

No. 33953-6-II

CRIG

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

MARY JO THOLA, D.C., and SUNSET CHIROPRACTIC AND
WELLNESS CENTER, INC., a Washington corporation,

Respondent,

vs.

ALTA D. MAHAN, D.C. and JOHN DOE MAHAN, and their marital
community;

Defendants,

MARTIN R. HENSHELL and JANE DOE HENSHELL, and their
marital community; HENSHELL CHIROPRACTIC, a Washington
sole proprietorship and partnership,

Appellants.

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

INTRODUCTION.....	1
ASSIGNMENTS OF ERROR	2
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	4
STATEMENT OF THE CASE.....	5
A. Doctors Thola, Mahan and Henschell developed chiropractic practices in close proximity, but Thola did not require Mahan to sign non-compete or confidentiality agreements.....	5
B. Mahan declined Thola's offer to sell Sunset Chiropractic as too expensive.	6
C. Mahan gave notice at Sunset Chiropractic in November 2002, and negotiated to begin employment with Henschell Chiropractic in January 2003.	9
D. Mahan sent out her patient-notification letter on December 27, 2002, letting them know that she would be moving to Henschell Chiropractic in the New Year, but Mahan never discussed her letter with Dr. Henschell.....	10
E. Mahan began working for Henschell Chiropractic in January 2003, and roughly 100 Sunset patients transferred to Henschell for unknown reasons.	13
F. Procedural History.....	17
ARGUMENT.....	25
A. The UTSA preempts inconsistent tort claims like breach of the duty of loyalty and tortious interference with a business expectancy, and the trial court erred in instructing the jury on those claims.	25
B. The Henschells cannot be vicariously liable for their future employee's willful and malicious trade secret misappropriation, an unauthorized act of which they were completely unaware at the time.	29

C.	The Henschells did not ratify Mahan’s willful and malicious trade-secret misappropriation.	35
D.	For all of the reasons stated above, Thola’s intentional interference with a business expectancy and unjust enrichment claims against the Henschells also fail.	40
E.	At a minimum, the Court must reverse the damages.	41
	CONCLUSION	44

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Vigoro Indus., Inc. v. Cleveland Chem. Co.</i> , 866 F. Supp. 1150, 1161 (E.D. Ark. 1994), <i>reversed in part on other grounds</i> , 82 F.3d 785 (8 th Cir. 1996)	27
--	----

STATE CASES

<i>Barnes v. Treece</i> , 15 Wn. App. 437, 549 P.2d 1152 (1976).....	38
<i>Bratton v. Calkins</i> , 73 Wn. App. 492, 870 P.2d 981, <i>rev. denied</i> , 124 Wn.2d 1029 (1994)	30
<i>Brazier v. Betts</i> , 8 Wn.2d 549, 113 P.2d 34 (1941)	31
<i>Chase v. Smith</i> , 35 Wash. 631, 77 P. 1069 (1904)	42
<i>Consumers Insurance Co. v. Cimoch</i> , 69 Wn. App. 313, 848 P.2d 763 (1993).....	38, 39
<i>Corbit v. J. I. Case Co.</i> , 70 Wn.2d 522, 424 P.2d 290 (1967)	42
<i>Dickinson v. Edwards</i> , 105 Wn.2d 457, 716 P.2d 814 (1986)	30
<i>Eagle Group, Inc. v. Pullen</i> , 114 Wn. App. 409, 58 P.3d 292 (2002).....	35
<i>Ed Nowogroski Insurance, Inc. v. Rucker</i> , 88 Wn. App. 350, 944 P.2d 1093 (1997), <i>aff'd on other issues</i> , 137 Wn.2d 427 (1999).....	25, 26, 27
<i>Hein v. Chrysler Corp.</i> , 45 Wn.2d 586, 277 P.2d 708 (1954)	32
<i>Hewson Constr., Inc. v. Reintree Corp.</i> , 101 Wn.2d 819, 823, 685 P.2d 1062 (1984).....	34
<i>Kuehn v. White</i> , 24 Wn. App. 274, 600 P.2d 679 (1979).....	30, 32
<i>Matsumura v. Eilert</i> , 74 Wn.2d 362, 444 P.2d 806 (1968)	33

<i>Niece v. Elmview Group Home</i> , 131 Wn.2d 39, 929 P.2d 420 (1997)	31
<i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35, 59 P.3d 611 (2002)	31
<i>Smith v. Hansen, Hansen & Johnson, Inc.</i> , 63 Wn. App. 355, 818 P.2d 1127 (1991)	38
<i>Snyder v. Medical Serv. Corp. of E. Wash.</i> , 145 Wn.2d 233, 35 P.3d 1158 (2001)	31
<i>Stansfield v. Douglas Cy.</i> , 107 Wn. App. 1, 27 P.3d 205, <i>rev. denied</i> , 145 Wn.2d 1009 (2001)	34
<i>Tegman v. Accident & Medical Investigations, Inc.</i> , 150 Wn.2d 102, 75 P.3d 497 (2003)	42
<i>Tuthill v. Palermo</i> , 14 Wn. App. 781, 545 P.2d 588, <i>rev. denied</i> , 87 Wn.2d 1002 (1976)	42

STATE STATUTES

RCW 19.108.020	26
RCW 19.108.030	26
RCW 19.108.030(2)	35
RCW 19.108.900	27
RCW 19.108.900(1)	26
RCW 19.108.900(2)(a)	26
RCW 19.108.910	26
RCW 19.108.930	26

RULES

CR 49(b)) 42

MISCELLANEOUS

3 Am.Jur.2d *Agency* § 195, at 698 (1986)..... 38

Restatement (Second) of Agency §§ 15, 25, 99, 195, 228,
233 30, 31, 33, 38, 39

INTRODUCTION

A jury determined that defendant Alta Mahan, D.C. intentionally, willfully and maliciously misappropriated trade secrets from her then-employers, respondents Mary Jo Thola, D.C. and Sunset Chiropractic. Specifically, despite Dr. Thola's refusal to allow it, Dr. Mahan copied from Sunset's patient "travel cards" the names and addresses of patients she had treated, and sent out a letter notifying her patients that she was moving to appellant Henschell Chiropractic and inviting them to transfer their care. Although Mahan read her patient-notification letter to a chiropractic assistant at Henschell over the phone, no one at Henschell Chiropractic knew that Mahan had misappropriated Thola's trade secrets. Many patients transferred to Henschell.

In addition to alleging trade-secret misappropriation, Thola brought several other claims, including breach of Mahan's duty of loyalty, tortious interference with a business expectancy, and unjust enrichment. The Uniform Trade Secrets Act displaces tort and restitutionary theories based on trade-secret misappropriation, yet the trial court declined to dismiss the other claims or to instruct the jury so as to avoid the other claims once they found a trade-secret violation. A prospective employer cannot be vicariously liable for a

future employee's willful and malicious misappropriation of a trade secret (even when styled as tortious interference), yet the trial court repeatedly refused to dismiss these claims. And although the Henschells sought segregation of any damages awards because Thola conceded that they could be vicariously liable on only one of Thola's tort theories, the trial court declined to so instruct the jury.

These errors resulted in the jury finding the Henschells vicariously liable for over \$280,000, including exemplary damages and attorney fees. The trial court committed these and several other prejudicial errors over the Henschells' clear objections. The Henschells thus ask this Court to reverse.

ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury on tort and restitutionary claims displaced by the Uniform Trade Secrets Act. CP 1005-06 (parties' claims); 1022 (unjust enrichment); 1024-25 (tortious interference); 1026-28, 1030-32 (agency); 1033 (duty of loyalty); 1037 (damages); 1042-44 (Special Verdict Form).¹

¹ The Court's Instructions to the Jury (CP 1001-45) are in Appendix A to this brief. The relevant portion of the Henschells' proposed instructions (CP 955) is in Appendix B. Relevant portions of the jury-instruction colloquy (5/23 RP 25- 33) are in Appendix C.

2. The trial court erred in instructing the jury regarding agency and vicarious liability, and specifically in failing to give the Henschells' proposed instruction concerning ratification (CP 955). See App. B; App. C, 5/23 RP 24-31.²
3. The trial court erred in failing to give any of the Henschells' proposed Special Verdict Forms. See Apps. F & G, CP 957-86.
4. The trial court erred in denying defendants' motions for directed verdict. RP 655-80.
6. The trial court erred in ruling that because the jury found Mahan's misappropriation "wilful" and "malicious," the Henschells are liable for double damages and attorney fees under the UTSA.
7. The trial court erred in failing to instruct or permit the jury to segregate damages among the various claims.
8. The trial court erred in entering judgment based on the erroneous verdicts. CP 1369-71.

² The Verbatim Report of Proceedings for this nine-day trial is consecutively numbered, except for May 12, 2005, cited 5/12 RP ____; May 19, 2005, cited 5/19 RP __; and May 23, 2005, cited 5/23 RP ____.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where, as here, the UTSA displaces tort and restitutionary claims based upon a trade-secret misappropriation, is it error to permit the jury to consider such displaced claims?
2. Under the UTSA, is a prospective employer vicariously liable for its future employee's (a) intentional, willful and malicious misappropriation of trade secrets (including exemplary damages and attorney fees) from her then-employer; and (b) intentional interference with her then-employer's business expectancy?
3. By accepting payment for treating new patients, did the Henschells "ratify" Mahan's intentional, willful and malicious trade-secret misappropriation, or her intentional interference with a business expectancy, where the Henschells did not know that Mahan had previously misappropriated Thola's trade secrets?
4. Is a chiropractor who accepts payment for treating patients unjustly enriched by the entire amount of the payments?
5. Where, as here, the plaintiff asserts some claims solely against one co-defendant, and other claims against both co-defendants, does the trial court err by refusing to instruct or permit the jury to segregate their damages awards?

STATEMENT OF THE CASE

A. Doctors Thola, Mahan and Henschell developed chiropractic practices in close proximity, but Thola did not require Mahan to sign non-compete or confidentiality agreements.

In 1994, Mary Jo Thola became a chiropractor; in 1995, she and another chiropractor opened a practice (Respondent Sunset Chiropractic) in Bonney Lake. RP 86. Thola worked long hours and marketed the practice, gaining 18-to-23 new patients a month over the next several years. RP 94. In 1998, Thola and her partner opened a new clinic east of the mountains (Omak); after that, Sunset Chiropractic had fewer new patients because Thola was its only chiropractor. RP 94.

Defendant Alta Mahan, D.C. (a/k/a "Dr. Alta") joined Sunset Chiropractic in roughly May 2000. RP 814, 817. Thola hired her away from another chiropractor's office. RP 769. One of the things Thola liked best about Mahan was her interest in buying the practice in two-to-five years. RP 103-04, 107-08. Thola did not ask Mahan to sign a non-compete agreement. RP 818. Sunset Chiropractic's employee manuals contain no confidentiality or non-compete terms or agreements. RP 768; Exs 9 & 10.

Thola had not expected Mahan to work full time, but due to a shoulder injury, Thola could not work during Mahan's first two

months at Sunset Chiropractic; Mahan thus worked six days a week. RP 113-14, 818-19. Thola expected Mahan to increase patient visits by 10-to-20 percent, but Thola told Mahan that all those patients would be Sunset's, not Mahan's. RP 116. After Thola came back to work, Mahan worked four days a week, and Thola worked two days a week. RP 820. Thola paid Mahan \$3,000 a month. RP 174-75.

In June 2001, appellant Martin ("Marty") Henschell, D.C. opened his chiropractic practice down the road from Sunset Chiropractic. RP 531; 5/19 RP 52. Henschell worked five or six days a week and engaged in a great deal of marketing. 5/19 RP 52-53, 57; RP 504-06, 508-09. As a result of his efforts, his solo practice expanded to a point that, a little over one year later, he had 852 patient visits in August, 874 visits in September, and 1057 visits in October, 2002. RP 508-09; 5/19 RP 54-57. By contrast, Thola and Mahan together had only 659 patient visits in August, 668 in September, and 822 in October, 2002. RP 808-09.

B. Mahan declined Thola's offer to sell Sunset Chiropractic as too expensive.

Following up on her interest in buying Thola's practice, Mahan repeatedly asked Thola about buying Sunset Chiropractic,

but Thola generally put her off. RP 826. When Mahan got married in August 2002, she and her new husband decided that they needed to make decisions about their future, so Mahan asked Thola to make an offer. RP 826-27. In September 2002, Thola offered to sell Sunset Chiropractic to Mahan. Ex 16. Thola admitted that she was tired and “burn[ed] out” with the practice by that time. RP 238, 291-92.

Thola asked \$335,000 for Sunset, plus rent of \$5,130 per month (over \$61,500 per annum to Thola, who owned the building housing Sunset Chiropractic). RP 129-131; Ex 16. Thola also wanted Mahan to pay 65 cents on the dollar for accounts receivable. RP 131-33; Ex 16. Thola also required buyer financing and a 20% down payment (\$67,000). *Id.* Thola gave Mahan 30 days to come up with the down payment and to sign a letter of intent. Ex 16. If Mahan did so, then she could also pay to have the business appraised. *Id.* Thola gave Mahan only 23 days to raise any objections to or questions about the offer, in writing. *Id.*

Mahan had never owned a chiropractic business. RP 296-97. To quickly gather the means to understand Thola’s offer, Mahan met with Dr. Henschell on October 7, 2002. RP 368, 536; Ex 23. Mahan knew Henschell from school and from chiropractic

marketing opportunities when both of them worked for other chiropractors. 5/19 RP 60. Mahan said she was interested in buying a practice, and asked Henschell about various aspects of running a chiropractic business, such as rent, overhead, and other business expenses. RP 370, 534, 536; 5/19 RP 61. Henschell surmised that Mahan was thinking about buying Sunset Chiropractic. RP 534, 629-30. But Mahan never mentioned the terms of Thola's offer to Henschell or anyone else. RP 831.

Mahan concluded that Thola did not really want to sell her the practice because Thola's offer said that she had another potential buyer (with whom Thola actually had little contact, see RP 104-06) and that she would permit Mahan to have the business appraised only after Mahan signed a letter of intent. RP 829-30; Ex 16. Mahan frankly could not afford Thola's price on her salary; moreover, their relationship had deteriorated and Mahan did not want Thola as her landlord. RP 418-19, 426, 830, 834-85. In any event, Mahan's husband was tired of her coming home frustrated every night and thought that she should stop working with Thola. RP 835. On October 16, 2002, Mahan declined Thola's offer. RP 831; Ex 17.

C. Mahan gave notice at Sunset Chiropractic in November 2002, and negotiated to begin employment with Henschell Chiropractic in January 2003.

Also by mid-October 2002, Dr. Henschell knew he needed an associate chiropractor to assist with his heavy patient load. 5/19 RP 59. About a week after the luncheon Mahan had initiated, Henschell called Mahan to ask whether she was interested in working with him. RP 833. While she could not buy Sunset Chiropractic, Mahan also was not very interested in becoming an associate doctor again. RP 833-34. Nonetheless, Mahan met with Henschell and his wife over dinner in late October to determine whether she might like to work with him. *Id*; RP 416-17; Ex 18. Among other things, Henschell offered Mahan \$4,000 a month and a \$100 bonus for each new patient she brought in. RP 375-76; Ex 18. Negotiations between Mahan and Henschell continued throughout October, November, and into the early part of December, 2002. RP 376, 834; Ex 18.

Mahan was aware that Thola's Omak office had terminated an associate who refused to buy that practice. RP 231-32, 420-22. Thola mentioned financial problems in staff meetings and, as noted above, her attitude toward Mahan had deteriorated. RP 834-35. Although Mahan's contract with Sunset Chiropractic required only

30-days notice, she gave Thola 41-days notice on November 21, 2002. *Id.*; Ex 9. At that time, Mahan did not have a firm commitment from Henschell Chiropractic. RP 401-02, 834.

D. Mahan sent out her patient-notification letter on December 27, 2002, letting them know that she would be moving to Henschell Chiropractic in the New Year, but Mahan never discussed her letter with Dr. Henschell.

After Mahan gave Thola her notice, Mahan raised the issue of sending out patient-notification letters. RP 260, 402. Mahan did not want to simply abandon her patients:

[I]f I had left without telling my patients where I was going or to provide them with an alternative or provide them with an ability to choose where they wanted their care, then I understood that to be patient abandonment.

RP 403. But Thola refused to allow Mahan to send out any notices; instead, Thola permitted Mahan to display a letter at Sunset Chiropractic, telling patients generally that Mahan was leaving, that she had enjoyed treating them, and that she hoped they would allow Sunset Chiropractic to continue meeting their needs; this posting failed to tell the patients where Mahan was going or why she was leaving. RP 141, 409; 5/19 RP 2; Ex 20.

Thola claimed that there was no need to mail out notices because Mahan had said that she was “going to Mexico.” RP 137, 139, 205. But Mahan’s October 16, 2002 letter declining to buy

Sunset Chiropractic said that the Mahans were considering moving to Mexico over a year later, in 2004. RP 428-29; Ex 17.

When the posting (Ex 20) appeared at Sunset Chiropractic during the first two weeks of December 2002, many of Mahan's patients asked her where she was going. RP 410; 5/19 RP 3-4. By then, Mahan and Dr. Henschell had orally agreed on the general terms of her employment, and she attended a staff meeting at Henschell Chiropractic on December 10th; but she would not start working there until January 2, 2003. RP 377, 407, 491; 5/19 RP 5, 65. Mahan offered to send patients who inquired further information; if they said yes, then she copied their names and addresses from patient treatment cards. RP 410; 5/19 RP 3-4. When a few patients (perhaps five or six) pressed Mahan for more information, she explained that she was going down the road to Henschell Chiropractic. RP 430-31; 5/19 RP 6-7.

For her patients who asked for later notification, and for those Mahan did not see between the first week of December and December 24th (her last day in the office), Mahan decided to send out a patient-notification letter. 5/19 RP 5-6; Ex 21 (attached as

Appendix D).³ Mahan copied down the names and addresses of at least 31 patients. RP 386-87. Mahan did not remove patient files or any other kind of documents from Sunset. RP 302. Mahan prepared her patient-notification letter on her own paper, paid for the mailing, and sent it to about 100 patients on or about December 27, 2002. RP 384; 5/19 RP 7; Ex 21.⁴

Mahan did not show this letter to Dr. Henschell – or discuss it with him – before or after she sent it out. RP 303-04, 424-25, 628-29. She did call Henschell’s chiropractic assistant, Linda Weingard, and read it to her over the phone. RP 387-88, 433-34, 514-15. Weingard told Mahan that she might have worded some things differently, but Mahan said that she could not change the letter because it was already done. RP 484-85. Henschell Chiropractic was in complete “chaos” during December 2002 due to an ongoing remodel, so Weingard did not find this call important; Mahan left no message for Dr. Henschell. RP 513-15, 527.

³ Ex 21 is the patient-notification letter sent to Suzanne Smith, which is the only version of the patient-notification letter in the record. RP 778. No such letters appeared in Henschell Chiropractic’s files. RP 513.

⁴ There was a dispute at trial over Mahan’s interrogatory answers (Ex 43) which Thola interpreted to say Mahan sent 137 letters; the interrogatory answers are ambiguous, and Mahan said she sent approximately 100 letters. See RP 384-85. There is no evidence to the contrary.

E. Mahan began working for Henschell Chiropractic in January 2003, and roughly 100 Sunset patients transferred to Henschell for unknown reasons.

On her first workday at Henschell Chiropractic, January 2, 2003, Mahan signed an employment agreement containing non-compete and confidentiality provisions. RP 550; Ex 22. Mahan's employment was not contingent on her bringing any new patients to Henschell Chiropractic because they were quite busy and had plenty of work for her. 5/19 RP 5. But Henschell did agree to pay Mahan \$100 per new patient she brought in. Ex 22. As noted above, Dr. Henschell had no idea that Mahan had sent out her patient-notification letter. RP 303-04, 424-25, 628-29.

While Henschell continued its marketing blitz throughout 2003, Sunset did no external marketing that year. RP 766.

There was a wide range of testimony regarding the number of patients transferring from Sunset to Henschell during 2003. By one accounting, roughly 80 patients transferred in 2003. RP 391-92, 432; Ex 31.⁵ This is consistent with Thola's prior experience concerning another associate with whom she had no non-compete

⁵ This exhibit contains roughly 123 names, 43 of which Mahan crossed out because she did not refer them to Henschell. RP 432. Thus, roughly 80 patients came to Henschell from Sunset by this accounting. *Id.*

agreement: the associate left the Omak office, and 50-to-80 patients followed her to a new office. 5/12 RP 80-81. Mahan testified that Henschell Chiropractic received \$28,711.72 from these new patients. RP 433-34. Dr. Henschell noted that this raw number did not account for any overhead to serve these patients. RP 574. And Mahan received a bonus for bringing in new patients in 2003 (RP 492), which obviously reduced Henschell's \$28,711.72 – but the jury eventually awarded Thola this full amount, plus a portion of Mahan's bonus. CP 1044.

At a different point in her testimony, Mahan said that about 140 patients transferred from Sunset to Henschell in 2003. RP 414. But she noted that 40 of those patients did not stay at Henschell, leaving 100 patients. *Id.*

Thola asserted that 169 patients (or more) transferred from Sunset to Henschell in 2003. RP 144-151; 155, 760; Exs 25A – 25L. But she admitted on direct that many of the people in her Exhibits 25A – 25L (transfer slips) did not transfer to Henschell from Sunset, but rather from other chiropractic offices. RP 146-49. Yet even after removing 36 of these slips (*see also* RP 468-84; Ex 58), Thola's counsel continued to assert that the "169" transfer patients were represented by Exs 25A through 25L. RP 150-51. She even

used the 169 number in closing. RP 893-94, 898-99. Yet after eliminating the many duplicate records in those Exhibits, and eliminating one more patient who actually transferred to another doctor (Barnes, Ex 25L, HEN168), the actual number is 101. Exs 25A-25L.⁶ No evidence supports the 169 number.

Thola also presented Ex 35, which contains two lists, the second list duplicating the first, and adding some names. The first list contains 82 names, while the second has 108. Ex 35. Again, these names repeat the names in Exs 25A through 25L. *Compare Ex 35 with App. E.*

Despite the complete absence of proof that 169 patients transferred from Sunset to Henschell, the jury found that Mahan was “unjustly enriched” \$16,900 – precisely \$100 x 169 patients – and exactly what Thola asked the jury to award. CP 1044; RP 908. Perhaps this is because Thola asked her expert, Neil Beaton, simply “to assume that ... in this case 169 patients were taken from” Sunset. 5/12 RP 8. Beaton’s analysis assumes that 169 patients left Sunset for Henschell solely due to Mahan’s patient-notification letter. 5/12 RP 47, 50. Beaton did not investigate

⁶ See also, Appendix E (nonduplicative alphabetical listing of all patients with transfer records in Exs 25A through 25L).

whether a factor such as liking Mahan's treatment better caused their departure. 5/12 RP 51. He used the second list in Ex 35 for his calculations, which has only 108 names. 5/12 RP 43.

Beaton acknowledged that he had never valued a practice where the doctors had no non-compete agreement. 5/12 RP 69, 70-71. In such circumstances, a doctor's leaving would normally cause a "tectonic shift" of patients. *Id.* Yet Beaton did not account for the absence of a non-compete in valuing the practice. *Id.*

Aside from the evidentiary issue regarding the number of transferring patients, Thola presented no evidence that Mahan's patient-notification letter caused a single patient to transfer. On the contrary, Thola's expert Beaton admitted that he simply assumed causation. 5/12 RP 47. And Thola herself had no idea why any patient transferred, except for two patients who "wanted to follow Dr. Alta" (RP 781-82), and several patients who testified at trial. RP 772, 774-85.

Those patients testified that the patient-notification letter had nothing to do with their transfers to Henschell: Janice Whitehead said she followed Dr. Alta because she did not like the way Thola treated her, but did like Dr. Alta's adjustments (RP 588-89); Valerie Vaughn said Thola injured her, but she liked Dr. Alta's adjustments

(RP 591-93); Michelle Wittmier also said Thola injured her, but she liked Dr. Alta's adjustments (RP 596-98); Mark Lemme said that he treated very little with Thola, thought Dr. Alta was a very good chiropractor, and transferred to Henschell when his wife received a postcard mailer from Henschell, not Mahan's patient-notification letter (RP 600-02); Martin Sandor said he liked Thola, but did not like her style of adjusting, so he sought out Dr. Alta after she left Sunset (RP 605-07). On the other hand, patient June Jarvey said that she did receive the patient-notification letter, but she did not transfer to Henschell. RP 184-89. No other patients testified.

F. Procedural History.

Thola and Sunset sued Mahan for breach of contract and breach of the common law duty of loyalty. CP 345-53. They sued the Mahans, the Henschells and Henschell Chiropractic, for violation of the Uniform Trade Secrets Act (UTSA); tortious interference with a business expectancy; and unjust enrichment. *Id.* They also sought an injunction against using their confidential information. *Id.* The Henschells and Henschell Chiropractic denied Thola's claims. CP 673-79. The parties later brought cross-motions for summary judgment. CP 1-21 (Henschell), 265-97 (Thola). The court denied the motions. CP 396-98.

The case went to trial on May 10, 2005, lasting eight court days. The parties brought extensive motions *in limine*. CP 476-86 (Thola); 399-409, 489-98 (Henschell & Mahan). As relevant here, the defendants asked the court to exclude the testimony of plaintiff's expert, Neil Beaton, because Thola could not establish causation. As noted above, Beaton simply "assumed" that the patient-notification letter caused the patients to transfer, Thola had no idea why anyone transferred, and the witnesses who testified said the letter did not cause them to transfer. The trial court reserved its ruling, CP 944-45, but later denied the motion, allowing the jury to consider Beaton's testimony. RP 643-45.

At the close of Thola's case, the defendants brought a motion for directed verdict. RP 653-680. They first noted that no evidence supported Thola's claim for an injunction, RP 654-55; Thola agreed, and the trial court dismissed that claim. RP 655; CP 947. As relevant here,⁷ the defendants also sought directed verdict on the tortious interference and trade secrets claims on various grounds (discussed *infra*), which the trial court denied, repeatedly

⁷ Mahan also sought dismissal of the breach of confidentiality and duty-of-loyalty claims; but those claims run solely against Mahan, so the Henschells are not challenging the trial court's rulings on those issues.

suggesting that he did not believe the defendants' testimony. RP 664-76. Indeed, although he had heard only the plaintiff's case, the trial judge commented, "Reminds me of Enron. This whole thing reminds me of Enron." RP 674. In light of these views, the trial court denied the rest of the defendants' motions for directed verdict rather quickly. RP 673-80.⁸

All parties proposed numerous jury instructions. CP 728-83 (Thola); 784-849, 949-87 (Henschells); 909-38, 988-92 (Mahan). While the plaintiffs accepted all of the Court's Instructions to the Jury (5/23 RP 2-3), and Mahan had only one objection (5/23 RP 3-5), the Henschells had numerous objections (5/23 RP 2-33). This may reflect the makeup of the Court's Instructions: Of the 36 jury instructions, roughly half are form (WPI) instructions, and all but one of the other half were Thola's proposed instructions. *Compare* App. A *with* CP 728-83. The one was Mahan's proposal (CP 992, 1029); the trial court gave none of the Henschells' substantive instructions. *Compare* App. A *with* CP 784-849, 949-87.

As relevant here, the Henschells raised the following objections to the Court's Instructions:

⁸ The relevant trial court comments are in Appendix H.

Instruction 14 (CP 1018) misstates the law, adding a common-law element to the WPI definition of “improper means” under the UTSA (5/23 RP 7-8);

Instruction 17 (CP 1021) inaccurately defines “malicious” under the UTSA (5/23 RP 8-12; see *also* CP 993-96);

Instruction 23 (CP 1027) – in the guise of a “ratification” instruction – essentially imposes strict liability on the Henschells under the UTSA (5/23 RP 12-15);

Instruction 24 (CP 1028) comments on the evidence and misstates the law regarding actual or implied authority (5/23 RP 15-18).

The Henschells also objected to the court failing to give their proposed instructions on malice (CP 950); agency (CP 951-52, 954); fair competition (CP 953); and ratification (CP 955). App. B; App. C, 5/23 RP 24-31. Rejecting all of the Henschell’s proposed instructions, the court repeatedly stated that they did not comport with its view of the evidence and that it was “not buying” the Henschells’ theory of the case. App. C, 5/23 RP 25, 27, 28, 31.

Two additional relevant disputes concerned the special verdict forms, one involving the UTSA’s displacement (or preemption) of tort claims, and the other involving segregation of damages. The Henschells argued that the UTSA is the exclusive remedy for trade secret misappropriations. See CP 997-1000; 5/23 RP 32; RP 843. They therefore objected to the trial court’s Special Verdict Form A (5/23 RP 19-20; App. A, CP 1042-45), which

permitted the jury to address both misappropriation of trade secrets and also several displaced common-law theories arising out of the same alleged misappropriation. 5/23 RP 32. The Henschells proffered two alternative verdict forms that would have permitted the jury to avoid considering claims displaced by the UTSA if it found a UTSA violation. CP 957-71.⁹

The Henschells also objected that because the plaintiffs had two theories solely against Mahan (common-law duty of loyalty and breach of confidentiality agreement), and three against her and the Henschells, the special verdict forms should permit the jury to segregate any damages awards. 5/23 RP 20-24. The Henschells proposed two alternative verdict forms that would have permitted the jury to do so. CP 972-86.¹⁰

The trial court rejected all of the Henschells' proposed verdict forms. 5/23 RP 32-33. While acknowledging that this case

⁹ These forms are in Appendix F. "Version 1" (on upper right-hand corner of first page) accounts for UTSA preemption, and fully segregates the damages (the Henschells' second objection to the Special Verdict Forms, discussed *infra*). CP 957-64. "Version 2" reflects UTSA preemption, but with a simpler damages verdict. CP 965-71.

¹⁰ These forms are in Appendix G. "Version 3" (CP 972-79) segregates every element of damages, while "Version 4" (CP 980-86) simply segregates damages attributable to Mahan from those attributable to the Henschells.

“has a lot of nuances to it,” the court refused either to instruct under UTSA preemption or to segregate the damages. *Id.* Essentially, “if it is confusing and there are errors, that ... can be remedied by the Court and Counsel after the jury” verdict. 5/23 RP 32.

During closing argument, Thola’s counsel showed the jury an illustrative exhibit comparing Mahan’s patient-notification letter with “solicitation letters” quoted in reported court opinions from other cases – letters not in evidence in this case. RP 871-73. Before counsel objected, she fully compared the text of one letter not in evidence, telling the jury that “the Negrewski [*sic*] letter was a solicitation letter. You should conclude that the Mahan letter was solicitation letter.” *Id.* Counsel objected both that the letters quoted on the exhibit were not in evidence and that it is improper for counsel to argue about legal opinions on which the court has not instructed the jury. RP 873-75. The Henschells’ counsel sought a mistrial, or in the alternative a curative instruction. RP 874. The trial court gave the following curative instruction (RP 877):

An objection has been raised regarding the use of an exhibit without proper foundation or based on admitted exhibits. I have sustained the objection. You are to disregard the exhibit and the argument pertaining to the exhibit.

During its deliberations, the jury was confused about the trial court's Special Verdict Form A. RP 991-95. They asked whether questions 9 and 10 (regarding causation) referred to questions 7 and 8 (regarding the confidentiality agreement), or to everything Dr. Mahan allegedly did. *Id.*; App. A, CP 1043-44. The court instructed, "all." RP 995.

The jury returned a verdict finding Mahan liable on all counts except the alleged confidentiality agreement, and the Henschells vicariously liable on two counts; it awarded \$28,712.00 in unjust enrichment against the Henschells, plus \$16,900 in unjust enrichment against the Mahans, plus \$89,000 in undifferentiated, unspecified damages. RP 998-1000. The Henschells again objected that the confusing Special Verdict Form did not segregate the damages between claims against all defendants and that solely against Mahan. RP 1003-08. Yet despite the trial court's earlier assurance that it would remedy any juror errors, it refused to send the jury back to segregate or explain its damages awards. *Id.*

During this argument (before the court released the jury) Thola stated that the court should subtract the two unjust enrichment awards from the \$89,000 to arrive at the judgment on which the defendants would be jointly and severally liable:

Well, I think if you segregate out as to the defendant on the unjust enrichment claim you take 28,712 out of 89 and you take 16,900 out of 89 and half is left is what the joint and several liability amount is.

RP 1005. This leaves \$43,388 ($89,000 - 28,712 - 16,900 = 43,388$). While this still does not explain what part of the \$43,388 applies to the claims against the Henschells, the trial court accepted this representation, and dismissed the jury. RP 1006-09. Yet Thola submitted, and the trial court ultimately signed, a judgment against the Henschells for the full \$89,000. CP 1338.

The jury also found Mahan's misappropriation of trade secrets "wilful" and "malicious." App. A, CP 1043. As discussed below, this permitted the court to award double damages and attorney fees against Mahan under the UTSA. But though the Henschells had proposed jury instructions permitting the jury to determine whether the Henschells acted willfully and maliciously (Apps. F & G; CP 959, 967, 974, 982), the Court's Instructions did not ask this question, and the jury did not find the Henschells willful or malicious. App. A. Nonetheless, the trial court ultimately doubled the full amount of damages ($2 \times \$89,000 = \$178,000$) and awarded this entire amount against the Henschells. CP 1370.

In addition, Thola sought roughly \$160,000 in undifferentiated attorney fees and costs. CP 1046-1269 (total at CP 1082). The Henschells objected that since the UTSA is the only claim on which a court may award fees, Thola must segregate her fees. See, e.g., CP 1341-45; 1349-57. The Henschells suggested \$75,000 as a reasonable fee award. CP 1345. Thola responded with a demand for roughly \$124,000 in fees and costs. CP 1359. Performing no segregation and entering no findings, the trial court just split the difference, awarding roughly \$104,000 in fees and costs. CP 1370. This brought the Henschells' vicarious liability for Mahan's actions to roughly \$282,000. *Id.*

ARGUMENT

A. The UTSA preempts inconsistent tort claims like breach of the duty of loyalty and tortious interference with a business expectancy, and the trial court erred in instructing the jury on those claims.

Thola's tort claims (duty of loyalty and tortious interference) and her restitutionary theory (unjust enrichment) alleged liability based solely on Mahan's trade-secret misappropriation. But under the UTSA, a plaintiff may not base tort claims on trade-secret misappropriations because the UTSA expressly displaces them. *Ed Nowogroski Ins., Inc. v. Rucker*, 88 Wn. App. 350, 357-58, 944 P.2d 1093 (1997), *aff'd on other issues*, 137 Wn.2d 427 (1999)

(“*Rucker*”). The trial court erroneously refused to dismiss the tort claims, or to instruct the jury in a manner that would avoid the tort claims. This Court should reverse and remand for retrial.

The Uniform Trade Secrets Act took effect in 1982. RCW 19.108.930. As a uniform act, its main purpose is to “make uniform the law with respect to subject of this chapter among states enacting it.” RCW 19.108.910. The chapter’s “subject” is remedying trade secret misappropriations. RCW 19.108.020, .030.

To achieve this uniformity, the UTSA displaces conflicting tort and restitutionary theories:

This chapter displaces conflicting tort, restitutionary, and other law of this state pertaining to civil liability for misappropriation of a trade secret.

RCW 19.108.900(1). The UTSA thus leaves unaffected civil actions that do not arise out of a trade secret misappropriation:

This chapter does not affect:

(a) Contractual or other civil liability or relief that is not based upon misappropriation of a trade secret;

RCW 19.108.900(2)(a).

Under this plain language, our Court of Appeals has held that a party may not rely on acts constituting a trade secret misappropriation to state a tort claim:

While the UTSA does not affect “contractual or other civil liability or relief that is not based upon misappropriation of a trade secret[,]” it specifically displaces conflicting tort laws pertaining to trade secret misappropriation. RCW 19.108.900. Thus, [plaintiff] may not rely on acts that constitute trade secret misappropriation to support other causes of action. *Accord, Vigoro Indus., Inc. v. Cleveland Chem. Co.*, 866 F. Supp. 1150, 1161 (E.D. Ark. 1994), *reversed in part on other grounds*, 82 F.3d 785 (8th Cir. 1996).

Rucker, 88 Wn. App. at 358. In **Rucker**, an insurance company sued its former salespersons for taking confidential client lists and other information, bringing both UTSA and tort claims. The trial court dismissed the tort claims as displaced by the UTSA, but awarded damages for the UTSA violation. 88 Wn. App. at 355.

On appeal, the company challenged the tort-claims dismissal, but the appellate court affirmed. 88 Wn. App. at 357-58. Simply put, permitting recovery for trade-secret misappropriation under alternative tort or restitutionary theories thwarts the UTSA’s fundamental goal – uniformity (*id.* at 358):

[Plaintiff]’s tort claims are all based on the defendants’ retention and use of its client information. Because we have decided that these acts constituted trade secret misappropriation, we affirm the lower court’s ruling that liability and damages are governed exclusively by the UTSA.

The same is true here. Thola’s claims challenge only Mahan’s misappropriation and use of client information. The jury found that Mahan misappropriated trade secrets, so “liability and

damages are governed exclusively by the UTSA.” *Id.* But since the trial court refused to dismiss the tort claims or to instruct the jury (a) to ignore the tort claims after finding a UTSA violation, and/or (b) to segregate damages among the claims, this Court must reverse the verdict and remand for a new trial.

The Henschells brought these precise points to the trial court’s attention in writing and during argument over the jury instructions. See CP 997-999; RP 843, 5/23 RP 19-21, 32. They also proposed jury instructions that would have permitted the jury to avoid considering the tort claims if they first found a UTSA violation. CP 957-71. The trial court erred in permitting the jury to consider the tort theories and the unjust enrichment claim.

The prejudice resulting from the trial court’s errors was enormous. Thola had a very clear and unambiguous duty-of-loyalty claim solely against Mahan. The jury could well have awarded most or nearly all of the damages based on this claim. But the trial court failed to limit the jury to the UTSA claim and (as discussed further below) failed to require segregation of the damages awards, so the Henschells unjustly suffered liability for the over one-quarter-million dollar verdict. This injustice is directly contrary to controlling law and must be set aside.

B. The Henschells cannot be vicariously liable for their future employee's willful and malicious trade secret misappropriation, an unauthorized act of which they were completely unaware at the time.

The Henschells argued on summary judgment (CP 15-17), and in their trial brief (CP 869-72), and again on motion for directed verdict (RP 668-69), that they cannot be vicariously liable for Mahan's willful and malicious actions prior to starting work at Henschell Chiropractic. It was undisputed at trial that Sunset Chiropractic still employed Mahan in December 2002, and that Mahan acquired the patient information and sent out her patient-notification letter before and during that month. Indeed, Thola's breach-of-loyalty claim wholly depended on Mahan being a Sunset employee when she took patient information. Moreover, the jury determined that Mahan intentionally acted willfully and maliciously toward Thola. CP 1284. Since an employer is not vicariously liable for a future employee's willful and malicious acts outside the scope of employment, this Court should reverse the judgment against the Henschells and dismiss Thola's claims against them.¹¹

¹¹ As further discussed below, this same analysis applies to Thola's tortious interference with business expectancy and unjust enrichment claims, the only other claims on which the Henschells could be vicariously liable (see CP 1044, Questions 12 & 13), so dismissal is appropriate.

While scope of employment is generally a question of fact, it can and should be resolved as a matter of law where only one conclusion is possible. See, e.g., *Bratton v. Calkins*, 73 Wn. App. 492, 497, 870 P.2d 981 (citing, *inter alia*, *Dickinson v. Edwards*, 105 Wn.2d 457, 466-67, 716 P.2d 814 (1986); *Kuehn v. White*, 24 Wn. App. 274, 280-81, 600 P.2d 679 (1979)), *rev. denied*, 124 Wn.2d 1029 (1994). The black letter law on the scope of employment is fairly straightforward:

(1) Conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master, and ... [last factor irrelevant here.]

RESTATEMENT (SECOND) OF AGENCY ("Agency") § 228 (1958).

Agency § 233 further defines the temporal element:

Conduct of a servant is within the scope of employment only during a period which has a reasonable connection with the authorized period.

And Comment a. to Agency § 233 further explains that

The employment exists only during the time when the servant is performing or should be performing the work which he is employed to do. **It does not begin at the time when it is necessary for him to act in order to perform the required service. It begins only when the master has**

a right to direct the method by which the servant is to perform the work, and terminates when the master has no longer a right to control it. When it begins and terminates is determined by the terms of the employment and all the facts of the situation. [Emphases added.]

See also, e.g., **Brazier v. Betts**, 8 Wn.2d 549, 561-63, 113 P.2d 34 (1941) (citing Agency §§ 228 & 233; no vicarious liability when employee assaulted someone outside of business hours). Under these well established principles, Thola could not reasonably claim that the Henschells had any “right” (or ability) to control Mahan’s “work” prior to her first day on the job.

Moreover, Washington has long recognized that while employers may be liable for employees’ torts committed within the course and scope of their employment, willful and malicious torts committed outside the scope of employment do not subject the employer to vicarious liability. See, e.g., **Robel v. Roundup Corp.**, 148 Wn.2d 35, 53, 59 P.3d 611 (2002) (employer vicariously liable for employees’ abusive behavior on the employer’s premises during business hours); **Niece v. Elmview Group Home**, 131 Wn.2d 39, 56, 929 P.2d 420 (1997) (“[C]urrent Washington law clearly rejects vicarious liability for intentional or criminal conduct outside the scope of employment” (quoted with approval in **Snyder v. Med. Serv. Corp. of E. Wash.**, 145 Wn.2d 233, 242-43, 35 P.3d 1158

(2001) (employer not liable for forbidden abuse by supervisor)); **Hein v. Chrysler Corp.**, 45 Wn.2d 586, 600, 277 P.2d 708 (1954) (employer not liable where employee wrongfully induced breach of contract); **Kuehn**, 24 Wn. App. at 277-81 (employer not liable where “the servant’s intentionally tortious ... acts are not performed in furtherance of the master’s business”). As **Hein** holds:

An employee who willfully and for his own purposes violates the property rights of another (by inducing a breach of contract, or in some other manner) is not acting in the furtherance of his employer’s business. Consequently, his employer cannot be held liable under the doctrine of *respondeat superior* for the employee’s wrongful act. The same rule should apply to any tort, regardless of its nature.

45 Wn.2d at 600.

It is undisputed that Mahan did not start working for Henschell Chiropractic until January 2003, which is after she had performed all of the acts Thola claimed constituted trade-secret misappropriation – copying down names, talking with patients, and sending out her notification letter. In an unchallenged finding, the jury specifically determined that Mahan intentionally acted willfully and maliciously. App. A (CP 1021 (defining willful and malicious as intentional conduct), 1043). Moreover, the Henschells did not authorize Mahan, nor even impliedly authorize her to misappropriate Thola’s trade secrets before starting work for him.

In short, Mahan committed an intentional tort wholly outside the course and scope of her future employment as a matter of law. The Henschells could not be liable for her willful and malicious trade-secret misappropriation.

The same analysis applies under the rubric of principal/agent relations. See *generally*, Agency § 25 (general agency rules applicable to principal/agent and master/servant relations). “Before the sins of an agent can be visited upon his principal, the agency must be first established.” ***Matsumura v. Eilert***, 74 Wn.2d 362, 363, 444 P.2d 806 (1968). While no express agreement is required (*id.* at 368), Mahan nonetheless could not become the Henschells’ agent without their consent:

An agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act.

Agency § 15; see *also*, 74 Wn.2d at 368 (“agency does not come into existence out of thin air”). Agency § 15, Comment *a.* explains:

One becomes an agent only if another in some way indicates to him consent that he may act on the other’s account. . . . A person is not an agent merely from the fact that he believes he has been authorized to act as agent for another or purports to act as such. It is only where the person acting believes reasonably, from conduct for which the other is responsible, that he is authorized so to act that there is an agency relation.

Thola bore the burden of establishing Mahan's agency. **Stansfield v. Douglas Cy.**, 107 Wn. App. 1, 17, 27 P.3d 205 (citing **Hewson Constr., Inc. v. Reintree Corp.**, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984)), *rev. denied*, 145 Wn.2d 1009 (2001).

The Henschells did not authorize Mahan to act, nor did they have any control over her actions, prior to her beginning employment with them. RP 303-04, 424-25, 628-29. Mahan herself did not believe that she was acting on the Henschells' behalf when she took the patient names and sent out her notification letter; rather, she felt that she had an obligation to her patients to notify them about where she was going so as not to abandon them. RP 303-04, 403, 424-25. There is simply no evidence that Mahan was the Henschells' agent when she misappropriated Thola's trade secrets. Thus, they cannot be liable for her willful and malicious behavior.¹² Yet the trial court allowed this claim, and all of the agency instructions, to go to the jury over the Henschells' objections. This was reversible error.

A fortiori, the Henschells are not liable for exemplary damages or attorney fees under the UTSA. In addition to

¹² As noted above, Thola also claimed that the Henschells ratified Mahan's conduct, which is also incorrect, for reasons discussed below.

recovering for actual loss and unjust enrichment, the UTSA permits awards of exemplary damages and attorney fees for willful and malicious misappropriation. RCW 19.108.030(2), .040; **Eagle Group, Inc. v. Pullen**, 114 Wn. App. 409, 422, 58 P.3d 292 (2002), *rev. denied*, 149 Wn.2d 1034 (2003). But the Henschells argued to the trial court that they could not be vicariously liable for these amounts, proffered jury instructions permitting the jury to find Dr. Henschell willful and malicious, and objected to the trial court's failure to give these instructions. CP 872-73; Apps. F (CP 959, 967) & G (CP 974, 982); 5/23 RP 31-32. The trial court refused to ask the jury whether the Henschells acted willfully or maliciously. See App A, CP 1043. Because the Henschells are not vicariously liable for Mahan's willful and malicious behavior and because the jury did not find that the Henschells acted willfully or maliciously, the Court should reverse the trial court's awards of exemplary damages and attorney fees against the Henschells.

C. The Henschells did not ratify Mahan's willful and malicious trade-secret misappropriation.

Thola also argued that the Henschells ratified Mahan's willful and malicious trade-secret misappropriation after the fact. See, e.g., App. A, CP 1027. But as the Henschells argued below, they

never had full knowledge of the facts, so they did not ratify Mahan's acts. CP 871-72. Again, the Court should reverse.

As discussed above, the Henschells cannot be held liable (as employer or principal) for Mahan's intentional, willful and malicious trade secret misappropriation committed prior to her employment at Henschell Chiropractic. Since the jury may have determined that the Henschells were vicariously liable on this basis, the Court should reverse.

Thola also argued that when Mahan read her patient-notification letter to Henschell-chiropractic-assistant Linda Weingard in late December 2002, the Henschells thereby received notice of Mahan's wrongful actions. See, e.g., CP 1028. The evidence is undisputed that Mahan did not ask Weingard to approve the letter during this call; indeed, when Weingard suggested that she would change a few things in the letter, Mahan told her that she could not do so because the letter was already done. RP 387-88, 484-85, 514-15. Mahan and Weingard were friends, so Weingard found the call unremarkable. RP 522-23. Mahan did not leave a message for Dr. Henschell, and Weingard told him nothing about the call. RP 514-15, 527.

The trial court instructed the jury on ratification as follows:

Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.

Even if an agent acts without her principal's authority, the principal may nevertheless ratify the agent's act by acting with full knowledge of the act, accepting the benefits of the act or intentionally assuming the obligation imposed without inquiry. Actual or constructive knowledge of the act will suffice to support a determination of ratification.

If you find that Martin Henschell or Henschell Chiropractic acted with full knowledge of Alta D. Mahan's actions and accepted the benefits of her actions, then Martin Henschell and Henschell Chiropractic ratified Alta D. Mahan's acts.

App. A, CP 1027. But since Dr. Henschell knew nothing about the letter until months later, Thola asked for and received an instruction (in relevant part) permitting the jury to impute Weingard's "knowledge" to Henschell (*id.* at CP 1028):

Knowledge or notice by or to an agent with [interlineated: actual or implied] authority may be imputed to her principal and the knowledge had by an agent will bind the principal.

If you find that Linda Weingard is an agent of Martin Henschell or Henschell Chiropractic, and if you find that Linda Weingard had notice of Alta D. Mahan's actions in December 2002 and thereafter, then Martin Henschell and Henschell Chiropractic had notice of Alta D. Mahan's actions in December 2002 and thereafter.

The Henschells specifically objected that the court's ratification instruction misstated the law, 5/23 RP 12-18; explained in writing why it misstates the law, CP 872 & n.107; and proposed

an alternative, correct instruction, App. B, CP 955. These objections are correct, as the Court of Appeals long ago recognized in addressing the precise language quoted in the second paragraph of the trial court's ratification instruction:

The acceptance or retention of benefits derived from an agent's unauthorized act does not amount to a ratification of such act if the principal, in accepting such proceeds or benefits, does not have knowledge of all the material facts surrounding the transaction.

Consumers Ins. Co. v. Cimoch, 69 Wn. App. 313, 323, 848 P.2d 763 (1993) (citing "3 AM.JUR.2D Agency § 195, at 698 (1986). See also **Smith v. Hansen, Hansen & Johnson, Inc.**, 63 Wn. App. 355, 369, 818 P.2d 1127 (1991) (ratification occurs where corporate principal, *with full knowledge of the material facts*, receives, accepts, and retains benefits from a transaction), *rev. denied*, 118 Wn.2d 1023 (1992); **Barnes v. Treece**, 15 Wn. App. 437, 443, 549 P.2d 1152 (1976)"). Despite this clear holding, the trial court's ratification instructions erroneously imply that mere benefit is enough. App. A, CP 1027-28.

And even assuming *arguendo* that the instructions had correctly stated the law, Thola's evidence simply failed to establish sufficient knowledge to support her ratification theory. At most, Weingard's only "knowledge" was that Mahan had sent (or was

sending) a letter notifying her patients where she was going and inviting them to transfer their care to her new location. Weingard did not (and could not) know that Mahan had improperly obtained her patients' names and addresses – indeed, Weingard had no idea to whom Mahan had sent (or was sending) the letter. This is not “all material facts surrounding the transaction.” *Cimoch*, 69 Wn. App. at 323. Thus, Thola failed to establish that the Henschells ratified Mahan’s intentional, willful and malicious misappropriation, even under her erroneous jury instructions.

Furthermore, the evidence showed that the Henschells had treated patients transferring from Sunset for many months prior to Thola’s September 2003 complaint. CP 260. The Henschells could not simply “fire” their patients. Nor could they afford to turn over to Thola the moneys they had received in return for rendering months of treatment. In short, the Henschells had changed position to a degree that requiring them to disgorge their earnings or turn away their patients would be patently unjust. See, e.g., Agency § 99 (Retention of Benefits as Affirmance) & Comment c. (“if the situation of the principal has so changed that it is inequitable to require their return under the changed circumstances their retention does not constitute an affirmance”).

D. For all of the reasons stated above, Thola's intentional interference with a business expectancy and unjust enrichment claims against the Henschells also fail.

For the same reasons stated above, Thola's intentional interference with a business expectancy and unjust enrichment claims against the Henschells must also fail. The UTSA displaces those claims, so a jury could not properly find the Henschells vicariously (or directly) liable under those theories once it had determined that Mahan had willfully and maliciously misappropriated Thola's trade secrets. In any event, as with her intentional trade-secret misappropriation, the Henschells could not be vicariously liable for Mahan's intentional tortious interference committed prior to beginning employment at Henschell Chiropractic. See App. A, CP 1024 (element (3) requiring intentional interference). And these claims also fail due to the erroneous ratification instruction and Thola's failure to establish the Henschells' knowledge of all material facts.

Thola's unjust enrichment claim also fails because the Henschells' "enrichment" was not "unjust." Many patients transferred from Sunset to Henschell when Mahan transferred. From the Henschells' perspective, this is precisely the sort of "tectonic shift" of patients even Thola's own expert admitted would

normally occur in the absence of a non-compete agreement. Once those patients signed up, Henschell treated them, and in turn received roughly \$28,000 in payments for those treatments. It is not “unjust” to accept payment for services rendered.

E. At a minimum, the Court must reverse the damages.¹³

At a minimum, the Court must reverse the damages verdicts, for several reasons. First, the jury found the Henschells vicariously liable on only two of Thola’s five claims (App. A, CP 1044, Question 13) and the jury was instructed that it could not duplicate damages (App. A, CP 1037). Yet the trial court refused to permit the jury to segregate its damages awards, rejecting the Henschells’ proposed instructions (Apps. F & G), and their post-verdict motion seeking segregation by the jury (5/23 RP 20-24). As a result, it is certainly possible (if not highly likely) that the jury awarded a substantial portion of the \$89,000 in damages based on solely Mahan’s breach of her duty of loyalty, for which the Henschells have no liability.

¹³ The Henschells’ damages arguments must assume *arguendo* that the tort theory under which the Henschells are not vicariously liable – Mahan’s breach of her duty of loyalty – is not displaced by the USTA; *i.e.*, that there is some (unknown) ground for liability under that theory other than Mahan’s misappropriation of Thola’s trade secret. If that theory is displaced, then the Court must reverse the entire judgment.

Our appellate courts have long held that where, as here, it is not possible to determine what portion of a general verdict is properly attributable to a given defendant, reversal and remand for a new trial is required. See, e.g., **Tegman v. Accident & Med. Investigations, Inc.**, 150 Wn.2d 102, 75 P.3d 497 (2003) (reversing general verdict because damages resulting from both negligent and intentional conduct must be segregated); **Tuthill v. Palermo**, 14 Wn. App. 781, 545 P.2d 588 (reversing where general and special verdicts conflicted and trial court failed to send the jury back under CR 49(b)), *rev. denied*, 87 Wn.2d 1002 (1976); **Corbit v. J. I. Case Co.**, 70 Wn.2d 522, 424 P.2d 290 (1967) (reversing general verdict because one or more of several intertwined liability theories was erroneous); **Chase v. Smith**, 35 Wash. 631, 77 P. 1069 (1904) (same). While none of these cases is directly on point (and no case has yet been found that is) their consistent holdings make clear that where, as here, a defendant who is not potentially liable on all theories requests segregation of damages, it is reversible error to neither submit a special verdict form that segregates the damages nor further inquire of the jury. Again, the Court should reverse.

Assuming *arguendo* that the failure to segregate were not sufficient to require reversal, the failure of proof is sufficient, for at least two reasons. First, Thola admitted during the Henschells' post-verdict motion that the unjust enrichment awards should be subtracted from the \$89,000, leaving \$43,388 in joint-and-several liability. RP 1005. Although the trial court apparently agreed with this analysis (RP 1006), it nonetheless entered a judgment awarding the entire \$89,000 (doubled) against the Henschells. CP 1370). This was error.

Second, Thola repeatedly asserted – including in closing argument – that “169” patients transferred, even after removing 36 transfer slips from evidence. RP 144-151, 155, 468-84, 760, 893-94, 989-99; Exs 25A – 25L, 58). The evidence supports far less than this. *See supra*, Facts § E; App. E. The evidence simply fails to support the verdict.

Similarly, the jury's unjust enrichment awards (\$28,716 and \$16,900) are insupportable. The latter amount (Mahan's “unjust enrichment”) not only relies entirely on Thola's unsupported “169 patients” claim (\$100 per patient times 169 patients), but it also duplicates roughly 60% of the Henschells' so-called “unjust enrichment” (*i.e.*, Henschell paid Mahan the \$16,900 out of the

\$28,716 it made for treating the transferring patients). The jury plainly disregarded the court's instruction not to duplicate damages. These amounts must be reversed.

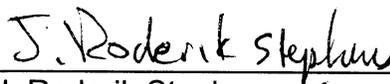
Finally, as discussed above in Argument § B, the trial court erred in imposing exemplary damages and attorney fees against the Henschells. As a matter of law, they cannot be vicariously liable for her intentional, willful and malicious trade-secret misappropriation. The Court should reverse the entire damages award.

CONCLUSION

For the reasons stated above, the Court should reverse and dismiss. In the alternative the Court should reverse and remand for a new trial. At a minimum, the Court should reverse the damages verdicts and remand for a new trial on damages.

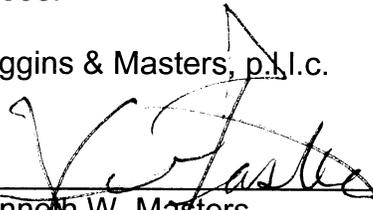
DATED this ⁴13 day of May 2006.

The Stephens Law Firm



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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the 15th day of May 2006, to the following counsel of record at the following addresses:

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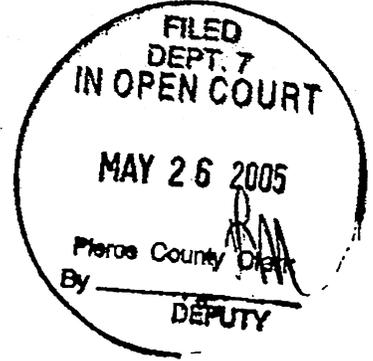


Kenneth W. Masters, WSBA 22278
Attorney for Appellants Henschell

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

MARY JO THOLA, D.C. and SUNSET
CHIROPRACTIC AND WELLNESS
CENTER, INC.,

NO. 03-2-11387-1

Plaintiffs,

vs.

ALTA D. MAHAN, D.C., et ux; et al.

Defendant..

COURT'S INSTRUCTIONS TO THE JURY

DONE IN OPEN COURT this 24th day of May, 2005.

Frederick Fleming
Hon. Frederick Fleming, Judge

APPENDIX A

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of

APPENDIX A

the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you to understand the evidence and apply the law. However, it is important for you to remember that the lawyer's remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In

APPENDIX A

the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. 2

The plaintiffs claim that Alta D. Mahan breached her common law duty of loyalty to Mary Jo Thola and Sunset Chiropractic not to compete with them during the term of her employment by soliciting the transfer of patients from Sunset Chiropractic to Henschell Chiropractic.

The plaintiffs also claim that Alta D. Mahan breached her common law duty of loyalty to Mary Jo Thola and Sunset Chiropractic not to use confidential information acquired during her employment in competition with or to the detriment of Mary Jo Thola and Sunset Chiropractic by using patient information taken from patient files to solicit the transfer of patients from Sunset Chiropractic to Henschell Chiropractic.

The plaintiffs claim that Alta D. Mahan's breach of her common law duties was a proximate cause of injuries and damage to plaintiffs. The defendants deny these claims.

In addition, the plaintiffs claim that Alta D. Mahan tortiously interfered with Mary Jo Thola's and Sunset Chiropractic's relationships with their patients by soliciting the transfer of patients from Sunset Chiropractic to Henschell Chiropractic.

The plaintiffs claim that Alta D. Mahan's tortious interference was a proximate cause of injuries and damage to plaintiffs. The defendants deny these claims.

In addition, the plaintiffs claim that Alta D. Mahan violated the Uniform Trade Secrets Act by taking patient information from Sunset Chiropractic patient treatment cards to solicit the transfer of patients from Sunset Chiropractic to Henschell Chiropractic. The plaintiffs claim that Sunset Chiropractic and Wellness Center's patients' names, addresses, and treatment histories are a protectible trade secret.

The plaintiffs claim that Alta D. Mahan's actions in misappropriating Sunset Chiropractic

and Wellness Center's trade secrets were willful and malicious and were a proximate cause of injuries and damage to plaintiffs. The defendants deny these claims.

The defendants contend that once the notice of departure was posted, Dr. Mahan was entitled to respond honestly to patient inquiries regarding her departure from the clinic without violating her duty to avoid competition with the plaintiffs.

In addition, the plaintiffs claim that Alta D. Mahan breached the September 18, 2002 confidentiality agreement by discussing the confidential information Mary Jo Thola provided in that document with Martin Henschell and others outside Alta D. Mahan's family.

The plaintiffs claim that Alta D. Mahan's breach of contract was a proximate cause of injuries and damage to plaintiffs. The defendants deny these claims.

In addition, the plaintiffs claim that Martin Henschell, Henschell Chiropractic and Alta D. Mahan were unjustly enriched by Alta D. Mahan's solicitation of Mary Jo Thola's and Sunset Chiropractic's patients.

The plaintiffs claim that defendants' unjust enrichment is a proximate cause of injuries and damage to the plaintiffs. The defendants deny these claims.

In addition, the plaintiffs also claim that Martin Henschell and Henschell Chiropractic vicariously liable for Alta D. Mahan's actions. The defendants deny these claims.

INSTRUCTION NO. 3

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed; and you are to consider only those matters that are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

APPENDIX A

INSTRUCTION NO. 4

The evidence that has been presented to you may either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to the facts. You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

APPENDIX A

INSTRUCTION NO. 6

If you find that (1) Mary Jo Thola agreed to provide confidential information about Sunset Chiropractic and Wellness Center to Alta D. Mahan for her use in deciding whether to buy Sunset, and (2) Alta D. Mahan agreed to keep the information confidential and not discuss it with anyone outside her family, then there was consideration.

APPENDIX A

INSTRUCTION NO. 7

A contract is a legally enforceable promise or set of promises.

INSTRUCTION NO. 8

A promise is an expression that justifies the person to whom it is made in reasonably believing that a commitment has been made that something specific will happen or not happen in the future. A promise may be expressed orally, in writing, or by conduct.

INSTRUCTION NO. 9

In order for there to be mutual assent, the parties must agree on the essential terms of the contract, and must express to each other their agreement to the same essential terms.

INSTRUCTION NO. 10

The failure to perform fully a contractual duty when it is due is a breach of contract.

INSTRUCTION NO. 11

On the claim of misappropriated trade secrets, Mary Jo Thola and Sunset Chiropractic and Wellness Center has the burden of proving each of the following propositions:

- (1) That Mary Jo Thola and Sunset Chiropractic and Wellness Center had a trade secret;
- (2) That Alta D. Mahan misappropriated Mary Jo Thola's and Sunset Chiropractic and Wellness Center's trade secret;
- (3) That Alta D. Mahan's misappropriation was a proximate cause of damages to Mary Jo Thola and Sunset Chiropractic and Wellness Center.
- (4) That, as a result of the misappropriation, Alta D. Mahan received money or benefits that in justice and fairness belong to Mary Jo Thola and Sunset Chiropractic and Wellness Center.

: The law does not permit a plaintiff to recover twice for the same damages. Thus you may include as damages both plaintiff's lost profits and defendant's gain only if and to the extent that they do not overlap in this way.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for Mary Jo Thola and Sunset Chiropractic and Wellness Center on this claim. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for Alta D. Mahan, Martin R. Henschell and Henschell Chiropractic.

INSTRUCTION NO. 12

Washington law prohibits misappropriation of a trade secret. "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique or process that:

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

INSTRUCTION NO. 13

"Misappropriation" of a trade secret means acquisition, disclosure, or use of a trade secret of another without the express or implied consent of the owner of the trade secret by a person who:

- (1) Used improper means to acquire the trade secret;
- (2) At the time of acquisition, 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;
 - (c) derived from or through a person who owed a duty to the plaintiff to maintain its secrecy or limit its use;
- (3) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

INSTRUCTION NO. 14

"Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

The duty to maintain secrecy may be a common law duty owed by an employee to an employer.

INSTRUCTION NO. 15

Information has "independent economic value" if it gives the owner of the information a competitive advantage over others who do not know the information.

In determining whether information derives "independent economic value" from not being generally known or readily ascertainable, you may consider, among other factors, the following:

- (1) The value of the information to the plaintiff and to plaintiff's competitors.
- (2) The amount of effort or money that the plaintiff expended in developing information.
- (3) The extent of measures that the plaintiff took to guard the secrecy of the information.
- (4) The ease or difficulty of acquiring or duplicating the information by proper means.
- (5) The degree to which third parties have placed the information in the public domain or rendered the information readily ascertainable.

INSTRUCTION NO. 16

In determining whether information is "the subject of efforts that are reasonable under the circumstances to maintain its secrecy," you may consider, among other factors, the following:

- (1) The extent to which the information is known outside the plaintiff's business.
- (2) The extent to which employees and others in plaintiff's business know the information.
- (3) The nature and extent of the measures the plaintiff took to guard the secrecy of the information.
- (4) The existence or absence of an express agreement restricting disclosure.
- (5) The extent to which the circumstances under which the information was disclosed to others indicate that further disclosure without the plaintiff's consent was prohibited.

INSTRUCTION NO. 17

If you determine that Alta D. Mahan misappropriated plaintiffs' trade secrets, you must determine whether the misappropriation was willful and malicious.

A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently.

A malicious act is a wrongful act intentionally done without legal justification or excuse; an unlawful act done willfully or purposely to injure another.

INSTRUCTION NO. 18

Unjust enrichment is a contract that is implied in law requiring a party to repay any benefit they received that they should not in equity or fairness keep. Enrichment alone will not justify a finding of unjust enrichment.

To prove unjust enrichment, you must find:

1. that a benefit was conferred on Martin Henschell or Henschell Chiropractic by the plaintiff,
 2. that Martin Henschell or Henschell Chiropractic had an appreciation or knowledge of the benefit, and
 3. that Martin Henschell or Henschell Chiropractic accepted and retained the benefit under circumstances that would make it unjust for him to retain the benefit without payment for its value.
- 

INSTRUCTION NO. 19

Unjust enrichment is a contract that is implied in law requiring a party to repay any benefit they received that they should not in equity or fairness keep. Enrichment alone will not justify a finding of unjust enrichment.

To prove unjust enrichment, you must find:

1. that a benefit was conferred on Alta Mahan by the plaintiff,
2. that Alta Mahan had an appreciation or knowledge of the benefit, and
3. that Alta Mahan accepted and retained the benefit under circumstances that would make it unjust for her to retain the benefit without payment for its value.

APPENDIX A

INSTRUCTION NO. 20

To recover on a claim of tortious interference with business relationships, Mary Jo Thola and Sunset Chiropractic and Wellness Center have the burden of proving each of the following propositions:

(1) That at the time of the conduct about which Mary Jo Thola and Sunset Chiropractic and Wellness Center complain, Mary Jo Thola and Sunset Chiropractic and Wellness Center had a business relationship with the probability of future economic benefit for Mary Jo Thola and Sunset Chiropractic and Wellness Center;

(2) That Alta D. Mahan knew of the existence of that business relationship;

(3) That Alta D. Mahan intentionally induced or caused the termination of the business relationship;

(4) That Alta D. Mahan's interference was for an improper purpose or by improper means, as defined later in these instructions; and

(5) That the conduct of Alta D. Mahan was a proximate cause of damages to Mary Jo Thola and Sunset Chiropractic and Wellness Center.

If you find from your consideration of all of the evidence that each of these propositions has been proved, and if you find that Dr. Henschell and Henschell Chiropractic are vicariously liable for the acts of Dr. Mahan, then your verdict should be for Mary Jo Thola and Sunset Chiropractic and Wellness Center on this claim.

INSTRUCTION NO. 21

“Interference for improper purpose” means interference with an intent to harm Mary Jo Thola and Sunset Chiropractic and Wellness Center.

“Interference for improper means” means interference that violates a statute, a regulation, a recognized rule of common law, or an established standard of the trade or profession.

INSTRUCTION NO. 22

Defendants Martin R. Henschell and Henschell Chiropractic are sued as the principal and the defendant Alta D. Mahan as the agent. Defendants Martin R. Henschell/Henschell Chiropractic deny that Alta D. Mahan was acting within the scope of authority as an agent of the defendant Martin R. Henschell/Henschell Chiropractic.

If you find that the defendant Alta D. Mahan was acting within the scope of authority, and if you find Alta D. Mahan is liable, then Alta D. Mahan, Martin Henschell and Henschell Chiropractic are all liable. If you do not find that Alta D. Mahan is liable, then none of the defendants are liable.

If you find that the defendant Alta D. Mahan is liable but do not find that she was acting within the scope of the authority as agent of the defendant Martin R. Henschell and Henschell Chiropractic then defendants Martin R. Henschell/Henschell Chiropractic are not liable.

INSTRUCTION NO. 23

Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.

Even if an agent acts without her principal's authority, the principal may nevertheless ratify the agent's act by acting with full knowledge of the act, accepting the benefits of the act or intentionally assuming the obligation imposed without inquiry. Actual or constructive knowledge of the act will suffice to support a determination of ratification.

If you find that Martin Henschell or Henschell Chiropractic acted with full knowledge of Alta D. Mahan's actions and accepted the benefits of her actions, then Martin Henschell and Henschell Chiropractic ratified Alta D. Mahan's acts.

INSTRUCTION NO. 24
actual or implied

Knowledge or notice by or to an agent with ~~apparent~~ authority may be imputed to her principal and the knowledge had by an agent will bind the principal.

If you find that Linda Weingard is an agent of Martin Henschell or Henschell Chiropractic, and if you find that Linda Weingard had notice of Alta D. Mahan's actions in December 2002 and thereafter, then Martin Henschell and Henschell Chiropractic had notice of Alta D. Mahan's actions in December 2002 and thereafter.

If you find Alta D. Mahan is an agent of Martin Henschell or Henschell Chiropractic, then Martin Henschell and Henschell Chiropractic had notice of Alta D. Mahan's actions in December 2002 through Alta Mahan.

INSTRUCTION NO. 25

If you find Robyn Crombie or Maria Kissner were agents with apparent authority of Dr. Mary Jo Thola, then their knowledge in mid-December 2002 that Dr. Mahan was relocating to Henschell Chiropractic may be imputed to Dr. Thola.

INSTRUCTION NO. 26

Any act or omission of an agent within the scope of authority is the act or omission of the principal.

INSTRUCTION NO. 27

One of the issues for you to decide is whether Alta D. Mahan was acting within the scope of authority.

An agent is acting within the scope of authority if the agent is performing duties that were expressly or impliedly assigned to the agent by the principal or that were expressly or impliedly required by the contract of employment. Likewise, an agent is acting within the scope of authority if the agent is engaged in the furtherance of the principal's interests.

If an agent acts without the knowledge or approval of the principal, or in violation of the principal's instructions, liability is determined by examining whether the employee was acting within the scope of implied authority.

INSTRUCTION NO. 28

An agent is a person employed under an express or implied agreement to perform services for another, called the principal, and who is subject to the principal's control or right to control the manner and means of performing the services. One may be an agent even though he or she receives no payment for services. The agency agreement may be oral or in writing.

INSTRUCTION NO. 29

An employee has a duty of loyalty to her employer which prohibits the use of confidential information obtained during employment to the detriment of her employer. An employee may not use confidential information of her employer, either written down and removed from her employer, or remembered, to solicit the patients of her former employer.

The duty of loyalty prohibits an employee, before the end of her employment, from soliciting her employer's customers for her new employer.

These duties exist even if there is no non-competition or non-solicitation agreement between the employer and employee.

INSTRUCTION NO. 30

The term "proximate cause" means a cause which in a direct sequence unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened. There can be more than one proximate cause of an injury.

INSTRUCTION NO. 31

You will now be given evidence in the form of answers to written interrogatories.

Interrogatories are questions asked in writing by one party and directed to another party. The answers to interrogatories are given in writing, under oath, before trial.

The answers to interrogatories will be presented to you. Insofar as possible, give them the same consideration that you would give to answers of a witness testifying from the witness stand.

INSTRUCTION NO. 32

I am allowing this exhibit, exhibit number 55, to be used for illustrative purposes only. This means that its status is different from that of other exhibits in the case. This exhibit is not itself evidence. Rather, they are one witness's illustrations, offered to assist you in understanding and evaluating the evidence in the case. Keep in mind that actual evidence is the testimony of witnesses and the exhibits that are admitted into evidence.

Because it is not itself evidence, this exhibit will not go with you to the jury room when you deliberate. The lawyers and witnesses may use the exhibit now and later on during this trial. You may take notes from this exhibit if you wish, but you should remember that your decisions in the case must be based upon the evidence.

INSTRUCTION NO. 33

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiffs, then you must determine the amount of money that will reasonably and fairly compensate the plaintiffs for such damages as you find were proximately caused by the defendants' wrongful acts.

If you find for the plaintiffs, you should consider the following economic damages:

The loss of value of Dr. Thola's practice as a result of the loss of patients;

Lost profits of Dr. Thola and Sunset Chiropractic resulting from the loss of patients; and

The amounts by which Dr. Mahan and Dr. Henschell and Henschell Chiropractic have been unjustly enriched.

The law does not permit a plaintiff to recover twice for the same damages. Thus you may include as damages both plaintiffs' lost profits and defendants' unjust enrichment only if and to the extent that they do not overlap in this way.

The burden of proving damages rests upon the plaintiffs. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess or conjecture.

INSTRUCTION NO. 34

If you decide that one or more of the defendants are liable in this case, use Verdict Form

A. If you decide that none of the defendants is liable, use Verdict Form B.

INSTRUCTION NO. 35

Upon retiring to the jury room for your deliberations, first select a presiding juror. The presiding juror shall see that your discussion is sensible and orderly, that you fully and fairly discuss the issues submitted to you, and that each of you has an opportunity to be heard and to participate in the deliberations on each question before the jury.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. However, do not assume that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question simply and clearly. The presiding juror should sign and date the question and give it to the ^{JA} bailiff. The court will confer with counsel to determine what answer, if any, can be given.

In your question to the court, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question, issue, or claim, or in any other way

APPENDIX A

express your opinions about the case.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror must sign the form, whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the ^{JA} ~~baillif~~ that the jury has reached a verdict, and the ^{JA} ~~baillif~~ will bring you back into court where your verdict will be announced. Z

INSTRUCTION NO. 36

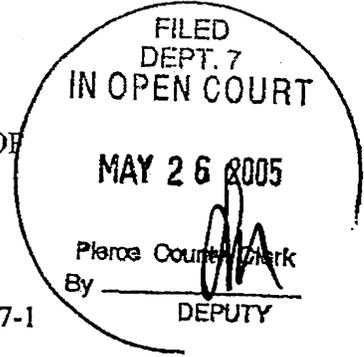
When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.



03-2-11387-1 23110541 VRD 05-26-05

Special Verdict Form A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY



MARY JO THOLA, D.C., and SUNSET CHIROPRACTIC AND WELLNESS CENTER, INC., a Washington corporation,

Plaintiffs,

v.

ALTA D. MAHAN, D.C. and JOHN DOE MAHAN and their marital community; MARTIN R. HENSHELL, D.C. and JANE DOE HENSHELL and their marital community; HENSHELL CHIROPRACTIC, a Washington sole proprietorship and partnership,

Defendants.

NO. 03-2-11387-1

SPECIAL VERDICT FORM A

1. Did Alta Mahan breach her common law duty of loyalty to Mary Jo Thola and Sunset Chiropractic not to compete with them during her employment?

YES

NO

2. Did Alta Mahan breach her common law duty of loyalty to Mary Jo Thola and Sunset Chiropractic by using confidential information acquired during her employment in competition with or to the detriment of Mary Jo Thola and Sunset Chiropractic?

YES

NO

3. Did Alta Mahan tortiously interfere with Mary Jo Thola's and Sunset Chiropractic's relationships with their patients by soliciting the transfer of patients from Sunset Chiropractic to Henschell Chiropractic?

APPENDIX A

YES

NO

4. Did Alta Mahan violate the Uniform Trade Secrets Act by taking patient information from Sunset Chiropractic patient files to solicit the transfer of patients from Sunset Chiropractic to Henschell Chiropractic?

YES

NO

5. If you find that Alta Mahan misappropriated Mary Jo Thola's and Sunset Chiropractic's trade secrets, were her actions willful?

YES

NO

6. If you find that Alta Mahan misappropriated Mary Jo Thola's and Sunset Chiropractic's trade secrets, were her actions malicious?

YES

NO

7. Was the September 18, 2002 letter an enforceable confidentiality agreement?

YES

NO

8. Was the September 18, 2002 confidentiality agreement breached?

YES

NO

9. Were Mary Jo Thola and Sunset Chiropractic damaged by Alta Mahan's actions?

APPENDIX A

YES

NO

10. Were Alta Mahan's actions the proximate cause of Mary Jo Thola's and Sunset Chiropractic's damages?

YES

NO

11. Were Martin Henschell, Henschell Chiropractic and Alta Mahan unjustly enriched by Alta Mahan's solicitation of ^{Mary Jo} Sunset Thola's and Sunset Chiropractic's patients?

YES

NO

12. If your answer to the preceding question was yes, by what amount were Martin Henschell, Henschell Chiropractic and Alta Mahan unjustly enriched?

Martin Henschell and Henschell Chiropractic \$ 28,712.00

Alta Mahan \$ 16,900.00

13. Are Martin Henschell and Henschell Chiropractic vicariously liable for Alta Mahan's actions under question 3 or question 4?

YES

NO

Having answered the foregoing Special Interrogatories, we, the jury, find for the Plaintiffs in the sum of \$ 89,000.00 and against all defendant(s).

DATE: 5-26-05

Dennie Christensen
Presiding Juror

Special Verdict Form B

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR PIERCE COUNTY

MARY JO THOLA, D.C., and SUNSET
CHIROPRACTIC AND WELLNESS CENTER,
INC., a Washington corporation,

Plaintiffs,

v.

ALTA D. MAHAN, D.C. and JOHN DOE MAHAN
and their marital community; MARTIN R.
HENSHELL, D.C. and JANE DOE HENSHELL
and their marital community; HENSHELL
CHIROPRACTIC, a Washington sole proprietorship
and partnership,

Defendants.

NO. 03-2-11387-1

SPECIAL VERDICT FORM **B**

We, the jury, find for the defendants.

DATE: _____

Presiding Juror

APPENDIX A

INSTRUCTION NO. _____

The acceptance or retention of benefits derived from an agent's unauthorized act does not amount to a ratification of such act if the principal, in accepting such proceeds or benefits, does not have knowledge of all the material facts surrounding the transaction.

Smith v. Hansen, Hansen & Johnson, Inc., 63 Wn. App. 355, 369, 818 P.2d 1127 (1991) review

denied, 118 Wn.2d 1023 (1992)

Barnes v. Treece, 15 Wn. App. 437, 443, 549 P.2d 1152 (1976).

APPENDIX B

1 that's where I think the problem is, that these are
2 separate causes of action and so that's where the
3 confusion comes in, in the verdict form.

4 THE COURT: We haven't used the words aided
5 and abetted, we have used --

6 MR. STEPHENS: Vicariously liable.

7 THE COURT: Vicariously liable. So why
8 aren't you protected? If the jury thinks that he
9 didn't aid and abet or he isn't vicariously liable, he
10 is not exposed.

11 MR. STEPHENS: Well, I think, I mean I have
12 explained it as best as I could, your Honor. That's
13 it.

14 THE COURT: Well.

15 MR. STEPHENS: Can we go to the other
16 nonincluded instructions?

17 THE COURT: Right.

18 MR. STEPHENS: That deals with the Court's
19 instructions. The other ones that I want to talk
20 about --

21 THE COURT: You are objecting to me not
22 giving.

23 MR. STEPHENS: Not giving. Yes, your honor.

24 WPI 2.13 we talked about earlier, malicious
25 definition. WPI 352.06, which was the ethical

1 obligation instruction.

2 THE COURT: Let me see that one again.

3 You are asking me in this one, if I
4 understand it right, twenty says to give this in effect
5 say that the ethical obligation to the patients trumped
6 her ethical obligation to her employer?

7 MR. STEPHENS: That there was an obligation
8 she had to the patients.

9 THE COURT: That took -- that trumped her
10 ethical obligation to her employer?

11 MR. STEPHENS: Yes.

12 THE COURT: Isn't that the bottom line?

13 MR. STEPHENS: Yes.

14 THE COURT: I am not buying that.

15 MR. STEPHENS: Next one was the instruction I
16 had on from the --

17 THE COURT: I will tell you one other thing
18 while I am thinking about that. In her letters she
19 talks about, you know, that their care would be
20 provided for. And she hopes they stayed with Sunset.
21 And what more could you say, if you meant it?

22 MR. STEPHENS: Okay. Next one is the
23 reasonable efforts to maintain secrecy instruction that
24 I had in my original submittal and that is the
25 reasonable efforts to maintain secrecy from National

1 Aircraft, I believe is the case, as providing a more
2 clear identification in terms of what reasonable
3 efforts to maintain secrecy are as a supplement to the
4 WPI.

5 THE COURT: This is not commenting on the
6 situation?

7 MR. STEPHENS: I don't believe so.

8 THE COURT: That ran through my mind. All
9 right.

10 MR. STEPHENS: The next one is the privilege
11 of the competitor. The restatement of torts, section
12 768.1 definition.

13 THE COURT: Boy, you could still argue your
14 interference with business relationships and the
15 competitive philosophy of our capitalistic society.
16 It just seemed to me that we are talking about unduly
17 emphasizing what they are going to have to -- the jury
18 is going to have to segregate out. What they are
19 going to have to differentiate as what is good
20 capitalistic ethics and what is unethical.

21 MR. STEPHENS: Okay. Then the next
22 instructions are what I am going to be filing with the
23 clerk, which is the Defendant's supplemental
24 instructions, Defendant Henschell's supplemental
25 instructions. The first one I think we have talked

1 about, which is the instruction that I had appended to
2 my memorandum I filed on the issue of malice that was a
3 modification of WPIC 2.13 and also took language that
4 was utilized by the Federal District Court in Virginia
5 in the Microstrategy versus Business Objects case as
6 being more indicative. I don't know if we need to
7 belabor this point.

8 THE COURT: We don't have to talk about that
9 any more, I don't think.

10 MR. STEPHENS: The other one was the
11 instruction that I proposed that came from Henderson
12 versus Penwalt Corp and Thompson versus Everett
13 Clinic. And that is that a civil wrong committed by
14 an agent even if committed while engaged in the
15 employment of the principal is not attributable to the
16 principal if it emanated from a wholly personal motive
17 of the agent and was done to gratify solely personal
18 objectives or desires of the agent.

19 THE COURT: Mahan did this solely, personally
20 for herself; is that what you are saying?

21 MR. STEPHENS: That any actions she did were
22 Mahan's actions for her own sole personal
23 gratification.

24 THE COURT: I am not buying that one.

25 MR. STEPHENS: The next one was based on

1 Niece versus Elmview and Schneider versus Medical
2 Services Corporation. And that was when an employee's
3 intentional tortious or criminal acts are not in
4 furtherance of the employer's business, the employer is
5 not liable as a matter of law even if the employment
6 situation provided the opportunity or means for the
7 wrongful acts.

8 THE COURT: Can I see that?

9 I don't think this fits the circumstances of
10 this case, so I am not giving that one.

11 MR. STEPHENS: Just for the record, your
12 Honor, I would just state that the authority I am
13 relying on on the instruction is Niece versus Elmview
14 case and Schneider and that's my stated basis for
15 requesting inclusion because I believe it goes with the
16 facts of this case.

17 The next one was the instruction from -- that
18 was based on Nowogroski versus Rucker. An employee who
19 has not signed an agreement not to compete is free upon
20 leaving employment to engage in competitive
21 employment. In doing so, the former employee may
22 freely use general knowledge, skills and experience
23 acquired under his or her former employer.

24 THE COURT: Again, you are talking about
25 competition, aren't you?

1 MR. STEPHENS: We are talking about
2 competition and instructing the jury what competition
3 is so they can fairly decide the issue.

4 THE COURT: Right. I think we have
5 instructed on competition.

6 MR. STEPHENS: The next one is my
7 instruction--

8 THE COURT: That one comments to me.

9 MR. STEPHENS: I didn't mean to cut your
10 Honor off.

11 THE COURT: I was thinking out loud about
12 it. Go ahead.

13 MR. STEPHENS: The next one was an
14 instruction that comes from the Rodderick Timber versus
15 Willipa Harbor case. It deals with the issue of
16 ratification as it relates to notification in states
17 that the principal is not bound by a notification
18 directed towards an agent whose duties or apparent
19 duties have no connection with the subject matter to
20 which the notification relates. It must be given to
21 one who has or appears to have authority and connection
22 with it either to receive it, to take action upon it or
23 to inform the principal or some other agent who has
24 duties in regard to it.

25 THE COURT: How does Linda Weingard fit into

1 that?

2 MR. STEPHENS: It instructs the jury that
3 just because somebody communicates something to an
4 employee of Henschell Chiropractic that that doesn't
5 necessarily mean that that's the person who is going to
6 be, if you will, high enough up the food chain to
7 communicate this information to Dr. Henschell. And
8 that it's even their worry or their job to do that.

9 THE COURT: Okay.

10 MR. STEPHENS: You are not going to give that
11 one?

12 THE COURT: No.

13 MR. STEPHENS: The next one was one that I
14 believe was probably in my original submission but I am
15 raising it now because I wasn't positive. It was
16 based on Smith versus Hanson and Hanson. The
17 acceptance or retention of benefits derived from an
18 agent's unauthorized act does not amount to
19 ratification of such if the principal in accepting such
20 proceeds or benefits does not have knowledge of all the
21 material facts surrounding the transaction.

22 That goes to the issue of ratification and so
23 that the jury can understand that just because you
24 accept benefits, if you don't have the big picture then
25 you are not necessarily held responsible.

1 THE COURT: And where is the evidence that he
2 didn't have the big picture? Is that what you are
3 saying?

4 MR. STEPHENS: He certainly didn't have it.
5 He started getting an inkling.

6 THE COURT: He blurted it out one time that
7 she didn't do anything wrong. I remember that, but,
8 you know.

9 MR. STEPHENS: I believe he stated that he
10 didn't think there was anything wrong, speaking from
11 the perspective of a lay person.

12 THE COURT: No, he didn't say it that way.
13 He said, "I didn't think she did anything wrong. "

14 And giminey Christmas, one could conclude
15 that you question his ethics. Anyway, I am not giving
16 that one.

17 MR. STEPHENS: Okay.

18 I think then the last four, there is a
19 duplication in here of the malice or evil intent one
20 that was uncited.

21 THE COURT: We covered malice.

22 MR. STEPHENS: The other one is they are all
23 entitled -- there is four of them, all entitled special
24 verdict form A. And what I have done is I have
25 identified them by writing in the upper right hand

1 corner version one, two, three, four. Version one and
2 two are two different forms of special verdict forms
3 that instruct the jury on or take into account
4 displacement and the statutory displacement.

5 And verdict three and four don't take into
6 account displacement but the difference between one and
7 two is that one has lump sum damages and one has
8 itemized damages. And three and four, absent the
9 displacement, one breaks out the damages and the other
10 doesn't. As alternatives to provide to the Court we
11 think that these instructions as followed are more
12 clear and would allow the finder of fact to arrive at a
13 verdict without having confusion.

14 I think that's all I have to say.

15 THE COURT: Those verdict forms are
16 interesting. But I think that the way the questions
17 are asked and when we add the unjust enrichment,
18 segregating that out depending on the answers if it is
19 confusing and there are errors, that they can be
20 remedied by the Court and Counsel after the jury.

21 If we don't follow the law, if they are
22 inconsistent with the Court's instructions on the law,
23 it seems to me that the Court with the assistance of
24 Counsel can remedy those errors under the law if there
25 are any.

1 Because it is, I agree with all of you, this
2 has a lot of nuances to it. But I think we have
3 crafted the instructions so that might not be perfect
4 but it will be fair. And I have great confidence that
5 the jury will be fair as they always are.

6 MR. STEPHENS: Thank you, your Honor. And I
7 appreciate your taking the time and letting me go
8 through all these. I know this was rather lengthy.

9 THE COURT: All right. Anything else?
10 Mr. Peick?

11 MR. PEICK: No, your Honor.

12 THE COURT: Ms. Martin?

13 MS. MARTIN: No, your Honor.

14 THE COURT: I forgot you hadn't said, I asked
15 you before.

16 MR. PEICK: I said less than she did.

17 THE COURT: You said less than
18 Mr. Stephens. That's why I went back to you rather
19 than starting with the Plaintiff.

20 We will start tomorrow morning at 9:30 and I
21 will read the instructions. The signature page is on
22 the front?

23 MS. MARTIN: Yes.

24 THE COURT: Now we have to take two and put
25 it in the right sequence for the original and all the

Dear Suzanne;

December 27, 2002

An old year is over, and a new one has begun. And as you know, there are some changes taking place. As I told you, last time I spoke with you, I am no longer working at Sunset Chiropractic, and at the time you requested all the information of where I would be working. Here it is!

As of Thursday, January 2, 2003, I will be practicing with Dr. Martin Henschell at **Henschell Chiropractic**. The office is located at:

19950 South Prairie Road, Bonney Lake, WA 98390

That is in the Albertson's Parking lot, just off of Hwy 410. The phone number is (253)-862-1555. I will be in the office seeing patients on the following days:

Monday 1pm - 6:30pm

Tuesday 9am - 12pm, 2pm - 6pm

Thursday 9am-12pm; 2pm - 6pm

Friday 9am - 1pm; 3pm - 6:30pm

Most insurance is accepted at **Henschell Chiropractic**. If you call prior to coming in for care, we will be able to determine what your coverage will be for both chiropractic care as well as massage therapy. YES, there are three massage therapists in the office as well as two Doctors!

In order to transfer your care from Sunset Chiropractic, we will need your records to be sent over the **Henschell Chiropractic**. Those records include your x-rays, and your treatment cards. As at Sunset Chiropractic, I do need your x-rays to provide you with complete chiropractic care. If you do not want to transfer your x-rays, I will more than happy to take a new set of x-rays for you. We will also do a brief exam to update your chiropractic record and to see how much your spinal health has improved in the past few years.

To transfer your records you can do one of two things; 1) Stop by **Henschell Chiropractic** and sign a release form and we will pick up your records for you, or 2) Stop by Sunset Chiropractic, sign a release form and bring your records with you to **Henschell Chiropractic**. Either way, please be aware it may take a day or two to get your records, and we will need them before we can continue with your care.

I'm excited about all that we can provide for you, at **Henschell Chiropractic**, to improve the quality of your life. The office staff is as concerned about a smooth transition, and receiving optimum care while in the office as myself and Dr. Henschell are. I'm looking forward to starting my New Year with you! If you have any questions, please contact **Henschell Chiropractic** where both Linda and Melanie are looking forward to assisting you!

See you soon! And good health to you!

Sincerely,



Dr. Alta Mahan, D.C.

EXHIBIT A

APPENDIX D
THO 00107

Individuals identified in Ex 25

1. Richard Brenner
2. Laureen Brockner
3. Jack H. Brown
4. Leonard Brown
5. Alice Cristel
6. Michael E. Dawson
7. Joanie Denison
8. Vickie Diede
9. Christina Doll
10. David K. Doll
11. Lee Doll
12. Lucus Doll
13. Glinda Dowdy
14. Michael Dowdy
15. Loren Dunn
16. Patricia (Tricia) Eagle
17. Catherine T. Elder
18. Gary Elzenga
19. Marci Finch
20. Jeffrey Ford
21. Shawna Ford
22. Chloe Foreman
23. Laura Foreman
24. Nick Foreman
25. Eric Francis
26. Jennifer Francis
27. Ann W. Frieberger
28. Brian Frieberger
29. Sharon Gentry
30. Jim Hart
31. Aubrey Jennings
32. Ben Krack
33. Brandon Kurkman (?)
34. Tony Lafoso
35. Anna Larsen
36. Adam Lemme
37. Anita Lemme
38. Mark Lemme
39. Shaina Lemme
40. Robert Lind
41. Andrew Ludwick
42. James Ludwick
43. Shannon Mayfield-Porter
44. Jason McFadden

45. Joseph (Joe) V. Mendoza
46. Ellen Minier (?)
47. Christi L. Morgan
48. Aaron O'Malley
49. Robert (Rob) J. Neuman
50. Nikole Neuman
51. Valerie (Val) Neuman
52. Ashley Orr
53. Greg Orr
54. Hannah Orr
55. Mary Ann Orr
56. Bridget Packer
57. Troy Packnett
58. James Percival
59. Jessica Pollard
60. Carol Powers
61. Jean Rambish
62. Roberta Rambish
63. Charles Rehberg
64. Dave Rembert
65. Gregory S. Ross
66. David Ruziska (?) – recipient Ranjiv Barns, D.C.
67. Kathleen M. Sand [Sandor?]
68. Martin L. Sandor
69. Marcy Lynn Severson
70. Carole Sharp
71. Clifford W. Sharp
72. Suzanne Smith
73. Angela Sorger
74. Robert Sorger, III
75. Donald Michael (Mike) Sowa
76. Pamela (Pam) K. Sowa
77. Gloria J. Spicer
78. Teresa Spicer
79. Beau Stanfield
80. Blake Stanfield
81. Dan Stanfield
82. Jan Stanfield
83. Megan Steinman-Neal
84. Joe Swenson
85. Aaren Thompson
86. Mary V. Tracy
87. Val (Valerie) Vaughn
88. William S. Ward
89. Clay W. Watkins
90. Donna Weingard (?)

91. J. Kevin Wheat
92. Shannon Wheat
93. Janice L. Whitehead
94. Lisa Whitehead
95. Yvonne Wilber
96. Chris Wiley
97. Jennifer Wiley
98. Lisa Wiley
99. Michelle Wittmier
100. Luke Zeman
101. Maria Zeman
102. Wanda Zeman

version 1

Special Verdict Form A

IN THE SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

MARY JO THOLA, D.C., and)
SUNSET CHIROPRACTIC AND)
WELLNESS CENTER, INC., a)
Washington corporation,)

NO. 03-2-11387-1

Plaintiff,)

SPECIAL VERDICT FORM A

vs.)

ALTA D. MAHAN, D.C. and JOHN)
DOE MAHAN, and their marital)
community; MARTIN R.)
HENSHELL and JANE DOE)
HENSHELL, and their marital)
community; HENSHELL)
CHIROPRACTIC, a Washington)
sole proprietorship and partnership,)

Defendants.)

A. TRADE SECRETS

A1. Do you find that patient names and addresses on travel cards at Plaintiff's
chiropractic practice were trade secrets?

YES _____

NO _____

If you answered this question "YES," then go to question A2. If you answered this question
"NO," then go to question A9.

A2. Do you find that Defendant Alta Mahan misappropriated trade secrets?

YES _____

NO _____

If you answered this question "YES," then go to question A3. If you answered this question "NO," then go to question A9.

A3. Do you find that Defendant Alta Mahan's misappropriation of trade secrets was the proximate cause of damages sustained by Plaintiff?

YES _____

NO _____

If you answered this question "YES," then go to question A4. If you answered this question "NO," then go to question A9.

A4. If you answered "YES" to questions A1, A2, and A3, do you find that Defendant Alta Mahan's actions were willful?

YES _____

NO _____

If you answered this question "YES" then go to question A5. If you answered this question "NO," then go to question A6.

A5. If you answered "YES" to questions A1, A2, A3 and A4, do you find that Defendant Alta Mahan's actions were malicious?

YES _____

NO _____

Please go to the next question.

A6. If you answered "YES" to questions A1, A2 and A3, do you find that Defendant Alta Mahan was acting as an agent of Defendant Martin Henschell at the time that she misappropriated the Plaintiff's trade secrets?

YES _____

NO _____

If you answered this question "YES" then go to question A7. If you answered this question "NO," then go to question F1.

A7. If you answered "YES" to question A6, do you find that Defendant Martin Henschell's actions were willful?

YES _____

NO _____

If you answered this question "YES," then go to question A8. If you answered this question "NO," then go to question F1.

A8. If you answered "YES" to question A7, do you find that Defendant Martin Henschell's actions were malicious?

YES _____

NO _____

If you answered this question "YES" or "NO," then go to question F1.

A9. If you answered "NO" to questions A1, A2 or A3, do you find that Plaintiff brought her trade secrets claim against Defendant Alta Mahan in bad faith?

YES _____

NO _____

Please go to the next question.

A10. If you answered "NO" to questions A1, A2, A3 or A6, do you find that Plaintiff brought her trade secrets claim against Defendant Martin Henschell in bad faith?

YES _____

NO _____

Please go to the next question.

B. TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY

B1. Do you find that Defendant Alta Mahan intentionally interfered with Plaintiff's business expectancy?

YES _____

NO _____

If you answered this question "YES," then go to question B2. If you answered "NO," go to question C1.

B2. If you answered "YES" to question B1, do you find that when she interfered with Plaintiff's business expectancy, Defendant Alta Mahan was engaged in competition and/or pursuing legitimate concerns regarding patient abandonment?

YES _____

NO _____

If you answered this question "YES," then go to question C1. If you answered "NO," then go to question B3.

B3. If you answered "NO" to question B2, do you find that Defendant Alta Mahan's intentional interference with Plaintiff's business expectancy was the proximate cause of Plaintiff's damages?

YES _____

NO _____

If you answered "YES" to this question, go to question B4. If you answered "NO," then go to question C1.

B4. If you answered "YES" to question B2, do you find that Defendant Alta Mahan was an agent of Defendant Martin Henschell at the time that she intentionally interfered with Plaintiff's business expectancy?

YES _____

NO _____

Please go to the next question.

C. UNJUST ENRICHMENT

C1. Do you find that Defendant Alta Mahan was unjustly enriched?

YES _____

NO _____

If you answered this question "YES," go to question C2. If you answered "NO," then go to question D1.

C2. Do you find that Defendant Martin Henschell was unjustly enriched?

YES _____

NO _____

Please go to the next question.

D. CONFIDENTIALITY AGREEMENT

D1. Do you find that the letter of September 18, 2002 (Exhibit 16) created a contract not to disclose information regarding the sale of Plaintiff's chiropractic practice?

YES _____

NO _____

If you answered this question "YES," please go to question D2. If you answered "NO," go to question E1.

D2. If you answered "YES" to question D1, do you find that Defendant Mahan's breach of the confidentiality agreement proximately caused damages to the Plaintiff?

YES _____

NO _____

Please go to the next question.

E. COMMON LAW DUTY OF LOYALTY

E1. Do you find that Defendant Alta Mahan breached her common law duty of loyalty to the Plaintiff?

YES _____

NO _____

If you answered this question "YES," please go to question E2. If you answered "NO," please go to question F1.

E2. If you answered "YES" to question E1, do you find that Defendant Alta Mahan's breach of her common law duty of loyalty proximately caused damages to the Plaintiff?

YES _____

NO _____

Please go to the next question.

F. DAMAGES

F1. If you answered "YES" to any of the following questions, then enter the amount of damages proximately caused by Defendant Alta Mahan as to each proven claim:

Yes to Question A3, Trade Secrets: \$ _____.

Yes to Question B2, Intentional Interference With Contractual Relations:

\$ _____.

Yes to Question C1, Unjust Enrichment: \$ _____.

Yes to Question D2, Confidentiality Agreement: \$ _____.

Yes to Question E1, Common Law Duty of Loyalty: \$ _____.

The damages may not be duplicative. If you awarded the same damages under more than one question above, then please enter the total amount of damages caused by Defendant Alta Mahan, without duplication: \$ _____.

F2. If you entered an amount greater than \$0 for questions A3, B3 and/or C2, and you answered "YES" to any of the following questions, then enter the amount of the damages entered in F1 for which Defendants Henschell are liable as Defendant Alta Mahan's principal:

Yes to Question A6, Trade Secrets: \$ _____.

Yes to Question B3, Intentional Interference With Contractual Relations: \$ _____.

Yes to Question C2, Unjust Enrichment: \$ _____.

The damages may not be duplicative. If you awarded the same damages under more than one question above, then please enter the total amount of damages for which Defendants Henschell are liable as Defendant Alta Mahan's principal, without duplication: \$ _____.

The above is the finding of this jury.

Dated this _____ day of May, 2005.

PRESIDING JUROR

Version 2

Special Verdict Form A

IN THE SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

MARY JO THOLA, D.C., and SUNSET CHIROPRACTIC AND WELLNESS CENTER, INC., a Washington corporation,

Plaintiff,

vs.

ALTA D. MAHAN, D.C. and JOHN DOE MAHAN, and their marital community; MARTIN R. HENSHELL and JANE DOE HENSHELL, and their marital community; HENSHELL CHIROPRACTIC, a Washington sole proprietorship and partnership,

Defendants.

NO. 03-2-11387-1

SPECIAL VERDICT FORM A

A. TRADE SECRETS

A1. Do you find that patient names and addresses on travel cards at Plaintiff's chiropractic practice were trade secrets?

YES _____

NO _____

If you answered this question "YES," then go to question A2. If you answered this question "NO," then go to question A9.

A2. Do you find that Defendant Alta Mahan misappropriated trade secrets?

YES _____

NO _____

If you answered this question "YES," then go to question A3. If you answered this question "NO," then go to question A9.

A3. Do you find that Defendant Alta Mahan's misappropriation of trade secrets was the proximate cause of damages sustained by Plaintiff?

YES _____

NO _____

If you answered this question "YES," then go to question A4. If you answered this question "NO," then go to question A9.

A4. If you answered "YES" to questions A1, A2, and A3, do you find that Defendant Alta Mahan's actions were willful?

YES _____

NO _____

If you answered this question "YES" then go to question A5. If you answered this question "NO," then go to question A6.

A5. If you answered "YES" to questions A1, A2, A3 and A4, do you find that Defendant Alta Mahan's actions were malicious?

YES _____

NO _____

Please go to the next question.

A6. If you answered "YES" to questions A1, A2 and A3, do you find that Defendant Alta Mahan was acting as an agent of Defendant Martin Henschell at the time that she misappropriated the Plaintiff's trade secrets?

YES _____

NO _____

If you answered this question "YES" then go to question A7. If you answered this question "NO," then go to question F1.

A7. If you answered "YES" to question A6, do you find that Defendant Martin Henschell's actions were willful?

YES _____

NO _____

If you answered this question "YES," then go to question A8. If you answered this question "NO," then go to question F1.

A8. If you answered "YES" to question A7, do you find that Defendant Martin Henschell's actions were malicious?

YES _____

NO _____

If you answered this question "YES" or "NO," then go to question F1.

A9. If you answered "NO" to questions A1, A2 or A3, do you find that Plaintiff brought her trade secrets claim against Defendant Alta Mahan in bad faith?

YES _____

NO _____

Please go on to question A10.

A10. If you answered "NO" to questions A1, A2, A3 or A6, do you find that Plaintiff brought her trade secrets claim against Defendant Martin Henschell in bad faith?

YES _____

NO _____

Please go on to the next question.

B. TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY

B1. Do you find that Defendant Alta Mahan intentionally interfered with Plaintiff's business expectancy?

YES _____

NO _____

If you answered this question "YES," then go to question B2. If you answered "NO," go to question C1.

B2. If you answered "YES" to question B1, do you find that when she interfered with Plaintiff's business expectancy, Defendant Alta Mahan was engaged in competition and/or pursuing legitimate concerns regarding patient abandonment?

YES _____

NO _____

If you answered this question "YES," then go to question C1. If you answered "NO," then go to question B3.

B3. If you answered "NO" to question B2, do you find that Defendant Alta Mahan's intentional interference with Plaintiff's business expectancy was the proximate cause of Plaintiff's damages?

YES _____

NO _____

If you answered "YES" to this question, go to question B4. If you answered "NO," then go to question C1.

B4. If you answered "YES" to question B2, do you find that Defendant Alta Mahan was an agent of Defendant Martin Henschell at the time that she intentionally interfered with Plaintiff's business expectancy?

YES _____

NO _____

Please go to the next question.

C. UNJUST ENRICHMENT

C1. Do you find that Defendant Alta Mahan was unjustly enriched?

YES _____

NO _____

If you answered this question "YES," go to question C2. If you answered "NO," then go to question D1.

C2. Do you find that Defendant Martin Henschell was unjustly enriched?

YES _____

NO _____

Please go to the next question.

D. CONFIDENTIALITY AGREEMENT

D1. Do you find that the letter of September 18, 2002 (Exhibit 16) created a contract not to disclose information regarding the sale of Plaintiff's chiropractic practice?

YES _____

NO _____

If you answered this question "YES," please go to question D2. If you answered "NO," go to question E1.

D2. If you answered "YES" to question D1, do you find that Defendant Mahan's breach of the confidentiality agreement proximately caused damages to the Plaintiff?

YES _____

NO _____

Please go to the next question.

E. COMMON LAW DUTY OF LOYALTY

E1. Do you find that Defendant Alta Mahan breached her common law duty of loyalty to the Plaintiff?

YES _____

NO _____

If you answered this question "YES," please go to question E2. If you answered "NO," please go to question F1.

E2. If you answered "YES" to question E1, do you find that Defendant Alta Mahan's breach of her common law duty of loyalty proximately caused damages to the Plaintiff?

YES _____

NO _____

Please go to the next question.

F. DAMAGES

- F1. If you answered "YES" to questions A3, B2, C1, D2, and/or E2, enter the amount of damages proximately caused by Defendant Alta Mahan: \$ _____.
- F2. If you entered an amount greater than \$0 in F1, and you answered "YES" to questions A6, B3, and/or C2, enter the amount of the damages entered in F1 for which Defendants Henschell are liable as Defendant Alta Mahan's principal: \$ _____.

The above is the finding of this jury.

Dated this _____ day of May, 2005.

PRESIDING JUROR

Version 3

Special Verdict Form A

IN THE SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

MARY JO THOLA, D.C., and)
SUNSET CHIROPRACTIC AND)
WELLNESS CENTER, INC., a)
Washington corporation,)

NO. 03-2-11387-1

SPECIAL VERDICT FORM A

Plaintiff,)

vs.)

ALTA D. MAHAN, D.C. and JOHN)
DOE MAHAN, and their marital)
community; MARTIN R.)
HENSHELL and JANE DOE)
HENSHELL, and their marital)
community; HENSHELL)
CHIROPRACTIC, a Washington)
sole proprietorship and partnership,)

Defendants.)

A. TRADE SECRETS

A1. Do you find that patient names and addresses on travel cards at Plaintiff's
chiropractic practice were trade secrets?

YES _____

NO _____

If you answered this question "YES," then go to question A2. If you answered this question
"NO," then go to question A9.

A2. Do you find that Defendant Alta Mahan misappropriated trade secrets?

YES _____

NO _____

If you answered this question "YES," then go to question A3. If you answered this question "NO," then go to question A9.

A3. Do you find that Defendant Alta Mahan's misappropriation of trade secrets was the proximate cause of damages sustained by Plaintiff?

YES _____

NO _____

If you answered this question "YES," then go to question A4. If you answered this question "NO," then go to question A9.

A4. If you answered "YES" to questions A1, A2, and A3, do you find that Defendant Alta Mahan's actions were willful?

YES _____

NO _____

If you answered this question "YES" then go to question A5. If you answered this question "NO," then go to question A6.

A5. If you answered "YES" to questions A1, A2, A3 and A4, do you find that Defendant Alta Mahan's actions were malicious?

YES _____

NO _____

Please go to the next question.

A6. If you answered "YES" to questions A1, A2 and A3, do you find that Defendant Alta Mahan was acting as an agent of Defendant Martin Henschell at the time that she misappropriated the Plaintiff's trade secrets?

YES _____

NO _____

If you answered this question "YES" then go to question A7. If you answered this question "NO," then go to question B1.

A7. If you answered "YES" to question A6, do you find that Defendant Martin Henschell's actions were willful?

YES _____

NO _____

If you answered this question "YES," then go to question A8. If you answered this question "NO," then go to question B1.

A8. If you answered "YES" to question A7, do you find that Defendant Martin Henschell's actions were malicious?

YES _____

NO _____

If you answered this question "YES" or "NO," then go to question B1.

A9. If you answered "NO" to questions A1, A2 or A3, do you find that Plaintiff brought her trade secrets claim against Defendant Alta Mahan in bad faith?

YES _____

NO _____

Please go to the next question.

A10. If you answered "NO" to questions A1, A2, A3 or A6, do you find that Plaintiff brought her trade secrets claim against Defendant Martin Henschell in bad faith?

YES _____

NO _____

Please go to the next question.

B. TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY

B1. Do you find that Defendant Alta Mahan intentionally interfered with Plaintiff's business expectancy?

YES _____

NO _____

If you answered this question "YES," then go to question B2. If you answered "NO," go to question C1.

B2. If you answered "YES" to question B1, do you find that when she interfered with Plaintiff's business expectancy, Defendant Alta Mahan was engaged in competition and/or pursuing legitimate concerns regarding patient abandonment?

YES _____

NO _____

If you answered this question "YES," then go to question C1. If you answered "NO," then go to question B3.

B3. If you answered "NO" to question B2, do you find that Defendant Alta Mahan's intentional interference with Plaintiff's business expectancy was the proximate cause of Plaintiff's damages?

YES _____

NO _____

If you answered "YES" to this question, go to question B4. If you answered "NO," then go to question C1.

B4. If you answered "YES" to question B2, do you find that Defendant Alta Mahan was an agent of Defendant Martin Henschell at the time that she intentionally interfered with Plaintiff's business expectancy?

YES _____

NO _____

Please go to the next question.

C. UNJUST ENRICHMENT

C1. Do you find that Defendant Alta Mahan was unjustly enriched?

YES _____

NO _____

If you answered this question "YES," go to question C2. If you answered "NO," then go to question D1.

C2. Do you find that Defendant Martin Henschell was unjustly enriched?

YES _____

NO _____

Please go to the next question.

D. CONFIDENTIALITY AGREEMENT

D1. Do you find that the letter of September 18, 2002 (Exhibit 16) created a contract not to disclose information regarding the sale of Plaintiff's chiropractic practice?

YES _____

NO _____

If you answered this question "YES," please go to question D2. If you answered "NO," go to question E1.

D2. If you answered "YES" to question D1, do you find that Defendant Mahan's breach of the confidentiality agreement proximately caused damages to the Plaintiff?

YES _____

NO _____

Please go to the next question.

E. COMMON LAW DUTY OF LOYALTY

E1. Do you find that Defendant Alta Mahan breached her common law duty of loyalty to the Plaintiff?

YES _____

NO _____

If you answered this question "YES," please go to question E2. If you answered "NO," please go to question F1.

E2. If you answered "YES" to question E1, do you find that Defendant Alta Mahan's breach of her common law duty of loyalty proximately caused damages to the Plaintiff?

YES _____

NO _____

Please go to the next question.

F. DAMAGES

F1. If you answered "YES" to any of the following questions, then enter the amount of damages proximately caused by Defendant Alta Mahan as to each proven claim:

Yes to Question A3, Trade Secrets: \$ _____.

Yes to Question B2, Intentional Interference With Contractual Relations:

\$ _____.

Yes to Question C1, Unjust Enrichment: \$ _____.

Yes to Question D2, Confidentiality Agreement: \$ _____.

Yes to Question E1, Common Law Duty of Loyalty: \$ _____.

The damages may not be duplicative. If you awarded the same damages under more than one question above, then please enter the total amount of damages caused by Defendant Ala Mahan, without duplication: \$ _____.

F2. If you entered an amount greater than \$0 for questions A3, B3 and/or C2, and you answered "YES" to any of the following questions, then enter the amount of the damages entered in F1 for which Defendants Henschell are liable as Defendant Alta Mahan's principal:

Yes to Question A6, Trade Secrets: \$ _____.

Yes to Question B3, Intentional Interference With Contractual Relations: \$ _____.

Yes to Question C2, Unjust Enrichment: \$ _____.

The damages may not be duplicative. If you awarded the same damages under more than one question above, then please enter the total amount of damages for which Defendants Henschell are liable as Defendant Alta Mahan's principal, without duplication: \$ _____.

The above is the finding of this jury.

Dated this _____ day of May, 2005.

PRESIDING JUROR

UCLSLan

Special Verdict Form A

**IN THE SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

MARY JO THOLA, D.C., and)
SUNSET CHIROPRACTIC AND)
WELLNESS CENTER, INC., a)
Washington corporation,)

NO. 03-2-11387-1

Plaintiff,)

SPECIAL VERDICT FORM A

vs.)

ALTA D. MAHAN, D.C. and JOHN)
DOE MAHAN, and their marital)
community; MARTIN R.)
HENSCHELL and JANE DOE)
HENSCHELL, and their marital)
community; HENSCHELL)
CHIROPRACTIC, a Washington)
sole proprietorship and partnership,)

Defendants.)

A. TRADE SECRETS

A1. Do you find that patient names and addresses on travel cards at Plaintiff's
chiropractic practice were trade secrets?

YES _____

NO _____

If you answered this question "YES," then go to question A2. If you answered this question
"NO," then go to question A9.

A2. Do you find that Defendant Alta Mahan misappropriated trade secrets?

YES _____

NO _____

If you answered this question "YES," then go to question A3. If you answered this question "NO," then go to question A9.

A3. Do you find that Defendant Alta Mahan's misappropriation of trade secrets was the proximate cause of damages sustained by Plaintiff?

YES _____

NO _____

If you answered this question "YES," then go to question A4. If you answered this question "NO," then go to question A9.

A4. If you answered "YES" to questions A1, A2, and A3, do you find that Defendant Alta Mahan's actions were willful?

YES _____

NO _____

If you answered this question "YES" then go to question A5. If you answered this question "NO," then go to question A6.

A5. If you answered "YES" to questions A1, A2, A3 and A4, do you find that Defendant Alta Mahan's actions were malicious?

YES _____

NO _____

Please go to the next question.

A6. If you answered "YES" to questions A1, A2 and A3, do you find that Defendant Alta Mahan was acting as an agent of Defendant Martin Henschell at the time that she misappropriated the Plaintiff's trade secrets?

YES _____

NO _____

If you answered this question "YES" then go to question A7. If you answered this question "NO," then go to question B1.

A7. If you answered "YES" to question A6, do you find that Defendant Martin Henschell's actions were willful?

YES _____

NO _____

If you answered this question "YES," then go to question A8. If you answered this question "NO," then go to question B1.

A8. If you answered "YES" to question A7, do you find that Defendant Martin Henschell's actions were malicious?

YES _____

NO _____

If you answered this question "YES" or "NO," then go to question B1.

A9. If you answered "NO" to questions A1, A2 or A3, do you find that Plaintiff brought her trade secrets claim against Defendant Alta Mahan in bad faith?

YES _____

NO _____

Please go to the next question.

A10. If you answered "NO" to questions A1, A2, A3 or A6, do you find that Plaintiff brought her trade secrets claim against Defendant Martin Henschell in bad faith?

YES _____

NO _____

Please go to the next question.

B. TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY

B1. Do you find that Defendant Alta Mahan intentionally interfered with Plaintiff's business expectancy?

YES _____

NO _____

If you answered this question "YES," then go to question B2. If you answered "NO," go to question C1.

B2. If you answered "YES" to question B1, do you find that when she interfered with Plaintiff's business expectancy, Defendant Alta Mahan was engaged in competition and/or pursuing legitimate concerns regarding patient abandonment?

YES _____

NO _____

If you answered this question "YES," then go to question C1. If you answered "NO," then go to question B3.

B3. If you answered "NO" to question B2, do you find that Defendant Alta Mahan's intentional interference with Plaintiff's business expectancy was the proximate cause of Plaintiff's damages?

YES _____

NO _____

If you answered "YES" to this question, go to question B4. If you answered "NO," then go to question C1.

B4. If you answered "YES" to question B2, do you find that Defendant Alta Mahan was an agent of Defendant Martin Henschell at the time that she intentionally interfered with Plaintiff's business expectancy?

YES _____

NO _____

Please go to the next question.

C. UNJUST ENRICHMENT

C1. Do you find that Defendant Alta Mahan was unjustly enriched?

YES _____

NO _____

If you answered this question "YES," go to question C2. If you answered "NO," then go to question D1.

C2. Do you find that Defendant Martin Henschell was unjustly enriched?

YES _____

NO _____

Please go to the next question.

D. CONFIDENTIALITY AGREEMENT

D1. Do you find that the letter of September 18, 2002 (Exhibit 16) created a contract not to disclose information regarding the sale of Plaintiff's chiropractic practice?

YES _____

NO _____

If you answered this question "YES," please go to question D2. If you answered "NO," go to question E1.

D2. If you answered "YES" to question D1, do you find that Defendant Mahan's breach of the confidentiality agreement proximately caused damages to the Plaintiff?

YES _____

NO _____

Please go to the next question.

E. COMMON LAW DUTY OF LOYALTY

E1. Do you find that Defendant Alta Mahan breached her common law duty of loyalty to the Plaintiff?

YES _____

NO _____

If you answered this question "YES," please go to question E2. If you answered "NO," please go to question F1.

E2. If you answered "YES" to question E1, do you find that Defendant Alta Mahan's breach of her common law duty of loyalty proximately caused damages to the Plaintiff?

YES _____

NO _____

Please go to the next question.

F. DAMAGES

F1. If you answered "YES" to questions A3, B2, C1, D2, and/or E2, enter the amount of damages proximately caused by Defendant Alta Mahan: \$ _____.

F2. If you entered an amount greater than \$0 in F1, and you answered "YES" to questions A6, B3, and/or C2, enter the amount of the damages entered in F1 for which Defendants Henschell are liable as Defendant Alta Mahan's principal: \$ _____.

The above is the finding of this jury.

Dated this _____ day of May, 2005.

PRESIDING JUROR

1 I encourage you to stay that Dr. Mahan drafted?

2 MR. PEICK: And then her patients asked
3 where are you going.

4 MS. MARTIN: And the ethical thing to do
5 would have been to?

6 MR. PEICK: To lie.

7 MS. MARTIN: What she claimed she said
8 before she got caught and that is keep your eyes open
9 after I settle somewhere.

10 THE COURT: I'm going to let the jury
11 decide it Mr. Peick. Denied. I don't think I have to
12 verbalize any more aspects of it. I read that one
13 sentence there. I sincerely hope you will allow Sunset
14 Chiropractic to continue meeting those needs. At the
15 same time what was Dr. Mahan doing? Anyway, denied.

16 MR. PEICK: Your Honor, based on your
17 comments perhaps we can speed this up.

18 THE COURT: Probably.

19 MR. PEICK: I will simply assume that you
20 will deny the others, so there's no sense in taking the
21 Court's time.

22 THE COURT: All right. Uniform Trade
23 Secrets Act?

24 MR. STEPHENS: What about Dr. Henschell?

25 THE COURT: What do you want to say about

APPENDIX H

1 the Uniform Trade Secrets? It's denied.

2 Interference, tortious interference, you know,
3 Dr. Henschell, they're going to judge his credibility
4 and not me, but I had real problem, I'll say, with what
5 he was saying also as far as credibility and also with
6 Dr. Mahan, but I'm not the judge of credibility in this
7 case.

8 MR. STEPHENS: Your Honor, as to one
9 component of the Uniform Trade Secrets Act, which is
10 the issue of maliciousness, I don't think that the
11 plaintiff has established adequate proof, not only of
12 intentional conduct but also maliciousness, in other
13 words if there was--

14 THE COURT: How about crafty?

15 MR. STEPHENS: Crafty may be competitive,
16 but it's not maliciousness.

17 THE COURT: So we're crafty.

18 MR. STEPHENS: I'm not saying my client was
19 crafty, Your Honor.

20 THE COURT: Reminds me of Enron. This
21 whole thing reminds me of Enron. And whether you call
22 these people crafty or capitalism--

23 MR. STEPHENS: Your Honor, I would
24 completely disagree that Dr. Henschell's conduct in
25 this case had anything close to what-- or is anything

APPENDIX H

1 close to what the people at Enron did. What
2 Dr. Henschell did is hire an employee. He probably
3 should have made the call early, when she couldn't make
4 up her mind. She wrote a letter without his knowledge
5 and now he's sitting here in this courtroom, but there
6 is absolutely no evidence the plaintiff has brought
7 forth to show that he acted intentionally and
8 maliciously and those are the standards that you have
9 to show to get to the stage of even submitting it to
10 the jury for punitive damages under the Uniform Trade
11 Secrets Act. And so that's why I'm asking you to
12 dismiss that portion. Whether you do that or not with
13 Dr. Mahan, that's an issue between Dr. Mahan and
14 Dr. Thola. That's not an issue for us.

15 THE COURT: All right. Ms. Martin?

16 MS. MARTIN: Dr. Henschell faces joint and
17 several liability for all conduct attributable to his
18 agent or his employee. He testified that when he found
19 out about this letter in June or July of 2003, after he
20 got served with a complaint, he didn't make
21 Dr. Henschell pay him, excuse me, Dr. Mahan pay him
22 back because Dr. Mahan didn't do anything wrong. He
23 continued to pay her a hundred dollars a patient
24 throughout 2003, even after he knew.

25 THE COURT: That was a statement he

APPENDIX H

1 volunteered. It was not a response to any question.
2 He just said Dr. Mahan didn't do anything wrong, came
3 out of the blue. That was an interesting comment.

4 MR. STEPHENS: It's interesting comment
5 because he reflects his belief. He didn't think
6 Dr. Mahan did anything wrong. She was not subject to--

7 THE COURT: He was trying to convince the
8 trier of fact, and they're going to judge his
9 credibility.

10 MR. STEPHENS: They are, Your Honor.

11 THE COURT: All right. Denied. Breach of
12 common law duty of loyalty by Mahan, how do you want to
13 argue that one Mr. Pieck?

14 MR. PEICK: I think, Your Honor, I could
15 anticipate your decision. I would argue basically that
16 she did not breach her duty of loyalty because she'd
17 already left and she was simply responding to patient
18 inquiries. That's the distilled version.

19 THE COURT: Distilled, that's good.

20 MR. STEPHENS: I have no objective
21 observations, because it's not against my client, Your
22 Honor.

23 THE COURT: I had sustained--

24 MS. MARTIN: As to this artificial
25 distinction that the defense would have you accept

APPENDIX H

1 between an active and I guess a passive employee,
2 Dr. Mahan was employed by Sunset Chiropractic until
3 December 31, 2002. While she was on vacation, she sent
4 out the December 17, 2002 letter. While she was
5 actively treating patients she was soliciting their
6 transfer to Henschell Chiropractic, and that was
7 competing with her employer and breaching her duty of
8 loyalty.

9 MR. PEICK: There's no evidence she was
10 soliciting. She was simply telling them if they wanted
11 to know where she ends up, she would tell them. And
12 they asked where are you going.

13 THE COURT: That's what she testified to.

14 MR. PEICK: Well, who testified to the
15 contrary?

16 THE COURT: Well, with the letter that went
17 out to how many patients was her request at the same
18 time she's talking about she's going to Mexico and
19 maybe open a practice up there.

20 MR. PEICK: Your Honor, that letter says
21 2004. Forgive me, but it says 1994 and we brought that
22 to Dr. Thola's attention.

23 THE COURT: It shows her state of mind and
24 how she was behaving and how she was acting and was
25 indicative of the goal she had. Denied, breach of

APPENDIX H

1 common law duty is denied.

2 Unjust enrichment by Mahan and Henschell, any
3 response from either one of you on that one?

4 MR. PEICK: Your Honor, obviously they
5 benefited from the transfer of patients, that doesn't
6 necessarily make the fact that they provided services
7 to these patients unjust. This goes back once again to
8 whether or not there's any causal link between a letter
9 or solicitation versus the fact these patients simply
10 prefer Dr. Mahan.

11 THE COURT: It doesn't have to be the sole
12 causal relationship, does it?

13 MR. PEICK: I think, Your Honor, if you're
14 going to base \$193,000 worth of damages--

15 THE COURT: That's not my job to do that.
16 All I have to say is there was a sole cause. The jury
17 will decide if it was \$193,000 worth.

18 MR. PEICK: I agree, it goes to the weight.

19 THE COURT: You agree with that, Mr.
20 Stephens?

21 MR. STEPHENS: With your observation? Your
22 Honor, no, I don't. I would reiterate we felt this was
23 a competitive environment and Dr. Henschell didn't--
24 she wasn't his agent when he paid her. When he
25 received the benefit of that it was just enrichment and

APPENDIX H

1 there is no prohibition under the law against just
2 enrichment.

3 THE COURT: I agree with that. Unjust
4 enrichment is what I disagree with.

5 MR. STEPHENS: I understand that, Your
6 Honor.

7 THE COURT: All right. Ms. Martin, do you
8 want to say anything?

9 MS. MARTIN: Just that the enrichment is
10 unjust as to the bonuses Dr. Mahan received and the
11 income derived from the patients because the patients
12 were improperly solicited and therefore Dr. Henschell
13 and Henschell Chiropractic and Dr. Mahan had no
14 marketing investment or investment in building that
15 client base. It was a benefit they received they
16 shouldn't have kept.

17 THE COURT: They didn't want to work hard
18 and diligently to build up a practice, they wanted a
19 short cut building up a practice. That's what happened
20 here. Now that's not my decision to make, I'm just
21 telling you in background, and you talk about unjust
22 enrichment, that's the unjust enrichment.

23 MR. PEICK: Your Honor, forgive me,
24 Dr. Mahan worked hard for two and a half years to build
25 relationships with these patients. Dr. Henschell

APPENDIX H

1 THE COURT: How long did it take to you
2 build up your practice?

3 MR. PEICK: Too long, Your Honor.

4 THE COURT: That's right, and you work hard
5 at it and you didn't take any short cuts.

6 MR. PEICK: I beg your pardon?

7 THE COURT: You didn't take any short cuts.

8 MR. STEPHENS: And neither did our client,
9 Your Honor.

10 THE COURT: I know that's your argument,
11 that's what you have to argue. I'm just saying that
12 for these motions most favorably in favor of the
13 plaintiff, in my mind, the totality of the
14 circumstances are such that these motions need to be
15 denied and decided by the jury.

16 MR. PEICK: With the exception of
17 injunction.

18 THE COURT: With the exception of the
19 injunction.

20 MR. PEICK: Okay, Your Honor, thank you. I
21 didn't sign that order.

22 THE COURT: I'm going to give it back to
23 you and you can each sign and copy receive it.

24 MR. STEPHENS: One other issue which is a
25 housekeeping issue, Your Honor, because I don't want to

APPENDIX H