted a counterclaim against Trost, and corresponding third-party claims against Warner and Bella Tu, for misappropriation of trade secrets in violation of the Uniform Trade Secrets Act, RCW Chap. 19.108 RCW. CP 45.

The counterclaim alleged that, "[a]t all times relevant hereto, Warner has been married to Trost. All actions taken by Trost at issue herein have been taken for the benefit of the marital community comprised of Trost and Warner." CP 43. Warner denied this allegation. CP 48.

**2. Summary judgment.**

ALT's motion for partial summary judgment, seeking liability against Trost, Warner and Bella Tu on ALT's trade secrets claim, was granted on February 28, 2007. CP 504-09.

**3. Trial; verdict; entry of judgment.**

Following a subsequent trial, the jury found that the misappropriation of trade secrets was willful and malicious, and awarded ALT damages totaling \$424,000, exclusive of attorney's fees and costs. CP 1134-35; Op. 5.

Judgment was entered against Warner and Bella Tu on May 5, 2008. CP 1520-22 (the "Original Judgment"). Judgment was separately entered against Trost dated June 12, 2008. CP 1562-64. Entry of the latter judgment was delayed because of a stay resulting from Trost's filing for bankruptcy. CP 1444-45. That proceeding was dismissed on May 22, 2008. CP 1563.

**4. The First Appeal.**

Warner, Trost, and Bella Tu appealed to this Court from the entry of judgment. On appeal, Warner (appearing pro se and as attorney of record for Trost and Bella Tu) argued, *inter alia*, "Mr. Warner's liability should only reach his marital or community property." App. 2 at 21. This Court's Opinion affirmed the Original Judgment as to Trost and Bella Tu

in regard to their liability for misappropriation of trade secrets, but reversed as to Warner's personal liability. Op. 1. As a result of a de novo review of the record, this Court held that, "ALT failed to carry its initial burden on its misappropriation claim against Warner individually." Op. 13. The Court ruled that, "[i]n the absence of evidence that Warner was personally involved in the wrongdoing, it was improper for the trial court to grant summary judgment on the issue of Warner's individual liability. *Id.*, at 14.

While ordering reversal of the grant of summary judgment imposing liability on Warner individually, this Court "decline[d] to order dismissal of ALT's individual claims against Warner or to order the judgment amended so as to reach only Warner's share of his and Trost's community property," instead remanding the case for further proceedings. *Id.*, at 14 n.1.

This Court denied Warner's motion for reconsideration and the Supreme Court denied his petition for review. CP 1855. This Court issued a mandate remanding the case to the trial court on June 2, 2010. CP 1855-56.

**5. Entry of the judgment at issue on this appeal.**

After the case was remanded, the trial court issued an order entered July 16, 2010, ruling in part that, "[t]he judgment against Alan Warner in

his individual capacity is vacated. The Court reserves as to liability of his marital community.” CP 1933.

Contrary to what he had argued to this Court on appeal, Warner argued to the trial court that, “Alan Warner’s marital estate was not and could not have been included in the judgment.” CP 1953. Warner argued that ALT was seeking to “convert an overturned Judgment against third-party defendant Alan G. Warner, individually, in his separate estate, into a Judgment against his marital estate.” CP 1954.

On September 24, 2010, the trial court entered another order, rejecting Warner’s argument and ruling that, “[t]he judgment entered June 13, 2008 [the Original Judgment] indicates that the marital community comprised of Jean Trost and Alan G. Warner is liable.” CP 1971; CP 1562-64. The court explained that separate judgments had been entered at different times because a stay resulting from Trost’s filing for bankruptcy had prevented entry of judgment against Trost at the time judgment was originally entered against Warner and Bella Tu. CP 1563.

ALT subsequently moved for entry of a revised judgment, in part to take into account an award of attorney fees made by this Court and, in part, to address any uncertainties created by Warner’s stated position that the then-existing Original Judgment did not reach his marital community, that is, “to clarify that Warner’s marital community is liable on the

judgment, in accordance with [the trial] Court's September 24, 2010 Order." CP 1979. The trial court granted ALT's motion, and a final judgment in the amount of \$624,701.82 was entered on October 13, 2010 against "Jean E. Trost and the marital community of Jean E. Trost and Alan G. Warner." CP 2059-60 (the "Revised Judgment").

**6. Warner's current appeal.**

Warner, again acting *pro se* and as counsel for Trost, filed a Notice of Appeal dated November 11, 2010, seeking review by this Court and this appeal ensued. CP 2066-67. (After filing the Notice of Appeal, Warner retained counsel for the briefing of this appeal.)<sup>1</sup> He now seeks to vacate the Revised Judgment to the extent it imposes liability against his share of the marital community. Br. 7. He does not contest his wife's liability. He also seeks an accounting of the funds recovered through garnishment and the calculation of interest in the Revised Judgment. Br. 10.

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<sup>1</sup> Although the Notice of Appeal purports to be on Trost's behalf, no arguments before this Court relate to the judgment entered against Trost. Indeed, if Warner is successful in his appeal, the effect will be to leave Trost as the only individual judgment debtor in this case. His opening brief refers to Warner as the sole "Appellant," although the title page to his brief identifies Trost as an additional appellant. Br. 1.

#### IV. ARGUMENT

**A. The Trial Court Correctly Entered Judgment Against Warner's Marital Community Because Trost's Tortious Misconduct Benefited The Marital Community And Because Trost And Warner Were Not Legally Separated When Judgment Was Entered.**

Warner previously argued before this Court in his first appeal, "Mr. Warner's liability should only reach his marital or community property." App. 2. Warner now does an about-face and argues that the trial court improperly directed entry of a judgment that "include[s] his one-half of the marital community." Br. 9. For the reasons that follow, the trial court correctly entered judgment against Warner's share of his marital community with the Revised Judgment, which simply clarified the Original Judgment and supplemented the amount owed because of the accumulation of additional legal fees and interest.

**B. Warner Has Waived Any Argument That The Original Judgment Did Not Reach The Marital Community.**

Warner argues that the Original Judgment, entered before his first appeal to this Court, was "taken against Warner individually" and did not reach his share of his marital community. Br. 9. That issue was not raised in his earlier appeal. Accordingly, it has been waived. Not only was it not raised but, as noted above, he acknowledged the Original Judgment did reach his marital community. This Court made clear that the then-existing Original Judgment reached "Warner's share of his and Trost's community

property” but left for further litigation the issue of Warner’s individual liability. Op. 14 n. 4. Thus, while the issue whether the Original Judgment reached Warner’s and Trost’s marital community was unchallenged by Warner on appeal, this Court nevertheless addressed and confirmed that in its Opinion. Warner’s effort to relitigate this issue should be rejected.

**C. Warner’s Marital Community Was Properly Held To Be Liable For Trost’s Tortious Misconduct.**

While ALT believes the issue whether Warner’s marital community was properly held liable has already been established, should this Court be inclined to revisit the issue, the law is clear that Warner’s marital community was properly held to be liable for his wife’s willful and malicious misappropriation of trade secrets. In *LaFramboise v. Schmidt*, 42 Wn.2d 198, 254 P.2d 485 (1953), our Supreme Court held a marital community liable for indecent liberties committed by the husband against a young girl. In that appeal, the Schmidts claimed the marital community could not be liable because the husband committed the acts individually. The court rejected that defense, holding that a marital community is liable for misconduct of a spouse if “the wrong either (1) results or is intended to result in a benefit to the community or (2) is committed in the prosecution of the business of the community.” *Id.*, at 200. Because the care of the

girl had been entrusted to the community's care, the court held that the husband's criminal misconduct was "done in the course of the community's business." *Id.* Last year, in *Clayton v. Wilson*, 168 Wn.2d 57, 65, 227 P.3d 278 (2010), our Supreme Court reaffirmed that "*LaFramboise*'s approach to community liability remains good law."

There can be no question that Trost's misappropriation of trade secrets benefited the marital community financially, since Trost was a 50 percent owner of Bella Tu, which benefited through the diversion of ALT's customers. CP 165. The tortious solicitation of ALT's patients using its trade secret information occurred in September 2005, after Warner's marriage to Trost the previous month. Op. 3; CP 1929-30; 138; 1921. This Court noted, in its earlier Opinion, that Bella Tu received \$119,000 in revenue during a 16-month period from ALT patients solicited by Trost. Op. 2-3. Thus, Trost's tortious misconduct was committed in a business directly benefiting Warner's marital community.

**D. The Trial Court Did Not "Amend" The Judgment To Include Warner's Marital Community. Even If It Did, The Court Did Not Err In Doing So.**

The Revised Judgment merely accounts for accrued fees and interest, and clarifies the status of the Original Judgment in light of Warner's initial appeal. The Court of Appeals employs an abuse of discretion standard in reviewing motions to amend a judgment.

*Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 454, 191 P.3d 879 (2008). Whether the applicable standard is an abuse of discretion; whether the Revised Judgment is deemed to present an issue of law amenable to de novo review; or whether it presents an issue of fact requiring substantial evidence, the Revised Judgment simply embodies an act of prudent house-keeping, correctly clarifying the status of the Original Judgment.

As detailed above, in Warner's initial appeal, he conceded the Original Judgment reached his marital community and this Court left that liability intact. Notwithstanding that history, following remand to the trial court, Warner asserted, "the [trial] court did not grant judgment against Alan Warner in his marital community." CP 1920. The trial court correctly rejected that mischaracterization of the Original Judgment. CP 1971; CP 1562-64. The court correctly observed that separate judgments had been entered against Trost and Warner at different times because the bankruptcy stay had prevented entry of judgment against Trost at the time judgment was originally entered against Warner. CP 1563.

The Revised Judgment merely reflects a housekeeping matter that benefited Warner because the Revised Judgment makes clear it does not apply to his separate property but only to his marital community. It was

entered on October 13, 2010 against “Jean E. Trost and the marital community of Jean E. Trost and Alan G. Warner.” CP 2059-60.

**E. Warner’s Claimed Separation Has No Legal Impact On The Revised Judgment.**

The thrust of Warner’s argument appears to be that the Revised Judgment is improper because he and Trost “have been living separate and apart since September 2009,” or because they “separated on May 9, 2009.”

Br. 7. There is neither factual support for these contradictory factual assertions nor legal support for the proposition that this would preclude entry of judgment against Warner’s marital community.

**1. The argument should be stricken because it is predicated on unsupported factual assertions.**

Under RAP 10.3(a)(5) and (6), the factual assertions in the Statement of the Case and the Argument sections of Warner’s brief must be supported by references to relevant parts of the record on appeal. One of the central factual assertions in Warner’s brief is that he and Trost began living “separate and apart” in September 2009 and “separated” on May 9, 2009. Br. 7; *see also* 4. Because neither assertion is supported by a record citation, the arguments based on these assertions should be stricken for failure to comply with a fundamental rule of appellate procedure.

**2. There is no legal merit in Warner's argument because he has presented no evidence of a legal separation in compliance with statutorily mandated procedures.**

Warner's sole statutory support for his contention that the Revised Judgment is improper because of his claimed separation is RCW 26.16.140 (copy attached at App. 3). That statute has no bearing on whether the trial court had the power to enter the Revised Judgment.

The statute merely provides in relevant part that, "[w]hen spouses or domestic partners are living separate and apart, their respective earnings and accumulations shall be the separate property of each." *Id.* As explained in *Kerr v. Cochran*, 65 Wn.2d 211, 225, 396 P.2d 642 (1964), the act "has no effect on the status of property acquired prior to the separation, nor does it dissolve the marital community." Thus, RCW 26.16.140 should not prevent entry of a judgment against an existing marital community (much less entry of a judgment that simply clarifies a pre-existing judgment against the marital community) or otherwise affect the ability of creditors to proceed against assets of the marital community. It only affects what assets may be executed upon in enforcing the judgment. Moreover, as the court held in *Seizer v. Sessions*, 132 Wn.2d 642, 657, 940 P.2d 261 (1997), citing *Kerr*, "[m]ere physical separation does not dissolve the community."

Warner makes no reference to a formal decree of separation or separation contract, the statutorily recognized procedures for obtaining a legal separation. *See* RCW 26.09.070(1) (see copy attached at App. 4). Thus, there is no evidence that ever legally separated from Trost.

In short, Warner was married and living with Trost when Trost tortiously solicited ALT's patients and when the Original Judgment was entered. At the time the Revised Judgment was entered (a judgment that relates back to the Original Judgment insofar as it simply clarifies the scope of the Original Judgment), Warner remained married and was not legally separated.<sup>2</sup> Thus, nothing in RCW 26.16.140 calls into question the validity of the Revised Judgment.

**F. Warner Is Not Entitled To An Accounting.**

Finally, Warner argues that the trial court should have ordered an accounting of funds recovered through garnishment and "to determine if the amount of interest requested by ALT was accurate." Br. 10. He is not entitled to an accounting.

Warner sought the relief in a motion by which he sought "to dismiss all judgments against the Third-Party Defendant, Alan Warner in the above entitled Action." CP 1880. There, he also sought an accounting and an order directing ALT to disgorge all funds collected from him. CP

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<sup>2</sup> Even if the Revised Judgment were invalid, since it replaced the Original Judgment, the Original Judgment would still provide for liability of Warner's marital community.

1881. There were two bases for Warner's requesting this relief: (1) "the court did not grant judgment against Alan Warner in his marital community;" and (2) "Alan Warner was not married to Jean Trost at the time of the misappropriation,..." CP 1920. The trial court properly rejected those arguments for the reasons discussed above. CP 1933, 1971.

"In Washington, all property acquired during marriage is presumptively community property." *Marriage of Mueller*, 140 Wn. App. 498, 501, 167 P.3d 568 (2007), *review denied*, 163 Wn.2d 1043, 187 P.3d 270 (2008). Despite this presumption, and despite the fact that the garnishments were all documented in appropriate pleadings, Warner points to nothing in the record to suggest any garnishment yielded separate property. As for the interest calculations, Warner had an opportunity to present a differing calculation of interest at the time judgment was entered. Again, he cites to nothing in the record showing that the trial court erred. Indeed, he does not even show the issue was raised below. Neither of these issues was presented in a fashion to allow ALT to respond further in this brief, given the utter lack of specificity to the argument.

## V. CONCLUSION

Before this Court on his last appeal, Warner conceded the liability of his marital community. He now disavows that position, and seeks to relitigate the liability of his marital community for his wife's tortious

misconduct. The trial court did not abuse its discretion in entering a revised judgment, relating back to the original judgment entered herein, to clarify that Warner's marital community, but not Warner individually, was liable to ALT. Warner's claimed separation is unsupported in the record. Even if it were, it has no legal significance as to the continuing liability of his marital community. Finally, he is not entitled to an accounting of funds collected on the original judgment.

RESPECTFULLY SUBMITTED this 5th day of August, 2011.

KELLER ROHRBACK L.L.P.

By   
Rob J. Crichton, WSBA #20471  
Attorneys for Respondent Aesthetic  
Litetouch, Inc., P.S.

**CERTIFICATE OF SERVICE**

I, Florine Fujita, certify under penalty of perjury under the laws of the state of Washington that on August 5, 2011, I caused a true and correct copy of the foregoing Brief of Respondent Aesthetic Litetouch, Inc., P.S. to be delivered to counsel listed below in the manner indicated:

Kristina A. Driessen Law Office of Ryan & Driessen, Inc., P.S. 16 A St. SE Auburn, WA 98002-5433	<input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Email <input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile
Jean E. Trost, R.N. Bella Tu, Inc. 27814 NE 149th Court Duvall, WA 98019	<input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Email <input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile

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DATED this 5th day of August, 2011.

  
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Florine Fujita

**APPENDIX**

1. Division I Court of Appeals, No. 61956-0-I  
Unpublished Opinion filed July 6, 2009 ..... A-1 - A-19
2. Cover page and pgs. 20-21 of Brief of Appellant  
filed January 26, 2009, No. 61956-0-I ..... A-20 - A-22
3. RCW 26.16.140 ..... A-23
4. RCW 26.09.070(1) ..... A-24

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEAN E. TROST, R.N.,	)	
	)	DIVISION ONE
Appellant,	)	
	)	No. 61956-0-1
v.	)	(Consolidated with No. 62256-1-1
	)	and No. 62257-9-1)
AESTHETIC LITETOUCH, INC., P.S., a	)	
Washington corporation; JOHN PAUL	)	
ISBELL, M.D., Officer/Medical Director,	)	
Aesthetic Litetouch, Inc.; MELISSA	)	UNPUBLISHED OPINION
ISBELL, Office Manager, Aesthetic	)	
Litetouch, Inc.; and JAMES E.	)	
FINNEGAN, Co-Owner/Manager,	)	
Aesthetic Litetouch, Inc.,	)	
	)	
Respondents,	)	
	)	
BELLA TU, INC., a Washington	)	
corporation, and ALAN G. WARNER,	)	
a married man, and his marital	)	
community,	)	
	)	
Appellants.	)	FILED: July 6, 2009

DWYER, A.C.J. — Jean Trost, Bella Tu, Inc., and Alan Warner appeal from the judgment entered in an action primarily involving cross-claims for infringement of Trost's right of publicity and misappropriation of trade secrets of Aesthetic Litetouch, Inc., P.S., Trost's former employer. Although we affirm the majority of the trial court's rulings, we hold that it erred in ruling both on Warner's individual liability for misappropriation of trade secrets and on Trost's claim for unpaid wages. We reverse the judgment on these two issues and remand the case to the trial court for further proceedings. We affirm in all other respects.

In 1999, Dr. John Paul Isbell and Dr. Kent Burk formed Aesthetic Litetouch, Inc., P.S., (ALT) a high-end, cosmetic skincare medical practice. They hired Jean E. Trost, an experienced registered nurse, to run the practice and treat ALT's patients. Trost did so for six years, largely without the doctors' day-to-day involvement. At all times, however, Trost worked under the supervision of either Dr. Isbell or Dr. Burk, as they were ALT's medical directors. Trost also appeared in various advertisements for ALT, including those published in telephone directories. Trost never held an ownership interest in ALT; she was a salaried employee. The parties dispute whether Trost was promised a commission in addition to her salary.

In early August 2005, Trost attempted to negotiate an increase in her salary and obtain a controlling interest in ALT from Dr. Isbell, who was by then the sole owner of the practice. She informed Dr. Isbell that one of ALT's competitors, which turned out to be Bella Tu, Inc., had offered her a 50 percent ownership stake and a higher salary than she was earning at ALT. On Friday, August 12, Dr. Isbell formally rejected Trost's demand and effectively terminated her employment. Dr. Isbell permitted Trost to maintain her access to ALT's office so that she could remove her personal belongings. He further informed her that she was "not to take any patient records or copy down any patient information on a chart." Over the ensuing weekend, however, Trost destroyed templates for patient forms that she had created for ALT's use and which were on file at ALT's office. She also gathered computer discs containing lists of patient contact

information and treatment histories.

The following Monday, August 15, Dr. Isbell confronted Trost about the missing templates in a meeting that Trost's then-fiancée, Alan Warner, also attended.<sup>1</sup> Trost refused to return the templates. Dr. Isbell testified that, after Trost refused to restore the form templates, he turned to Warner and said, "Alan, it's—when you're an employee and you create something for a company in which you're employed, those are not your personal items. Those belong to the company." Dr. Isbell was apparently unaware that Trost also had the patient lists.

By the end of August 2005, Trost had begun overseeing operations and treating patients at Bella Tu. In September 2005, Trost used ALT's patient lists to solicit business from individuals who had previously received treatment at ALT. Over the course of the next 16 months, 145 of these patients received treatment at Bella Tu, producing revenues in excess of \$119,000.

As Bella Tu's business grew, ALT's revenues shrank. ALT's troubles continued even after ALT and James Finnegan, LLC, formed a partnership for the latter to manage ALT's operations. As a result of the declining revenues, ALT ceased operations in the fall of 2006.

Before ALT closed, however, Trost filed a complaint in March 2006 against "Aesthetic Litetouch, Inc., a Washington corporation," as well as Dr. Isbell, Melissa Isbell, and James Finnegan, the principal shareholder of James

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<sup>1</sup> Warner and Trost married at some point after this meeting. Warner, who is an attorney, represents Trost, Bella Tu, and himself in this case.

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Finnegan, LLC, all in their capacity as officers of ALT. She brought 19 causes of action arising out of ALT's alleged infringement of her statutory and common law rights of publicity. (After she left ALT, Trost's name and picture continued to appear in some of ALT's advertisements, including telephone directory advertisements that had been placed and approved by Trost when she was still employed by ALT.) ALT subsequently counterclaimed against Trost, Bella Tu, and Warner, alleging that they had misappropriated ALT's trade secrets in the form of its patient lists.<sup>2</sup>

The trial court subsequently granted several dispositive pretrial motions in favor of ALT, the Isbells, and Finnegan. It ruled on summary judgment that Trost, Bella Tu, and Warner were liable for misappropriation of ALT's trade secrets, leaving the question of damages for the jury's determination. The trial court also dismissed Trost's claims against the individual defendants and allowed ALT to amend the case caption to reflect its status as a professional service corporation.

A significant focus of discovery concerned Bella Tu's disclosure of those ALT patients Trost had solicited and the amount of revenue Bella Tu had earned as a result of Trost's marketing email using ALT's patient list. Trost repeatedly failed to produce financial records that ALT had requested, despite multiple orders from the trial court compelling Trost to do so. Finally, months after ALT initially requested the documents and well after the deadline for the disclosure of

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<sup>2</sup> For simplicity, we refer to Trost, Bella Tu, and Warner collectively as "Trost," unless an issue pertains to only one or two of these parties.

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expert witness reports, Trost provided financial records.

Discovery-related problems then led to disputes over the parties' expert witnesses. In response to Trost's objection that ALT had failed to timely disclose its economic expert's report, the trial court admitted the testimony of ALT's expert, ruling that it was Trost's dilatory behavior that caused ALT's delay. ALT sought to exclude two witnesses that Trost listed as financial experts on the ground that Trost never submitted reports for either witness. Although Trost initially argued that her tardiness was due to ALT's delay in disclosing its expert's report, at a subsequent hearing, she stipulated to limitations on the witnesses' testimony.

The jury found in favor of ALT on all of its claims. It found that Trost's misappropriation of trade secrets was willful and malicious and awarded ALT \$305,000 in compensatory damages for future lost profits and \$119,000 on ALT's claim for unjust enrichment. The jury also found that ALT had infringed Trost's right of publicity, but it did not find that Trost had thereby suffered any compensable injury. After the trial concluded, the parties agreed to have the trial court adjudicate Trost's claim against ALT for unpaid wages, which Trost had failed to raise in a timely manner before trial. The trial court found that Dr. Isbell had promised to pay Trost 15 percent of ALT's profits and subsequently awarded Trost \$17,246.20 to be offset against ALT's recovery. The trial court also awarded Trost \$1,500 in statutory damages for each of the nine instances of infringement of her publicity right, a total of \$13,500, also to be offset against ALT's award. It declined, however, to increase this amount, noting that the jury

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did not find that Trost had suffered any compensable injury. With the offsets, ALT's net damages award came to \$393,253.80. The trial court also awarded each side attorney fees, offsetting ALT's fee award with those fees awarded to Trost.

II

Trost first contends that the trial court erred by treating ALT as a professional service corporation, allowing ALT to amend the case caption to reflect its corporate status, and dismissing her claims against the individual defendants. We disagree.

The Professional Service Corporation Act, chapter 18.100 RCW, provides for the creation of business entities, known as professional service corporations, to render healthcare services. RCW 18.100.050(1). The abbreviations P.C. or P.S. are used to distinguish a professional corporation from other business entities. RCW 18.100.030 (1), (2). The record is replete with evidence that ALT operated as a professional service corporation. That ALT did not clarify its status when filing its counterclaim is attributable to the original error in the caption of Trost's complaint. Further, it does not matter that ALT entered into a partnership with James Finnegan, LLC, as the remedy for such arrangements, if not authorized by law, is for the court to leave the parties to that arrangement where they are found. Morelli v. Ehsan, 110 Wn.2d 555, 562, 756 P.2d 129 (1988) (citing Sherwood & Roberts-Yakima, Inc. v. Leach, 67 Wn.2d 630, 637, 409 P.2d 160 (1965); Hederman v. George, 35 Wn.2d 357, 361, 212 P.2d 841 (1949)). Accordingly, the trial court correctly treated ALT as a professional service

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corporation.

In light of ALT's corporate status, the trial court properly allowed ALT to amend the case caption. Pursuant to CR 15, amendment of the case caption to reflect the true identity of a party is allowable when doing so will not result in prejudice to another party. Prof'l Marine Co. v. Certain Underwriters at Lloyd's, London, 118 Wn. App. 694, 705, 77 P.3d 658 (2003) (citing In re Marriage of Morrison, 26 Wn. App. 571, 573-74, 613 P.2d 557 (1980)). Here, the amendment to the case caption ensured that the correct entity was listed as a party to this suit. Trost remained able to proceed on her claims and faced no additional liability as a result of the amendment.

The trial court's dismissal of Trost's claims against the individual defendants was also proper. Trost does not contend that the individual defendants infringed her rights of publicity for personal gain. Thus, their actions on behalf of ALT and James Finnegan, LLC, do not fall within the narrow set of circumstances under which "corporate officers may face personal liability for tortious conduct other than by piercing the corporate veil." Consulting Overseas Mgmt., Ltd. v. Shtikel, 105 Wn. App. 80, 84, 18 P.3d 1144 (2001) (citing Dodson v. Econ. Equip. Co., 188 Wash. 340, 343, 62 P.2d 708 (1936); Grayson v. Nordic Constr. Co., 92 Wn.2d 548, 554, 599 P.2d 1271 (1979); Johnson v. Harrigan-Peach Land Dev. Co., 79 Wn.2d 745, 753, 489 P.2d 923 (1971)). There was no error.

III

The next question is whether the trial court erred by granting summary judgment against Trost and Bella Tu on ALT's trade secrets claim. It did not.

On appeal from summary judgment, we engage "in the same inquiry as the trial court, construing the facts and reasonable inferences therefrom in the manner most favorable to the nonmoving party to ascertain whether there is a genuine issue of material fact." Sellsted v. Wash. Mut. Sav. Bank, 69 Wn. App. 852, 857, 851 P.2d 716 (1993), overruled on other grounds by Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995).

Pursuant to the Uniform Trade Secrets Act, chapter 19.108 RCW, a compilation of information is a protected trade secret if it derives independent economic value by not being known by others who could benefit from it, and if it is subject to reasonable efforts to maintain secrecy. RCW 19.108.010(4)<sup>3</sup>; see also Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 442, 971 P.2d 936 (1999). Trost does not dispute that the patient lists at issue constitute a compilation of information. Rather, she contends that the other two criteria—the information's economic value and reasonable efforts to maintain secrecy—are not satisfied.

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<sup>3</sup> RCW 19.108.010(4) provides, in relevant part:

"Trade secret" means information, including a . . . compilation . . . that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Both Trost's deposition testimony and her complaint belie her assertion that the patient lists are not valuable. Trost testified in her deposition that cosmetic skincare practices compete for the same patients and that the information contained in ALT's patient lists were specifically valuable to Bella Tu for marketing purposes. As Trost put it: "Well, of course, you know, as anyone in our business, we would love to have that information [compiled in ALT's patient list] so we could focus our targeting—our advertising better." In her complaint, Trost characterized Bella Tu as a direct competitor of ALT's. Indeed, as a result of soliciting business from individuals who had previously received treatment at ALT, Bella Tu earned approximately \$119,000 in revenues. Thus, there is no genuine issue of material fact as to whether ALT's patient lists constituted a valuable compilation of information.

A review of the record also reveals that there is no genuine issue of material fact as to whether ALT took reasonable steps to secure the information on its patient lists. As both parties point out, the patient information contained on the list is protected by various privacy statutes and is therefore private in nature. Trost also confirmed in her deposition that Dr. Isbell told her on her last full day of employment "not to take any patient records or copy down any patient information on a chart" and that she agreed not to do so. Her argument that she complied with Dr. Isbell's instructions because she already possessed some of the patient lists before her employment ended is absurd. Based on the evidence in the record, ALT took reasonable steps to maintain the secrecy of the information contained in the patient lists.

Having concluded that the patient lists are protected trade secrets, we must next determine whether Trost and Bella Tu misappropriated the information contained therein. Pursuant to the Uniform Trade Secrets Act, misappropriation includes:

- (a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
  - (i) Used improper means to acquire knowledge of the trade secret; or
  - (ii) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was (A) derived from or through a person who had utilized improper means to acquire it, (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.

RCW 19.108.010(2). "Person" includes a corporate entity. RCW 19.108.010(3).

Based on the evidence in the record, there is no issue of material fact as to whether Trost and Bella Tu improperly acquired and disclosed the information contained in ALT's patient lists. In blatant disregard of Dr. Isbell's admonition not to take any patient information with her after she stopped working for ALT, Trost used ALT's patient lists to solicit business for Bella Tu. Given that Trost is an officer and fifty percent owner of Bella Tu, her actions are properly imputed to the company.

Trost's various arguments to the contrary are without merit. ALT, not Trost, owned the lists. Trost's assertion that a professional service corporation cannot have patients is at odds with the Professional Service Corporation Act, as

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discussed above. Trost acknowledged that she never owned any shares in the company and that she created the patient lists and used them in her capacity as ALT's employee. Trost further acknowledged that "as a registered nurse, I work under the supervision of a physician" and that she does so "at all times." To the extent that any of the individuals who received treatment at ALT considered themselves to be Trost's patients, they were so only as a result of Trost's status as an ALT employee. Moreover, no support exists for Trost's claim that she had a professional responsibility to inform ALT's patients of her new whereabouts. Finally, she should have raised any concern about false advertising to the appropriate administrative disciplinary authority pursuant to the procedures in RCW 18.130.080. No authority justified Trost's resort to self-help. Accordingly, the trial court properly granted summary judgment against Trost and Bella Tu on this claim.

#### IV

Warner separately contends that the trial court erred by holding him individually liable for misappropriation of ALT's trade secrets. We agree.

Again, in reviewing an order granting summary judgment, we sit in the same capacity as the trial court with respect to the evidence. A party may move for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case. Guile v. Ballard Cmty. Hosp., 70 Wn. App. 18, 21, 851 P.2d 689 (1993). The moving party bears the initial burden of showing that there is no genuine issue of material fact. Green v. A.P.C., 136 Wn.2d 87, 99, 960 P.2d 912 (1998).

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A de novo review of the record reveals that ALT failed to carry its initial burden on its misappropriation claim against Warner individually. To begin with, ALT did not allege facts in its complaint that support a misappropriation claim against Warner individually. ALT referred to Warner only as Trost's husband and alleged that "[a]ll actions taken by Trost at issue herein have been taken for the benefit of the marital community comprised of Trost and Warner." ALT's brief in support of its motion for summary judgment did not address Warner's conduct. No evidentiary support for the claim is present in the record. On appeal, to support its judgment against Warner individually, ALT points to Dr. Isbell's comment to Warner concerning the patient form templates constituting ALT's property. However, this statement does not establish Warner's individual liability for misappropriation of ALT's trade secrets. Warner did not work for ALT. There is no allegation that he personally used ALT's patient lists to solicit business. At most, Dr. Isbell's statement establishes that he had a conversation with Warner about Trost's actions.

ALT now also argues that it was entitled to summary judgment because Warner did not actively contest his personal liability in the trial court, even though he was named as an individual defendant in ALT's counterclaim. Be that as it may, Warner's silence does not establish his personal liability. Pursuant to CR 56(c), ALT had the burden to establish Warner's individual liability. It failed to do so. In the absence of any evidence of Warner's personal wrongdoing, it was

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improper for the trial court to grant summary judgment on the issue of Warner's individual liability. Therefore, reversal is required.<sup>4</sup>

V

Trost next contends that the trial court erred by admitting the testimony of ALT's expert witness on damages while also limiting the scope of her economic experts' testimony. Once again, we disagree.

A trial court's ruling on the admissibility and scope of expert testimony is reviewed for abuse of discretion. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Pursuant to King County Local Rule (KCLR) 26(b), parties must disclose primary and rebuttal witnesses according to the case management schedule set for the case. As regards expert witnesses, the disclosure must include a "summary of the expert's opinions and the basis therefore and a brief description of the expert's qualifications." KCLR 26(b)(3)(C). "Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires." KCLR 26(b)(4).

There was good cause for ALT's delay in producing the report of its economic expert: Trost's repeated failure to produce requested documents. As the trial court observed, ALT's delay in filing its expert report was attributable to

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<sup>4</sup> We decline to order dismissal of ALT's individual claims against Warner or to order the judgment amended so as to reach only Warner's share of his and Trost's community property. Having prevailed against Warner individually in its motion for summary judgment, it was reasonable for ALT not to introduce evidence against Warner individually at trial. Warner did not seek summary judgment dismissal of the claims against him individually. Accordingly, we remand the case for further proceedings.

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Trost's dilatory conduct. The trial court did not abuse its discretion in admitting the testimony of ALT's expert witness.

With respect to the trial court's ruling on Trost's economic experts' testimony, the record establishes that Trost stipulated to the limitations that the court imposed on their expected testimony.<sup>5</sup> Accordingly, she waived the ability to raise this issue on appeal.<sup>6</sup> RAP 2.5(a).

## VI

Next, Trost contends that the jury's award of damages to ALT—\$305,000 in future lost profits and \$119,000 for unjust enrichment resulting from Trost's use of ALT's patient list—is not supported by substantial evidence. She is wrong.

We will not overturn a jury verdict unless the verdict is outside the range of substantial evidence in the record, shocks the conscience of the court, or appears to result from passion or prejudice. Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 268–69, 840 P.2d 860 (1992) (quoting Bingaman v. Grays Harbor Cmty. Hosp., 103 Wn.2d 831, 835-37, 699 P.2d 1230 (1985)). Substantial evidence is evidence sufficient to “convince an unprejudiced, thinking mind.” Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 179, 116 P.3d 381 (2005) (internal quotation marks omitted) (quoting Indus. Indem. Co. of N.W., Inc. v. Kallevig, 114 Wn.2d 907, 916, 792 P.2d 520 (1990)).

With respect to the jury's award of future lost profits, Dr. Isbell testified that

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<sup>5</sup> The trial court specified that its written order excluding the testimony of Trost's expert witnesses as experts was “based on agreement [that they] are fact witnesses.”

<sup>6</sup> Even if the trial court had excluded these witnesses, as Trost contends, it would not have abused its discretion in doing so because Trost never submitted an expert report for either witness.

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ALT stood to earn \$500,000 in profits over the five-year period following Trost's misuse of ALT's patient lists. Trost does not dispute that five years into the future is the relevant timeframe for the calculation of future lost profits. ALT's economic expert, Michelle Swanson, testified that, based on six years' worth of ALT's financial records, ALT stood to earn \$650,000 in profits through 2009. Because Swanson's estimates were based on profit history, they were not speculative. See Larsen v. Walton Plywood Co., 65 Wn.2d 1, 15-17, 390 P.2d 677, 396 P.2d 879 (1964). Further, Bella Tu's business manager, Dorene Harrison, confirmed in her testimony at trial that the 145 former ALT patients who switched to Bella Tu after receiving Trost's emails would have accounted for \$362,500 in revenue.<sup>7</sup> Therefore, the jury's award of \$305,000 for future lost profits was within the range of the evidence introduced at trial.

With respect to the jury's award of \$119,000 on ALT's claim for unjust enrichment, Trost contends that this amount is based on evidence only of Bella Tu's gross revenues, not its profits. The general rule is that "[a] person has been unjustly enriched when he has profited or enriched himself at another's expense, contrary to equity." Cox v. O'Brien, \_\_\_ Wn. App. \_\_\_, 206 P.3d 682, 688 (2009)

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<sup>7</sup> On cross-examination, Harrison testified as follows:

Q. Go with me for a second. If each patient from Aesthetic Litetouch did yield 2,500 in dollars in revenues, if my arithmetic is right, that's \$362,500, does that look about right?

...

A. Yes.

Report of Proceedings (Jan. 28, 2008) at 52.

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(citing Dragt v. Dragt/DeTray, LLC, 139 Wn. App. 560, 576, 161 P.3d 473 (2007), review denied, 163 Wn.2d 1042 (2008)). Thus, the proper remedy is to disgorge wrongfully obtained profits. Staff Builders Home Healthcare, Inc. v. Whitlock, 108 Wn. App. 928, 932–33, 33 P.3d 424 (2001). The jury's award appears to be derived from Harrison's testimony that Bella Tu received \$119,000 in revenue from the 145 former ALT patients it treated in the first 16 months after Trost began working for Bella Tu.<sup>8</sup> Thus, the jury's award was not speculative. There is no indication that Trost sought to clarify at trial whether these revenues reflected gross earnings or profits. Nor did Trost object to the trial court's jury instructions on ALT's claim for unjust enrichment. Without providing any evidence of a contrary amount and in the absence of any objection to the court's instructions to the jury, Trost cannot now properly seek vacation of the jury's verdict.

## VII

Trost further contends that the trial court erred by declining to increase the amount of damages that it awarded to her on her claim that ALT infringed her right of publicity. Again, she is incorrect.

Pursuant to RCW 63.60.060(2), which provides a statutory cause of action for violation of one's publicity and personality rights,

[a]ny person who infringes the rights under this chapter shall be liable for the greater of [\$1,500] or the actual damages sustained as

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<sup>8</sup> Trost also admitted during discovery that between September 2005 and January 2007, 145 of ALT's former patients obtained treatment at Bella Tu, generating revenues of at least \$119,210. Trost did not specify in her discovery response whether this figure represents profit or gross revenue.

a result of the infringement, and any profits that are attributable to the infringement and not taken into account when calculating actual damages. To prove profits under this section, the injured party or parties must submit proof of gross revenues attributable to the infringement, and the infringing party is required to prove his or her deductible expenses.

Although the jury found that ALT infringed Trost's rights under chapter 63.60 RCW, it did not find that Trost suffered any injury as a result of ALT's reference to her in its advertisements. Consistent with RCW 63.60.060(2)'s mandate, the trial court determined that there were nine instances in which ALT infringed Trost's right of publicity. It awarded \$1,500 for each instance but declined to award additional damages, citing the jury's verdict.

Trost argues that the trial court should have awarded additional damages to her because the statute does not preclude recovery of damages just because a jury finds that the plaintiff has not suffered any injury. However, Trost approved of the instruction and verdict form that the trial court gave to the jury regarding the calculation of any award for damages. In her present argument, she also ignores the statutory requirement that she, as the claimant, had the burden to "submit proof of gross revenues attributable to the infringement." RCW 63.60.060(2). She points to nothing in the record that establishes her right to recover damages greater than the statutory amount. Nor does our independent review of the record reveal any such evidence. The trial court did not err.

#### VIII

Trost's final contention is that the trial court erred in calculating the amount of damages that she was owed for unpaid commissions during her tenure with

ALT. We agree.

It is unlawful for an employer to willfully withhold wages that it is obligated to pay an employee. RCW 49.52.050. An employer who does so shall be liable to the aggrieved employee "for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages." RCW 49.52.070. Thus, "[t]he critical determination in a case [for exemplary damages] is whether the employer's failure to pay wages was 'willful.'" Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 159, 961 P.2d 371 (1998). "Ordinarily, the issue of whether an employer acts 'willfully' for purposes of RCW 49.52.070 is a question of fact." Schilling, 136 Wn.2d at 160 (citing Pope v. Univ. of Wash., 121 Wn.2d 479, 490, 852 P.2d 1055, 871 P.2d 590 (1993)).

The trial court specifically found that Dr. Isbell had promised to pay Trost 15 percent of monthly profits. The trial court further found that, according to ALT's tax returns, the practice generated the following income: \$15,297 in 2000; \$39,392 in 2002; \$59,352 in 2003, and \$109,787 in 2004.<sup>9</sup> However, the trial court concluded that Trost "is entitled to 10 [percent] of the net profit in 2000 (\$3,935.20), and 15 [percent] of the profits made in 2003 and 2004 (\$13,311)," for a total award of \$17,246.20 to be offset against ATL's damages. It is unclear how the trial court calculated this award in light of its findings. Further, the trial court did not make a finding as to whether ALT's failure to pay Trost a commission was willful. That the parties stipulated to a bench trial on this claim

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<sup>9</sup> The tax returns for 1999, 2001, 2005, and 2006 reflect that ALT operated at a loss in each of these years. Trost does not contend otherwise.

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after the jury trial on the other claims does not absolve ALT from liability for exemplary damages. Accordingly, we reverse the trial court's award of damages and remand for a finding as to whether ALT's failure to pay a commission for net profits was willful and for a recalculation of damages.

IX

ALT requests an award of attorney fees on appeal for the continued litigation of its misappropriation claim. When there is a finding in the trial court that willful and malicious misappropriation exists, the prevailing party may recover attorney fees in the trial court and on appeal. RCW 19.108.040; Thola v. Henschell, 140 Wn. App. 70, 90, 164 P.3d 524 (2007) (citing RCW 19.108.040; Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 668, 935 P.2d 555 (1997)). The jury so found, and the trial court awarded ALT attorney fees. Accordingly, ALT is entitled to an award of attorney fees on appeal, and it may file a subsequent motion for the entry of such an award.<sup>10</sup>

Affirmed in part. Reversed and remanded in part.

Dwyer, A.C.J.

We concur:

Jain, J.

Cox, J.

<sup>10</sup> Trost, Bella Tu, and Warner made no request for an award of attorney fees on appeal.

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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JEAN E. TROST, R.N., BELLA TU, INC, and ALAN WARNER,  
Appellants,

V.

AESTHETIC LITETOUCH, INC., P.S., JOHN PAUL ISBELL, M.D.,  
MELISSA ISBELL and JAMES E. FINNEGAN

Respondents.

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APPELLANTS OPENING BRIEF

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1 129 (January 24, 2008). Yet, the jury awarded ALT \$305,000 for future net lost revenues as a  
2 result of losing its patient lists, and \$119,000 for unjust enrichment, reflecting a 300% premium  
3 for the entire tenure of the business.

4 As the trial court noted:

5 “...the jury’s award appeared to be extremely generous in light of the fact that the  
6 evidence amply demonstrated that after Ms. Trost left, ALT was not able to perform  
7 many of the procedures it had performed when she had been employed there. Although  
8 Dr. Isbell was qualified to perform the procedure, he was managing his ob/gyn practice  
9 and had little time to devote to aesthetic procedures. The evidence was clear that it was  
very difficult to hire and retain nursing staff qualified to perform the type of aesthetic  
procedures that ALT had previously offered its patients. It thus appears that the figure  
the jury settled on assumed that ALT would be able to resume performing these  
procedures had Ms. Trost not misappropriated the patient lists.”

10 CP 221, 222. In denying Ms. Trost’s motion, the trial Court cited only a lengthy and costly  
11 litigation process. *Id.*

12 VIII. THE TRIAL COURT ERRED IN ASSIGNING LIABILITY AGAINST MR.  
13 WARNER IN HIS INDIVIDUAL CAPACITY.

14 Under Washington law, community property cannot be garnished to satisfy the separate debt  
15 of one spouse. RCW 26.16.200. But if one member of a marriage commits a tort, e.g.,  
16 conversion, her one-half interest in the community property may be used to satisfy a judgment  
17 obtained by the tort victim. *See deElche v. Jacobsen*, 95 Wn.2d 237, 246, 622 P.2d 835 (1980);  
18 *see also Keene v. Edie*, 131 Wn.2d 822, 834-35, 935 P.2d 588 (1997). On summary judgment,  
19 the trial Court found that Ms. Trost had unlawfully misappropriated trade secrets under the  
20 Washington Trade Secrets Act, RCW 19.108. CP 45. The Court made no determination as to  
whether Mr. Warner, in his individual capacity, participated in the misappropriation. *Id.*

21 Further, because ALT’s claim against Ms. Trost included third-party defendants, Bella Tu, Inc.  
22 and Alan G. Warner, a married man, “and his marital property,” Mr. Warner had at all times  
23

1 reasonably believed that only his marital property was implicated in this suit. Mr. Warner's  
2 liability should only reach his marital or community property.

3 IX. UNDER RCW 49.520.070 THE TRIAL COURT FAILED TO ASSIGN, BY WAY OF  
4 EXEMPLARY DAMAGES, TWICE THE AMOUNT OF MS. TROST'S WAGES  
WHICH WERE UNLAWFULLY WITHHELD BY ALT.

5 RCW 49.52.070 applies to employers who willfully and intentionally withhold an  
6 employee's wages. In such instances, the employer shall be liable in a civil action by the  
7 aggrieved employee or his assignee to judgment for twice the amount of the wages unlawfully  
8 rebated or withheld by way of exemplary damages. *Id.* In discovery, Ms. Trost realized that she  
9 had been underpaid commissions owed based on an agreed compensation structure with ALT.  
10 At trial, she argued that she was to be paid commission on gross revenues, as customary practice  
11 in sales. RP 27, 34-35 (January 23, 2008). However, the trial Court found, as a matter of law  
12 that unpaid commissions were owed by ALT, but that those commissions should be based on net  
13 revenues, because Ms. Trost did not bring her complaint until trial. CP 221, 222. The trial Court  
14 did not assign twice the amount of wages unlawfully withheld. *Id.* Ms. Trost argues that since  
15 ALT, her employer, withheld wages from her (an employee), RCW 49.52.070 applies and that  
16 twice the amount of wages owed by ALT should be assigned to her.

17 **E. Conclusion**

18 For the reasons set out above, Ms. Trost respectfully requests that the Court of Appeals find  
19 that the trial court erred in: (1) granting ALT summary judgment for misappropriation of trade  
20 secrets under RCW 19.108; (2) granting summary judgment, dismissing individual defendants,  
21 Dr. and Ms. Isbell and James E. Finnegan; (3) modifying the caption and effectively changing  
22 the pleadings; (4) failing to exclude evidence proffered by ALT's business expert; (5) failing to  
23 allow a rebuttal witness to address evidence proffered by ALT's business expert; (6) failing to

**RCW 26.16.140**

**Earnings and accumulations of spouses or domestic partners living apart, minor children.**

When spouses or domestic partners are living separate and apart, their respective earnings and accumulations shall be the separate property of each. The earnings and accumulations of minor children shall be the separate property of the spouse or domestic partner who has their custody or, if no custody award has been made, then the separate property of the spouse or domestic partner with whom said children are living.

RCW 26.09.070  
Separation contracts.

(1) The parties to a marriage or a domestic partnership, in order to promote the amicable settlement of disputes attendant upon their separation or upon the filing of a petition for dissolution of their marriage or domestic partnership, a decree of legal separation, or declaration of invalidity of their marriage or domestic partnership, may enter into a written separation contract providing for the maintenance of either of them, the disposition of any property owned by both or either of them, the parenting plan and support for their children and for the release of each other from all obligation except that expressed in the contract.

(2) If the parties to such contract elect to live separate and apart without any court decree, they may record such contract and cause notice thereof to be published in a legal newspaper of the county wherein the parties resided prior to their separation. Recording such contract and publishing notice of the making thereof shall constitute notice to all persons of such separation and of the facts contained in the recorded document.

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