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No. 96560-9

(Court of Appeals No. 76220-6-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FREEDOM FOUNDATION,

Petitioner/Defendant,

v.

SEIU HEALTHCARE NORTHWEST TRAINING PARTNERSHIP,

Respondent/Plaintiff.

**RESPONDENT SEIU HEALTHCARE NORTHWEST TRAINING
PARTNERSHIP'S ANSWER TO PETITION FOR REVIEW**

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I. INTRODUCTION

A disgruntled employee secretly downloaded two spreadsheets from respondent Training Partnership's confidential database and sold them to Petitioner Freedom Foundation ("FF") for \$12,000. The stolen spreadsheets comprised the names of over 42,000 Training Partnership students, along with their personally-identifiable information that the Training Partnership was obligated to maintain confidentially.

When the Training Partnership discovered FF had possession of its confidential student data, it sued. Its original complaint, filed before it learned how FF acquired access to the database, alleged a violation of Washington's Uniform Trade Secrets Act ("UTSA"), RCW ch. 19.108. After it learned that FF had paid a confidential source \$12,000 for the two spreadsheets, it amended its complaint to add a claim for replevin under RCW ch. 7.64. The superior court entered judgment ordering the spreadsheets returned, and Division One affirmed.

FF claimed that it would move to dismiss the UTSA claim because the Training Partnership could not prove its confidential student database was a trade secret. At the same time, it argued that the UTSA preempted the replevin claim. In short, it claimed the Training Partnership was entitled to no remedy at all as a result of FF's secret collusion with a disgruntled employee and possession of the stolen data. The trial court held, and the

appellate court agreed, however, that the Training Partnership was entitled to replevy its property which FF had no right to retain.

The appellate court's well-reasoned Opinion, attached as *Appendix A*, is in accord with Washington statutory and case law, and there is no basis for review of its decision by this Court.

II. IDENTITY OF RESPONDENT

Respondent SEIU Healthcare Training Partnership (the "Training Partnership") is an independent, nongovernmental IRC §501(c)(3) nonprofit charitable educational trust which operates a school for long-term care workers. It is also an ERISA multiemployer welfare benefit plan, receiving tuition for certain students in the form of contributions from participating employers, including Washington Department of Social and Health Services ("DSHS") and private care agencies.

III. STATEMENT OF THE CASE

A. The Training Partnership Maintains a Database with Confidential and Sensitive Personal Information About Its Students

The Training Partnership provides training to many Washington home care workers, some of whom are members of SEIU 775 and covered by a collective bargaining agreement between the State of Washington and SEIU 775. *See CP 1225-1226, ¶¶3-4; CP 1297, ¶5; 1299, ¶2.* The Training Partnership maintains a database with information on about 125,000 current

and former students. CP 1296, ¶3. The database includes confidential information including complete contact information (telephone numbers, addresses, email addresses), students' employment history as a home care aide, including their current primary and secondary employers, their credentials, and the last four digits of their social security number. *Id.*; CP 1300, ¶¶4-5. Although some of the information comes from DSHS, other information in the database is provided by the students or nongovernmental home care agencies that employ some students, while other information is added to the database by the Training Partnership. CP 1226, ¶¶4-5.¹

All the information in the student database is owned or lawfully possessed by the Training Partnership. *Id.*, ¶6. While some of the information originally came from the Washington DSHS pursuant to a “Datasharing Agreement,” the Training Partnership is not allowed to disclose that information without DSHS’s written permission. *Id.*; CP 969-971; *see* CP 1232-1251; CP 974-993 (Datashare Agreements with DSHS).

¹ FF misstates the record by asserting the student lists are “undisputedly public records.” FF Brief, at 3. It claims that because some of the data originally came from DSHS, an agency subject to the Public Records Act, all the data were public records when in the Training Partnership’s hands as well. FF ignores the fact that the Training Partnership receives information from sources other than DSHS, and adds its own information into the data. Moreover, on November 8, 2016, Initiative 1501 passed, prohibiting public disclosure of the names of individual providers (Training Partnership students). *See*, https://sos.wa.gov/assets/elections/initiatives/FinalText_1024.pdf, §8.

The Datashare Agreement requires the Training Partnership to mitigate any risk of loss and to notify both DSHS and the affected home care workers if their confidential data is breached. CP 971, ¶9; CP 978, §6(e).

The Training Partnership maintains its student database confidentially. CP 1226-1227, ¶6; CP 1301, ¶6. It put in place strict policies that prohibited the downloading and sharing of the information. CP 1226-1227 ¶6; CP 1301, ¶6; *see, e.g., CP 1143-44 (Confidentiality Policy); CP 1653-1654; CP 1656-1658; CP 1660; CP 1662 (Employee Agreements to protect confidentiality of information).*

B. The Training Partnership Discovers FF Has Access to its Confidential Student Database

In May 2016, the Training Partnership suspected that FF had obtained access to its student database when it learned that its students were receiving flyers and door-to-door canvassers from FF at their homes. CP 1228, ¶10. The Training Partnership conducted an investigation to determine whether and how FF obtained that database, but was unable to determine if or how it had obtained access. *Id.*

In August 2016, however, the Training Partnership obtained irrefutable evidence that FF had access to some or all of the Training Partnership's confidential database: multiple flyers from FF were received by the Training Partnership, addressed to a mock student record that only

existed in the Training Partnership's database. CP 1228, ¶¶11-14. The mock record was created on January 27, 2016 as a training exercise by a new employee, and was never deleted. *Id.* Based on this evidence, the Training Partnership concluded that at least the mock student record and likely some or all of the student database was stolen between January 27 and August 1, 2016. *Id.*, ¶14. The Training Partnership reported the theft to the Seattle Police Department, and disclosed the data breach to DSHS and the Washington Department of Health. CP 1268, ¶2; CP 1272-1289.

C. This Lawsuit Is Filed; FF Discloses It Secretly Paid \$12,000 for the Student Spreadsheets, but Resists Discovery

The Training Partnership filed this lawsuit on August 22, 2016. *See CP 1-9, ¶¶9-19.* Because it did not yet know the extent of the data stolen or how it was stolen, the Training Partnership moved for expedited discovery immediately after filing suit, seeking, among other things, the identity of the person who had provided FF with the Training Partnership's data, and the precise data that had been stolen. CP 880-888. FF objected, and the court denied the motion, ruling discovery would be due after 30 days (September 23, 2016), consistent with the civil rules. CP 219-222.

Meanwhile, on September 9, 2016, FF's Rule 30(b)(6) witness, Maxford Nelson, was deposed in a separate case, *SEIU 775 v. Evergreen Freedom Foundation*, Cause No. 16-2-12945-5, in the Superior Court for

King County (the “SEIU 775 Case”). CP 904, ¶2; CP 909-939. Mr. Nelson admitted in that deposition that FF’s in-house counsel purchased a database that came from the Training Partnership from “Person B.” He testified that in a face-to-face meeting between Person B and FF’s counsel, Person B provided FF with a USB drive with a list of about 42,000 individual names of Training Partnership students in exchange for \$12,000. CP 923, pp. 58:9-59:23. FF’s counsel knew that the information came from the Training Partnership. CP 936, pp. 110:2-112:1. FF’s counsel drew up a contract detailing what FF would provide to Person B, in addition to \$12,000, as compensation for the delivery of the database, including free legal services to Person B if there was “legal blow back” as a result of the transaction. CP 933, pp. 99:20-100:12; *see CP 1119-1123* (original contract); CP 1121, §3.4 (indemnification and representation provision).

In this case, however, FF steadfastly refused to reveal the identity of the data thief or to respond to the Training Partnership’s discovery requests. On the day its answers to the outstanding discovery requests came due, FF moved for a protective order, claiming it was not obligated to identify “Person B.” *See CP 235-248*. It argued that discovery in this case should be stayed pending a decision by the Court of Appeals on FF’s interlocutory appeal of a contempt order in the SEIU 775 Case. CP 626-635. It also moved to stay discovery pending its filing of an anticipated motion to

dismiss the trade secret claim in which it would argue that the Training Partnership's stolen data did not qualify as a trade secret. The superior court denied FF's motion for a protective order. CP 994-996; CP 950-955; CP 957-960; CP 1454-1463.

D. The Training Partnership Amends its Complaint to Add a Replevin Claim and Agrees to Compromise on Discovery

After Mr. Nelson's 30(b)(6) deposition in the SEIU 775 Case disclosing that FF had the student spreadsheets in its possession and secretly paid \$12,000 for them, the Training Partnership demanded that FF immediately return them. CP 967-968. When FF refused, the Training Partnership amended its Complaint to include a claim for statutory replevin. CP 224-233.

The Training Partnership could not delay discovery in this case while FF's appeal over its alleged right to hide the identity of the data thief progressed through the appellate courts. The Training Partnership moved to compel discovery. CP 1464-1473. FF opposed discovery, making the same arguments it made in moving for a protective order – that disclosure of the identity of Person B should await a decision in the interlocutory appeal of the SEIU 775 Case, and that the Training Partnership could not prove a trade secret violation – in objecting to the motion. CP 626, 634. The show cause hearing, set for October 28, 2016, was approaching, and the Training

Partnership also had an immediate duty to mitigate the risk to its students and participating employers stemming from the data breach. *See* CP 575-578; CP 971, ¶9; CP 978, §6(e). It needed to identify the affected students and the specific information that had been breached as soon as possible so that proper notice could be given. To move forward without delay, the Training Partnership offered to forgo discovery into the identity of Person B while FF's appeal was pending, so long as other discovery and the show cause hearing could proceed. CP 1501-1502; CP 997-1003. Judge Andrus, to whom the matter had been reassigned, agreed. CP 1005-1009. Once the limitation on discovery was resolved, both parties engaged in substantial discovery over the following two weeks. *See* CP 1010-1011, ¶3 (five depositions taken by the parties, along with document production).

E. The Trial Court Enters a Replevin Judgment in Favor of the Training Partnership

On October 28, 2016, after briefing and oral argument, Judge Andrus ruled from the bench in the Training Partnership's favor. RP 72-79. Final Judgment on the replevin claim was entered November 15, 2016. CP 743-754.

Judge Andrus specifically found that *FF did not raise any issues of material facts*. CP 745, ¶3. She found that all the elements of replevin had been met, including these:

- FF purchased copies of two spreadsheets containing information about the Training Partnership's students from Person B for \$12,000. CP 745, ¶4.
- FF knew that the copies of the spreadsheets came from the Training Partnership when it purchased them. *Id.*, ¶5.
- The Training Partnership owned or had lawful possession of all of the information contained in its student database, maintained the spreadsheets and information they contain confidentially, and did not authorize FF to own or possess any part of that database. CP 746, ¶¶6-7, 9.
- DSHS owned some of the information in the Training Partnership's database and authorized the Training Partnership to possess it. DSHS never authorized FF to own or possess its portion of the Training Partnership student database. *Id.*, ¶10.
- FF did not demonstrate any possessory right to retain the two spreadsheets and the information they contained. CP 748, ¶6. Indeed, the Training Partnership had demanded the stolen information back, and FF refused to return it. *Id.*
- The value of the spreadsheets was at least \$12,000, the amount paid by FF for the information. CP 749, ¶11.

Based upon these *undisputed* factual findings, the trial court concluded that the Training Partnership had met its burden for a final judgment under the replevin statute, RCW 7.64.035(3). CP 747, pp. 2-12. It ordered the dispossession by FF of all copies of the spreadsheets and the data contained therein. CP 750-751. The court rejected FF's arguments that Washington's UTSA preempted the replevin claim, that electronic data is

not subject to replevin, or that replevin was defeated if FF only had “copies” of the spreadsheets. CP 347-348, ¶¶3, 4, 8. On separate motion, the court awarded the Training Partnership its attorney fees pursuant to RCW 4.84.010 and 7.64.035(3). CP 789-801.

F. FF Seeks Appellate Review; The Training Partnership Independently Discovers the Identity of “Person B”

On December 30, 2016, FF moved for discretionary review in the court of appeals. The parties stipulated that FF could seek interlocutory review pursuant to RAP 2.4(b), and agreed to stay the litigation before the trial court.

On January 6, 2017, the Training Partnership independently discovered that its former employee Matthew Williams was Person B, the data thief. CP 1163-1165, ¶¶6-11. Through the Training Partnership’s efforts, Mr. Williams was located and deposed on March 1, 2017, months after the replevin order had been entered. CP 1164-1165, ¶¶6-9; CP 1179-1183; CP 1179-1180. His testimony pointed the finger at FF.² Of course,

² For example, he testified he met repeatedly with FF’s in-house counsel who requested that he “procure” the Training Partnership’s student database. Williams Dep., attached as *Exh. E* to FF’s Appendix, p. 30:20-25. After he showed FF’s attorneys a spreadsheet that he downloaded from the Training Partnership’s database, *Id.*, pp. 31:7-35:7 they said they were “interested” in it. *Id.*, p. 35:11-14. The next day, after agreeing on a \$12,000 price, Mr. Williams, while at FF’s office, transferred two spreadsheets containing the Training Partnership’s student data to FF’s USB drive, and FF loaded them onto its laptop and reviewed them. *Id.*, pp. 58:18-60:25. Once the FF attorneys confirmed that the stolen data was that of the Training Partnership, FF paid him \$12,000. *Id.*, pp. 60:3-62:6. This testimony, properly excluded by the appellate court, is cited here only to dispute the factual representations in FF’s brief.

the Training Partnership was unable to present his testimony to the trial court at trial, because FF had so arduously protected his identity. Nevertheless, FF, believing that his testimony supports its position, moved the appellate court to supplement the record by adding the deposition testimony. The appellate court properly denied the motion: “The reason Williams’ testimony was not available before the order of replevin was entered is that [FF] chose not to reveal his identity.” Opinion, at 20.

G. The Appellate Court Affirms

Division One affirmed the trial court on October 1, 2018. Opinion (*App. A*). In a carefully reasoned decision, it held replevin claims are “in addition to any other remedy available,” and the UTSA does not preempt them. RCW 7.64.010. Opinion, at 16-17. Consistent with this Court’s decision in *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 738 P.2d 665 (1987), and its own decision in *Modumetal, Inc. v. Xtalic Corp.*, 4 Wn. App. 2d 810, 425 P.3d 871 (2018),³ Division One also held that the UTSA does not preempt claims, like the Training Partnership’s replevin claim, that are not based on the misappropriation of a trade secret. It affirmed that the replevin statute applies to electronic data, even if the party who seeks replevin has not lost access to it. It affirmed also that FF had wrongfully

³ A petition for review before this Court has been filed in *Modumetal*. As of the writing of this brief, there has been no decision on that petition.

retained the data after the Training Partnership demanded it back. It awarded attorney fees on appeal to the Training Partnership. *Id.*, at 21-22.

IV. ARGUMENT

A. **The Appellate Court Correctly Held Replevin Is Available in Addition to Other Remedies Including the UTSA**

The remedies provided under Washington’s replevin statute are specifically “in addition to any other remedy available to the plaintiff...” RCW 7.64.010. That provision was added to the replevin statute in 1990,⁴ nine years after adoption of the UTSA’s more limited provision preempting claims for liability based on “misappropriation of a trade secret.” RCW 19.108.060. The appellate court was correct in reconciling these two statutes to give life to both. FF provides no grounds for asking this Court to ignore the replevin statute’s requirement that it be broadly available.

B. **The Appellate Court Decision Is Not in Conflict with Washington Case Law Regarding UTSA Preemption**

Even if the replevin statute did not include the anti-preemption language that its remedy is “in addition to all other remedies,” the UTSA would not preempt the Training Partnership’s right to replevy the stolen spreadsheets. As the Court of Appeals noted, replevin is a remedy for an

⁴ FF argues, for the first time, that this section was merely “moved” from a differently-worded previous section that was added in 1979. Not so. The previous section was “repealed” in 1990. The Legislature adopted the new language after the preemption provision in the UTSA was adopted.

ancient problem that can be phrased as “that’s mine, give it back.” Opinion, at 3. The statutory replevin procedure allows for prompt and summary return of property upon a showing of the right to possession, before there has been a determination of whether other legal remedies, including those under the UTSA, may exist. The crucial question on replevin is who has title or right to possession of personal property. *Apgar v. Great Am. Indem. Co.*, 171 Wash. 494, 498, 18 P.2d 46 (1933). Whether the property might – or might not – also be considered a trade secret is irrelevant to the analysis of who has superior title to the stolen spreadsheets.

The UTSA, on the other hand, only preempts claims “based on misappropriation of a trade secret.” RCW 19.108.900(2)(1). This Court’s only decision on the reach of the preemption clause is *Boeing*. In *Boeing*, a claim for breach of a confidential relationship was not preempted by the UTSA because “proof of trade secrets is not required for breach of confidentiality claims, which may be brought independently of trade secrets claims.” *Id.*, 108 Wn.2d at 48. Relying on *Boeing*, the court of appeals held in *Modumetal* that the UTSA did not preempt a breach of confidentiality claim. 4 Wn. App. 2d at 831. Consistent with its *Modumetal* decision, and in reliance on *Boeing*, the court of appeals concluded here that the UTSA does not preempt a replevin claim – a claim that also can be brought independently of a trade secret claim.

The relevant question in replevin is who has the superior right to possession. If, for instance, A steals (or pays someone else to steal) a copy of a file containing B's confidential tax returns from B's desk, B is entitled to replevy the copies, regardless of whether those tax returns qualify as "trade secrets." Because the confidential documents belong to B, and B never authorized A to possess them, B has superior title and is entitled to their return in a replevin action. The UTSA is irrelevant. The same is true of the student spreadsheets FF paid the Training Partnership's disgruntled employee to procure. FF "had [the Training Partnership's] stuff," and the Training Partnership was entitled to "get it back." *See* Opinion, at 3.

FF claims that Division One's opinion below conflicts with Division Two's decision in *Thola v. Henschell*, 140 Wn. App. 70, 164 P.3d 524 (2007). Division One, however, carefully considered and analyzed *Thola*, and distinguished it because it was decided at a very different procedural juncture. In *Thola*, the case had been tried to a jury, which found for plaintiffs on several causes including for a trade secret violation. The jury awarded one damage award, not segregated by claim. For that reason, the *Thola* court could not determine whether the purpose of the UTSA preemption – to "preclude duplicate recovery for a single wrong" – had been thwarted. *Thola*, 140 Wn. 2d at 82. There is no threat that FF could have

been subjected to duplicate recovery by the court's replevin order. The primary concern underlying *Thola* was not present here.

Division One also disagreed that Division Two had "adopted" the three part, so-called "factual preemption" test in *Thola*; rather, that court had cited it as a "helpful guide" to determining whether there could have been duplicate recovery. Opinion, at 9, quoting *Thola*, 140 Wn. App. at 82. Division One declined to give that test further weight because the issue had not been briefed in *Thola*, nor had it been adopted in the earlier Division Two case, *Ed Nowogroski Insurance, Inc. v. Rucker*, 88 Wn. App. 350, 358, 944 P.2d 1093 (1997), cited in *Thola*. Opinion, at 10.

Most importantly, *Thola* could not have "adopted" any test that conflicted with the holding in *Boeing* – a case *Thola* did not cite or consider. Opinion, at 13. Under *Boeing*, a cause of action is preempted if it is founded on a law "regarding civil liability for misappropriation," not merely when overlapping facts are relevant to both. *Boeing*, 108 Wn.2d at 48. The court below properly followed the precedent from this Court, and its own decision in the now-published *Modumetal*. Its decision is not inconsistent with *Thola*. There is no basis for review.

C. FF Articulates No Public Interest That Would Be Served by Following Cases from Some Other Jurisdictions

FF cites several cases from other jurisdictions that follow a so-called “strong” view of preemption that applies even if no trade secret exists. A better term for this view is the “unfair” view. Under this unfair view, if a claim has even a sniff of a trade secret about it, but the plaintiff is unable to establish that a trade secret exists, the plaintiff would be denied any recovery for the theft of its property. *See, e.g., Yeiser Research & Dev. LLC v. Teknor Apex Co.*, 281 F. Supp. 3d 1021, 1051 (S.D. Cal. 2017) (applying Delaware law). This view is oft-rejected.⁵

In this case, FF claimed that the Training Partnership could not prove its stolen spreadsheets qualified as trade secrets, and announced its intent to move to dismiss the trade secret claim. But at the same time, it claimed the UTSA should preempt the replevin claim, leaving the Training Partnership with no redress for the theft of the confidential information it

⁵ *See, e.g., Callaway Golf Co. v. Dunlop Slazenger Group Ams., Inc.*, 295 F. Supp. 2d 430, 437 (D. Del. 2003); *Youtie v. Macy’s Retail Holding, Inc.*, 626 F. Supp. 2d 511, 523 (E.D. Pa. 2009); *SEIU v. Roselli*, 2009 U.S. Dist. LEXIS 91537, *24-26 (N.D. Cal., Sept. 17, 2009); *Burbank Grease Servs., LLC v. Sokolowski*, 717 N.W.2d 781, 791-792 (Wis. 2006); *Stone Castle Fin., Inc. v. Friedman, Billings, Ramsey & Co.*, 191 F. Supp. 2d 652, 658-659 (E.D. Va. 2002); *Orca Communications Unlimited, LLC v. Noder*, 337 P.3d 545, 546, 547 (Ariz. 2014); *Cenveo Corp. v. Slater*, 2007 U.S. Dist. LEXIS 9966, *10-12 (E.D. Pa., Feb. 13, 2007); *Think Village-Kiwi, LLC v. Adobe Sys.*, 2009 U.S. Dist. LEXIS 32450, *8 (N.D. Cal., April 1, 2009); *Kendall Holdings, Ltd. v. Eden Cryogenics, LLC*, 2010 U.S. Dist. LEXIS 103021, *22 (S.D. Ohio, Sept. 29, 2010); *TMX Funding, Inc. v. Impero Techs., Inc.*, 2010 U.S. Dist. LEXIS 60260, *12-13 (N.D. Cal., June 17, 2010); *Bagley v. Lumbermens Mut. Cas. Co.*, 100 F. Supp. 2d 879, 884 (N.D. Ill. 2000).

was responsible for safeguarding. In other words, rather than preventing double recovery, FF argues the UTSA preemption provision should preclude any recovery at all. Such a result would be contrary to the manifest intention of the legislature. This fundamental unfairness troubled Division One: “It would be unimaginable that someone who steals property ... would get a free pass just because none of what he filched is a trade secret.” Opinion at 16 (quoting *Hecny Transp., Inc. v. Chu*, 430 F.2d 402, 405 (7th Cir. 2005)). FF has demonstrated no substantial public interest in following extra-judicial case law that denies a party any redress for theft of its confidential information.

D. The Appellate Court Properly Rejected FF’s Claims that the Replevin Elements Were Not Proven

FF argues that the Training Partnership could not prove its entitlement to replevy the stolen spreadsheets because it maintained the original database. The replevin statute only requires that a plaintiff have a superior possessory interest in the property detained. RCW 7.64.020(2). The Training Partnership had a superior possessory interest in all copies of its confidential data, and the right to demand the data back. FF cites no authority to the contrary.

FF argues that electronic data is “intangible” and cannot be subject to replevin. Even if the spreadsheets could be classified as “intangible,” the

replevin statute makes no distinction between “tangible” and “intangible.” It applies to all property that can be seized and returned to the plaintiff. RCW 7.64.047. In this case, the stolen property was returned to a special master to be held pending the outcome of this case. It is undoubtedly property subject to replevy.

FF’s claim that “most” courts refuse to allow replevin of electronic data is off base. The trend is to recognize electronic data as the proper subject of conversion and replevin claims.⁶ Returning to the example above at 14, if the owner could replevy paper files of tax returns, she should also be able to replevy the same files in electronic format.

To the extent FF argues it did not act “wrongly” by detaining the spreadsheets, it relies on deposition testimony not in the record and not considered by the trial court. The appellate court properly denied FF’s motion to supplement the record with the deposition transcript of

⁶ In addition to *Chef’s Diet v. Lean Chefs*, 2016 U.S. Dist. LEXIS 133299, *27 (S.D.N.Y. Sept. 28, 2016), see *Thryoff v. Nationwide Mut. Ins. Co.*, 864 N.E.2d 1272, 1277-78 (2007); *EchoMail, Inc. v. Am. Express*, 445 F. Supp. 2d 87, 91-92 (D. Mass. 2006); *Advanced Marketing v. Dayton Data Processing*, 1992 Ohio App. LEXIS 994, *23 (Ohio App., March 6, 1992); *Coleman v. Vukovich*, 825 N.E.2d 397, 406 (Ind. App. 2005); *Mai Basic Four, Inc. v. Generic Business Solutions, Inc.*, 1990 Del. Ch. LEXIS 2, *5 (Del. Ch., Jan. 16, 1990); *Jamison Bus. Sys. v. Unique Software Support Corp.*, 2005 U.S. Dist. LEXIS 45480, *40-41 (E.D.N.Y., May 26, 2005); *Portfolioscope, Inc. v. I-Flex Solutions Ltd.*, 473 F. Supp. 2d 252, 256 (D. Mass. 2007); *Children’s Hosp., Corp. v. Cakir*, 2017 U.S. Dist. LEXIS 147123, 13-14 (D. Mass. Sept. 12, 2017) (“[i]n the modern world, computer files hold the same place as physical documents have in the past. If paper documents can be converted, ... no reason appears that computer files cannot.”).

Mr. Williams because FF “chose not to reveal his identity.” Opinion, at 20. There is no basis for reviewing the appellate court decision.

FF paid Person B \$12,000 to download two spreadsheets with personal, confidential information about thousands of the Training Partnerships’ students. It did so under cloak-and-dagger circumstances that belie its claim that it believed Person B could legitimately sell the spreadsheets. FF can cite no Washington law, and no policy reason, that would protect those spreadsheets if they were in paper form. There is no reason to protect them from replevin merely because they are in electronic form. The trial and appellate courts were right. There is no basis for review.

V. THE TRAINING PARTNERSHIP IS ENTITLED TO ITS FEES

RAP 18.1(j) provides that if attorney fees and expenses were awarded to the party who prevailed in the Court of Appeals, and if a petition for review is subsequently denied, reasonable attorney fees and expenses may be awarded to the prevailing party. The Training Partnership was awarded its fees and expenses below. *See* Opinion, at 21. This petition for review should be denied and the Training Partnership should be awarded the fees and expenses it incurred in preparing this answer.

VI. CONCLUSION

For all the reasons stated above, Freedom Foundation's Petition for Review should be denied with fees and expenses awarded to the Training Partnership.

DATED: January 3, 2019.

SIRIANNI YOUTZ
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s/ Ann E. Merryfield

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on January 3, 2019, I served a copy of the foregoing RESPONDENT SEIU HEALTHCARE NORTHWEST TRAINING PARTNERSHIP'S ANSWER TO PETITION FOR REVIEW on all counsel of record as indicated below:

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SEIU HEALTHCARE NORTHWEST)	
TRAINING PARTNERSHIP, a)	No. 76220-6-1
Washington trust,)	
)	DIVISION ONE
Respondent,)	
)	
v.)	
)	
EVERGREEN FREEDOM)	
FOUNDATION, d/b/a FREEDOM)	PUBLISHED OPINION
FOUNDATION, a Washington nonprofit)	
organization,)	FILED: October 1, 2018
)	
Petitioner.)	

BECKER, J. — Evergreen Freedom Foundation appeals from an order of replevin compelling the return of data belonging to respondent, SEIU Healthcare Northwest Training Partnership. We find no error. The trial court correctly determined that the replevin claim is not preempted by the Uniform Trade Secrets Act (UTSA), chapter 19.08 RCW, and is an appropriate remedy under the circumstances.

FACTS

The Partnership is a nonprofit organization that provides training to many Washington home care workers. These include individual providers whose training is funded by the State pursuant to a collective bargaining agreement with

the union for individual providers. The union, SEIU 775, is part of the Service Employees International Union. The State shares information with the Partnership about state-funded individual providers. The Partnership stores this data, along with other information about trainees, in a confidential electronic database.

The Foundation is a nonprofit organization that, among other things, endeavors to inform workers of their constitutional rights regarding financial support of public-sector unions. An opportunity to acquire contact information for individual providers arose in the spring of 2016. A former employee of the Partnership, Matthew Williams, had access to confidential records about thousands of trainees from the Partnership's internal database. He offered to sell this data to the Foundation. The Foundation paid Williams \$12,000 for two electronic spreadsheets stored on a flash drive. The Foundation copied and downloaded the spreadsheets and the data they contained, including individual contact information, into its electronic database. The Foundation used the records to notify individual providers that they had the right to opt out of financially supporting SEIU 775.

In August 2016, two flyers from the Foundation were delivered to the Partnership's office addressed to a name that existed in the Partnership's database only in connection with a mock file created as part of a training exercise for a new employee. The Partnership realized that the Foundation must have gained access to its database. The Partnership brought this suit, alleging a violation of the Uniform Trade Secrets Act and a claim for intentional interference

with business expectancy. Shortly thereafter, in a different lawsuit between the Foundation and SEIU 775, Maxford Nelsen—the Foundation’s CR 30(b)(6) witness—testified that the Foundation had purchased records concerning approximately 42,000 individual providers from a person he referred to as Confidential Source B. Although the Foundation refused to reveal the identity of Confidential Source B, the Partnership later learned through its own efforts that it was Williams.

The Partnership wrote to the Foundation demanding immediate return of all copies of the stolen records and the destruction of information derived from the stolen database. The Foundation did not comply with this demand.

In September 2016, the Partnership amended its complaint to include a cause of action for replevin, seeking return of the spreadsheets.

Replevin is an ancient remedy for an ancient problem that can be phrased as “that’s mine, give it back.” Replevin has come down to us from medieval times as a summary process, arising “out of the need of a turbulent society to discourage resort to self-help.” JOHN G. FLEMING, THE LAW OF TORTS 73 (5th ed. 1977). Washington has had a replevin statute since the first legislative assembly of the Territory of Washington. LAWS OF 1854, §§ 100-110, at 149-52. Replevin is a special statutory proceeding “to determine title to, or right of possession of, personal property.” Apgar v. Great Am. Indem. Co., 171 Wash. 494, 498, 18 P.2d 46 (1933). The prima facie elements are “ownership of the property, a right to its possession, a demand on the respondents for its surrender, their refusal to

surrender it, and their consequent wrongful detention of same.” Page v. Urick, 31 Wash. 601, 603-04, 72 P. 454 (1903).

In an action to recover the possession of personal property, the plaintiff “may claim and obtain the immediate delivery of such property.” RCW 7.64.010. As the result of an amendment in 1979, the plaintiff must first apply for an order directing the defendant to appear and show cause why the court should not issue an order putting the plaintiff in possession of the personal property.

RCW 7.64.020(1). Final judgment at a show cause hearing is permitted when the defendant raises no factual issues requiring a trial. RCW 7.64.035(3). In this respect, replevin is analogous to unlawful detainer, a summary proceeding designed for the purpose of hastening recovery of possession of real property.

MacRae v. Way, 64 Wn.2d 544, 546, 392 P.2d 827 (1964).

The trial court held a show cause hearing and determined the Foundation had raised no issue of material fact and all of the elements of replevin were met. The court entered a written order of replevin on November 15, 2016. The court listed the following as facts that were undisputed at the hearing:

- The Foundation purchased copies of two spreadsheets containing information about the Training Partnership’s students from Person B for \$12,000;
- The Foundation knew the copies of spreadsheets came from the Training Partnership when it purchased them;
- The Training Partnership maintained the spreadsheets and the information contained therein as confidential;
- The Training Partnership treated the information in the spreadsheets as confidential pursuant to its Confidentiality Policy;

- Downloading information from the Training Partnership's database is not permitted under the Partnership's policies;
- The Training Partnership owns or has lawful possession of all of the information contained in its student database, and the Partnership never authorized the Foundation to own or possess any part of its student database;
- The Washington State Department of Social and Health Services owns some of the information in the Training Partnership's student database and authorizes the Training Partnership to use that information. The department never authorized the Foundation to own or possess its portion of the Training Partnership database;
- The value of the spreadsheets purchased by the Foundation from Person B is at least \$12,000, the amount the Foundation paid for them; and
- The Foundation is able to identify and extract the information that was contained in the two spreadsheets from other information contained in its databases.

The court concluded that these facts supported a final judgment entitling the Partnership to possession of all copies of the two spreadsheets and the information contained therein, in addition to all other remedies authorized by the replevin statute. The Foundation was ordered to take various actions to comply with this ruling. The court rejected the Foundation's argument that the replevin claim was preempted by the Uniform Trade Secrets Act.

In December 2016, the Foundation filed a notice seeking discretionary review by this court. Discretionary review was granted under RAP 2.3(b)(4) based on the parties' stipulation.

ANALYSIS

1. The Uniform Trade Secrets Act does not preempt replevin

The Uniform Trade Secrets Act codifies the basic principles of common law trade secret protection. Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 438, 971 P.2d 936 (1999). It permits injunctive relief and damages for “misappropriation” of “trade secrets.” RCW 19.108.020, .030.

The act “displaces conflicting tort, restitutionary, and other law of this state pertaining to civil liability for misappropriation of a trade secret.”

RCW 19.108.900. The Foundation contends this language preempts the Partnership’s replevin claim.

The Partnership responds that the replevin claim cannot be preempted under these or any circumstances because the replevin statute expressly provides that its remedies “are in addition to any other remedy available to the plaintiff.” RCW 7.64.010.

Whether the Uniform Trade Secrets Act displaces a replevin action calls for statutory construction. Matters of statutory construction are reviewed de novo. O.S.T. v. Regence BlueShield, 181 Wn.2d 691, 696, 335 P.3d 416 (2014). Our fundamental goal is to discern and implement the legislature’s intent. O.S.T., 181 Wn.2d at 696. It is the duty of the court to reconcile apparently conflicting statutes and to give effect to each of them, if this can be achieved without distortion of the language used. State v. Fagalde, 85 Wn.2d 730, 736, 539 P.2d 86 (1975).

The issue under RCW 19.08.900 is whether statutory replevin is a “conflicting” law pertaining to misappropriation of a trade secret. The replevin statute expressly provides that its remedies “*are in addition to any other remedy available to the plaintiff.*” RCW 7.64.010 (emphasis added). This language was added to the Washington replevin statute in 1990, nine years after Washington's enactment of the Uniform Trade Secrets Act in 1981. It evinces legislative intent that statutory replevin is always available to a qualifying plaintiff. It follows that a plaintiff who has alleged (or could allege) misappropriation of a trade secret does not thereby lose the right to seek replevin of property owned by the petitioner and wrongfully detained by the alleged misappropriator.

The Foundation is able to construct an argument for the supremacy of the Uniform Trade Secrets Act only by ignoring the strong antipreemptive language in the replevin statute—“in addition to any other remedy available.” The Foundation does not address this provision. According to the Foundation, the displacement of other law that occurs by means of RCW 19.108.900 obliterates the court's duty to try to reconcile or harmonize statutes that might appear to conflict with the Uniform Trade Secrets Act. Reply Brief of Petitioner at 7-9. In the analysis recommended by the Foundation, the text of a preempted statute is irrelevant and statutory construction is unnecessary. Reply Brief of Petitioner at 9.

The Foundation contends that when another claim is brought in the same lawsuit with a claim of trade secret misappropriation, the question the court must ask is whether both claims are based on the same underlying facts. The

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Foundation supports this position by citation to a number of federal district court decisions. When such decisions apply Washington law, they typically take as their starting point the “factual preemption” test adopted in Thola v. Henschell, 140 Wn. App. 70, 82 & n.5, 164 P.3d 524 (2007). See, e.g., T-Mobile USA, Inc. v. Huawei Device USA, Inc., 115 F. Supp. 3d 1184, 1198 (W.D. Wash. 2015).

The plaintiff in Thola was a chiropractor. Her former employee, Mahan, went to work for Henschell, another chiropractor. Henschell paid Mahan a bonus of \$100 for every new client she added to the patient rolls. Mahan appropriated Thola’s confidential client list and used it to persuade many of Thola’s clients to transfer to Henschell. Thola sued Henschell and Mahan, alleging misappropriation of trade secrets under the Uniform Trade Secrets Act as well as three common law claims: breach of the duty of loyalty, tortious interference with a business relationship, and unjust enrichment by the tortious conduct. Thola, 140 Wn. App. at 76. When the case went to trial, defendants argued that the trade secrets claim preempted the three common law claims and moved for a directed verdict on those claims. The motion was denied. A jury awarded \$89,000 in damages against Mahan and Henschell and found that Henschell had been unjustly enriched by \$28,712.

Preemption was argued on appeal. The court did not dismiss any of the common law claims as preempted. The court preserved Thola’s cause of action for unjust enrichment, noting that the act expressly allows for recovery of “unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.” RCW 19.108.030(1), quoted in Thola, 140

Wn. App. at 84. The court also preserved the tortious interference claim because it was supported by evidence of Mahan's in-person solicitation of clients, which evidence was distinct from the misappropriated client list that supported the claim of trade secret misappropriation. Thola, 140 Wn. App. at 82-83. The court did not reach Henschell's argument that the act preempted Thola's claim for breach of the duty of loyalty because that claim pertained only to Mahan, who had filed for bankruptcy and was not a party to the appeal. Thola, 140 Wn. App. at 83-84 and 77 n.3.

Although the court did not dismiss any of the common law claims as preempted, the court reversed the jury's award in its entirety and remanded for a new trial. The error that required reversal was the court's failure to instruct the jury that it could not consider acts of trade secret misappropriation as proof of other claims. Most of the evidence related to the theft of the confidential customer list, and it was likely the jury used that evidence to find in Thola's favor on all claims. The trial court "should have instructed the jury that it could not consider evidence of Mahan's acts of trade secret misappropriation when it deliberated on Thola's common law claims." Thola, 140 Wn. App. at 85.

"Because the damages award was not segregated, we cannot strike those portions related to the preempted causes of action." Thola, 140 Wn. App. at 77.

In coming to this result, the court set forth an analytical framework that "precludes duplicate recovery for a single wrong." Thola, 140 Wn. App. at 82. The three-step analysis was offered as a "helpful guide" to determining whether the Uniform Trade Secrets Act preempts a civil claim: "(1) assess the facts that

support the plaintiff's civil claim, (2) ask whether those facts are the same as those that support the plaintiff's UTSA claim, and (3) hold that the UTSA preempts liability on the civil claim unless the common law claim is factually independent from the UTSA claim." Thola, 140 Wn. App. at 82, citing Mortg. Specialists, Inc. v. Davey, 153 N.H. 764, 778-79, 904 A.2d 652 (2006). The court referred to its analysis as "factual preemption," distinguishing it from an elements-based analysis discussed in Mortgage Specialists, Inc. Thola, 140 Wn. App. at 82 n.4. The elements analysis holds that "a common law claim is not preempted if the elements require some allegation or factual showing beyond those required under the UTSA." Thola, 140 Wn. App. at 82 n.4, citing Mortg. Specialists, Inc., 153 N.H. at 778. The Thola court decided not to adopt an elements test "at this time" because the issue had not been briefed by the parties and had not been adopted in the court's earlier opinion on preemption, Ed Nowogroski Insurance, Inc. v. Rucker, 88 Wn. App. 350, 358, 944 P.2d 1093 (1997) ("Nowogroski may not rely on acts that constitute trade secret misappropriation to support other causes of action"), aff'd, 137 Wn.2d 427. Thola, 140 Wn. App. at 82 n.4.

Thola has been described as taking a "strong" view of the preemptive scope of the Uniform Trade Secrets Act in Washington, in contrast to the "weaker" elements analysis. T-Mobile, 115 F. Supp. 3d at 1198. The distinction mattered in T-Mobile because on a motion to dismiss for failure to state a claim, the plaintiff's tortious interference claim would survive under the weak view but not under the strong view. T-Mobile, 115 F. Supp. 3d at 1198-99. The court

decided to apply “the stronger form of preemption that the Thola court embraced,” predicting that the Washington Supreme Court would also embrace that view if called on to make a choice. T-Mobile, 115 F. Supp. 3d at 1199. “As the court has already explained, there are no allegations in T-Mobile’s complaint that indicate that it can prove tortious interference without relying on the same facts that support its trade secret claim.” T-Mobile, 115 F. Supp. 3d at 1199.

Here, the Foundation argued to the trial court that the Partnership’s cause of action in replevin relied on the same facts as its trade secret claim and therefore should be dismissed under Thola. The trial court, while aware of Thola, ruled that replevin was not preempted:

The Court of Appeals held [in Thola] that the UTSA did not preempt the tort claims because they were based on actions that were not the acquisition or use of trade secrets. There is no conflict between Chapter 7.64 RCW and Chapter 19.108 RCW. Under Chapter 7.64 RCW, *it does not matter whether the data is confidential or a trade secret. Instead, what matters is whether Training Partnership or EFF has a superior possessory interest in the data.*

Conclusion of Law 3, Clerk’s Papers at 747 (emphasis added).

The Foundation contends the trial court’s ruling exemplifies the “weaker” elements-based reasoning disfavored by the courts that have followed Thola. The Foundation’s position is that when plaintiffs allege theft or misuse of confidential, commercially valuable information, they are confined to a single cause of action for misappropriation of trade secrets. Brief of Petitioner at 18-19; Reply Brief of Petitioner at 7-8. Thola does not support this position. Thola did not order dismissal of the common law causes of action. Instead, the court ordered a remand so that to the extent their factual bases overlapped with the

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trade secrets claim, proper instructions could be given to ensure that the jury did not give the plaintiff a duplicate recovery for a single wrong.

The leading case in Washington on the preemptive scope of the Uniform Trade Secrets Act is not Thola; it is our Supreme Court's decision in Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 48, 738 P.2d 665 (1987). Thola does not cite Boeing on the issue of preemption, even though the issue arose in both cases in a similar posture. The dispute in Boeing was between the airplane company and a former supplier, Sierracin, arising from Sierracin's use of a Boeing window design. Boeing claimed breach of a confidential relationship, breach of contract, and misappropriation of trade secrets under the act. The jury found for Boeing on all three claims and awarded unsegregated damages of more than \$1.6 million. Boeing, 108 Wn.2d at 40, 43, 47-48. On appeal, Sierracin argued that the trial court erred by refusing to consolidate the claims into one claim under the Uniform Trade Secrets Act. Boeing, 108 Wn.2d at 48.

The Supreme Court ruled that the trial court did not err in refusing to consolidate Boeing's claims. Boeing, 108 Wn.2d at 48. Because the act expressly provides that it does not affect contractual liability, the court determined that the contract claim was not preempted. RCW 19.108.900(2)(a). As to the claim for breach of a confidential relationship, the court reasoned that "proof of trade secrets is not required for breach of confidentiality claims, which may be brought independently of trade secrets claims." Boeing, 108 Wn.2d at 48. The court affirmed the verdicts on all three claims, finding they were supported by substantial evidence. Boeing, 108 Wn.2d at 46.

In Boeing, the court did not assess the facts underlying the claim of breach of a confidential relationship to see if they were the same as the facts supporting the claim for misappropriation of trade secrets. The court's reasoning—that a claim for breach of a confidential relationship is not preempted because it “may be brought independently of” a trade secrets claim—resembles an elements-based analysis more than the “factual preemption” test adopted in Thola.

In Boeing, the court did not consider the issue in Thola: whether the unsegregated award of damages gave the plaintiff a duplicate recovery for a single wrong. This may explain why the Supreme Court did not try to determine whether the breach of confidentiality claim was supported by the same facts as the trade secrets claim, and it may explain why Thola did not cite Boeing. Nevertheless, “Until or unless the Washington Supreme Court overrules Boeing and adopts the Thola analysis, Boeing controls.” Modumetal, Inc. v. Xtalic Corp., No. 76708-9-I, slip op. at 21 (Wash. Ct. App. June 25, 2018), <http://www.courts.wa.gov/opinions/pdf/767089orderandopinion.pdf>. The Foundation's refusal to examine the elements of replevin is inconsistent with Boeing. Boeing indicates the Uniform Trade Secrets Act is preemptive only if an examination of the allegedly preempted cause of action shows that it is founded on a law “regarding civil liability for misappropriation.” Boeing, 108 Wn.2d at 48.

The Foundation's preemption argument presented an apparent conflict between the Uniform Trade Secrets Act and the replevin statute. The trial court correctly perceived its duty to examine and, if possible, reconcile the apparently

conflicting statutes. We affirm the trial court's conclusion that relief under the replevin statute "is not based upon misappropriation of a trade secret," RCW 19.108.900(2)(a), and therefore is not displaced by RCW 19.108.900(1). The two statutes do not conflict. Both statutes can be given effect without distortion of the language used in either. See Fagalde, 85 Wn.2d at 736.

We are not convinced that the outcome would be different under Thola's three-step analysis. In support of its claim for relief under the Uniform Trade Secrets Act, the Partnership did allege facts supporting its claim that the confidential database of student educational records is a trade secret, the misappropriation of which caused damage. But to the extent that the Partnership alleged these same facts in support of replevin, they were not material to the replevin claim; they were simply part of the narrative. As the trial court stated, "Data can belong to one party and not be a trade secret. And the issue in a replevin case is who has the right to possess the data, not whether the data has any competitive value or economic value to a competitor." To have the right to replevin, the Partnership did not have to prove that the property was confidential data that might be characterized as a trade secret. What mattered was which entity, the Partnership or the Foundation, had the superior possessory interest in the property. The causes of action arising from the two statutes at issue operate independently of each other. There is no danger of a duplicate recovery for a single wrong, the problem Thola dealt with.

The Foundation cites two cases in which a federal district court ruled that a replevin claim was preempted by the Uniform Trade Secrets Act. In one case,

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replevin was among several causes of action dismissed on summary judgment. The court reasoned that although each cause of action had different elements, “the allegations necessary to prove each element still relate to the same core set of facts.” Enters. Int’l, Inc. v. Int’l Knife & Saw, Inc., No. C12-5638 BHS, 2013 WL 6185241, at *10 (W.D. Wash. Nov. 26, 2013) (court order). In the other case, a replevin claim was the subject of a motion to dismiss for failure to state a claim. The court granted the motion, finding the replevin claim was preempted “because it is based entirely on the misappropriation of [the plaintiff’s] trade secrets and seeks only the return of the misappropriated information,” a remedy contemplated by the Uniform Trade Secrets Act. Christopher Glass & Alum., Inc. v. O’Keefe, No. 1:16-cv-11532; 2017 WL 2834536, at *4 (N.D. Ill. June 30, 2017) (memorandum opinion and order).

Enterprises International, Inc. disposed of the replevin claim without mentioning that the remedies of Washington’s replevin statute “are in addition to any other remedy available to the plaintiff.” RCW 7.64.010. Christopher Glass likewise does not engage with the law of replevin. Because the interpretation of the two statutes and the resolution of their apparent conflict are issues of state law, Enterprises International and Christopher Glass, have neither authoritative nor precedential force. Hecny Transp., Inc. v. Chu, 430 F.3d 402, 404 (7th Cir. 2005). Their cursory treatment of replevin is not persuasive. State courts should be reluctant to part with a remedy long deemed essential to maintaining civil order.

The Seventh Circuit's opinion in Hecny Transportation, Inc. has more to offer. The district court decision under review held that the plaintiff's non-trade-secrets claims were "knocked out" by his allegation that the defendant misused customer information. Hecny Transp., Inc., 430 F.3d at 404. Reversing, the appellate court held that "an assertion of trade secret in a customer list does not wipe out claims of theft, fraud, and breach of the duty of loyalty that would be sound even if the customer list were a public record." Hecny Transp., Inc., 430 F.3d at 405. The court stated:

The Uniform Law Commissioners' comment to the model act supports this approach, stating: "The [provision] does not apply to duties imposed by law that are not dependent upon the existence of competitively significant secret information, like an agent's duty of loyalty to his or her principal." We would be shocked if the Supreme Court of Illinois were to disagree; nothing in its jurisprudence suggests that it would. This is not a close question.

Hecny Transp., Inc., 430 F.3d at 405. The court found it "unimaginable that someone who steals property . . . would get a free pass just because none of what he filched is a trade secret." Hecny Transp., Inc., 430 F.3d at 404.

The same is true here. The Foundation has argued both that the Partnership's only remedy is under the Uniform Trade Secrets Act and that the stolen data is not a trade secret.¹ If the wrongly detained data is not a trade secret, the consequence according to the Foundation is that the Partnership will be left without a remedy. The possibility of that result is contrary to the manifest

¹ See, e.g., Clerk's Papers at 642 n.1 (Defendant's Brief on Show Cause Hearing): "The copies of the lists plainly do not meet the high standard required for trade secret protection."

intention of the legislature that replevin remedies “are in addition to any other remedy available to the plaintiff.” RCW 7.64.010.

We conclude the trial court properly ruled that the replevin claim was not preempted.

2. The replevin statute applies to electronic data

The Foundation contends that the replevin statute does not apply to electronic data. The Foundation argues that replevin “has always been about the recovery of tangible property a plaintiff no longer possesses. A plaintiff’s possession must be interrupted to give rise to a replevin claim.” Brief of Petitioner at 26. We disagree. The replevin statute does not distinguish between tangible and intangible property. The question is whether the property may be taken back from the defendant and returned to the plaintiff. RCW 7.64.045, .047. Electronic data can be both taken and returned. In fact, this has already occurred in the present case. The electronic spreadsheets were removed from the Foundation’s database pursuant to the replevin order. As noted by the trial court, a persuasive decision is Chefs Diet Acquisition Corp. v. Lean Chefs, LLC, No. 14-CV-8467 (JMF), 2016 WL 5416498 (S.D.N.Y. Sept. 28, 2016) (opinion and order), in which the plaintiff was permitted to use replevin to compel the return of an electronically stored customer list.

The Foundation proposes that information stored electronically cannot be replevied unless the entity alleged to have the superior right of ownership has lost access to the information. The Foundation argues the court had no basis to compel the return of the copies because the Partnership retained the same

information in its own database. The replevin statute does not support this interpretation. The Partnership has a superior possessory interest in the information. That interest is a property interest. It includes the right to control whether others can have access to the information. If the Foundation had acquired and wrongfully detained copies of tangible documents belonging to the Partnership, the Foundation would have to give them back regardless of whether the Partnership maintained possession of the originals. The same is true with respect to electronic data. The trial court did not err in applying the replevin statute to the electronic spreadsheets.

3. It was wrongful for the Foundation to retain the data

In support of a motion for a show cause hearing under the replevin statute, the plaintiff must file an affidavit showing, among other things, that the property is “wrongfully detained” by the defendant. RCW 7.64.020(2)(b). The Foundation contends the Partnership did not and could not show the Foundation’s detention of the spreadsheets was wrongful because the Partnership always had access to its own copies of the information contained in the spreadsheets. As discussed above, for purposes of replevin, it does not matter that the Partnership kept its own copies of the stolen data. The Partnership’s superior possessory interest in the information included the right to control access by others to the information. The Foundation wrongfully detained the spreadsheets when it was asked to give them back and did not do so.

The Foundation also argues that the spreadsheets were not “wrongfully detained” because when Williams transferred them to the Foundation, he did not

divulge that he had acquired them from the Partnership's database and he gave assurances that it was lawful for him to possess and transfer the information. To the extent this argument is based on Williams' deposition testimony, it will not be considered because that evidence was not before the trial court. Further, the argument is contradicted by findings the Foundation does not argue are erroneous. The trial court specifically found that the Partnership owns or has lawful possession of all of the information contained in its student database, the Department of Social and Health Services owns some of the information in the database and authorizes the Partnership to use it, and neither the Partnership nor the department ever authorized the Foundation to own or possess any portion of the database.

The elemental question in this action for replevin is the relative right of possession as between the Foundation and the Partnership. It is immaterial that Williams may have told the Foundation he had a legal right to possess and share the spreadsheets. The Foundation has not shown any basis on which it was entitled to possess or retain the spreadsheets when asked by the Partnership to give them back.

We conclude the record supports the element of wrongful detention.

4. A bond was not required

The Foundation contends that the trial court erred by not requiring the Partnership to post bond upon being awarded possession. Bond is required only when temporary possession is granted "pending final disposition."

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RCW 7.64.035(1)(a)(i). No bond was necessary here because the trial court entered final judgment at the show cause hearing.

5. Motions

First, we address the Foundation's motion to supplement the appellate record with a transcript of Williams' deposition and related exhibits.

The Partnership discovered Williams' identity in January 2017. His deposition was taken in March 2017, but the deposition was not considered by the trial court and is not in the trial court record.

The motion is denied. The criteria of RAP 9.11 are not satisfied. The deposition adds nothing material to what is already in the record, and equitable considerations do not support the motion. The reason Williams' testimony was not available before the order of replevin was entered is that the Foundation chose not to reveal his identity.

Second, we address the Partnership's motion to strike a letter sent to this court by the Foundation.

The Foundation asserts that the majority of jurisdictions that have interpreted the Uniform Trade Secrets Act favor the fact-based or "strong" approach to preemption. During oral argument before this court on July 25, 2018, we asked the Foundation for authority supporting this assertion. The Foundation responded the next day with a letter citing eight cases. The Foundation's letter continues with briefing responding to points raised by the Partnership during oral argument. The letter states that questioning by the panel

prevented counsel for the Foundation from using her four minutes of reserved time to rebut the arguments of the Partnership.

The Foundation's case citations are accepted as a proper response to the panel's specific request for authority. We strike the remainder of the Foundation's letter as a brief not authorized by RAP 10.1. The use of time given for oral argument is at the discretion of the court. The opportunity to reserve time for rebuttal is not a guarantee that the panel will refrain from questioning counsel during that time.

6. Attorney fees on appeal are awarded to the Partnership

The trial court awarded fees to the Partnership as authorized by the replevin statute when final judgment is entered at a show cause hearing:

(3) If at the time of the hearing more than twenty days have elapsed since service of the summons and complaint and the defendant does not raise an issue of fact prior to or at the hearing that requires a trial on the issue of possession or damages, the judge or court commissioner may also, in addition to entering an order awarding possession, enter a final judgment awarding plaintiff possession of the property or its value if possession cannot be obtained, damages, court costs, reasonable attorneys' fees, and costs of recovery.

RCW 7.64.035(3). When a trial court awards attorney fees pursuant to a statute, it is ordinarily the rule that attorney fees are awardable on appeal as well.

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 825, 828 P.2d 549

(1992). This court once denied a request for attorney fees on appeal in a replevin action, reasoning that RCW 7.64.035 "applies only to rulings of a 'judge or court commissioner, at the hearing on the order to show cause' in a replevin action." Puget Sound Nat'l Bank v. Honeywell, Inc., 40 Wn. App. 313, 319, 698 P.2d 584 (1985). Because Cowiche Canyon is the stronger precedent, we follow

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it. We award attorney fees on appeal to the Partnership, subject to compliance with RAP 18.1.

Affirmed.

Becker, J.

WE CONCUR:

Leach, J.

Chivella, J.

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Appellate Court Case Title: SEIU Healthcare N.W. Training Partnership v. Evergreen Freedom Foundation
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