

FILED  
COURT OF APPEALS

08/27/02 11:37

STATE OF WASHINGTON

*Jo YN*

No. 33953-6-II

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.

---

**REPLY BRIEF**

---

WIGGINS & MASTERS, P.L.L.C.

Kenneth W. Masters, WSBA 22278  
Shelby R. Frost Lemmel, WSBA 33099  
241 Madison Ave. North  
Bainbridge Island, WA 98110  
(206) 780-5033

Attorney for Appellants

PM 9/21/06

## TABLE OF CONTENTS

INTRODUCTION.....	1
REPLY RE STATEMENT OF THE CASE.....	2
REPLY RE ARGUMENT .....	6
A. The Court must reverse because the UTSA displaced Thola’s conflicting tort and restitutionary claims, where Thola argued to the jury that it should find a breach of loyalty, intentional interference and unjust enrichment based on Mahan’s trade-secret misappropriations.....	8
B. The Henschells cannot be liable for Mahan’s willful and malicious trade-secret misappropriation, nor for fees and exemplary damages. ....	17
C. The Henschells could not ratify Mahan’s willful, malicious and intentional misconduct because they did not have full knowledge of the facts at the relevant time.....	20
D. Thola’s intentional interference and unjust enrichment claims also fail. ....	22
E. At a minimum, the Court must reverse on damages.....	22
F. The Henschells did not assign error to the trial court’s fee award, so Thola responds to nothing, and she is not entitled to fees on appeal. ....	24
CONCLUSION .....	25

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>E.I. du Pont de Nemours Powder Co. v. Masland</i> , 244 U.S. 100, 37 S. Ct. 575, 61 L. Ed. 1016 (1917).....	14
<i>Pacific Aerospace &amp; Electric, Inc. v. Taylor</i> , 295 F. Supp. 2d 1205 (E.D. Wa. 2003).....	14, 15

### STATE CASES

<i>Barnes v. Treece</i> , 15 Wn. App. 437, 549 P.2d 1152 (1976).....	20
<i>Boeing Co. v. Sierracin Corp.</i> , 108 Wn.2d 38, 738 P.2d 665 (1987).....	12, 13, 14, 15
<i>Consumers Insurance Co. v. Cimoch</i> , 69 Wn. App. 313, 848 P.2d 763 (1993).....	20
<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).....	<i>passim</i>
<i>Hein v. Chrysler Corp.</i> , 45 Wn.2d 586, 277 P.2d 708 (1954).....	18
<i>Island Air, Inc. v. LaBar</i> , 18 Wn. App. 129, 566 P.2d 972 (1977).....	14, 15
<i>Kieburz &amp; Associates, Inc. v. Rehn</i> , 68 Wn. App. 260, 842 P.2d 985 (1992).....	16
<i>Kuehn v. White</i> , 24 Wn. App. 274, 600 P.2d 679 (1979).....	18
<i>Mortgage Specialists, Inc. v. Davey</i> , New Hampshire Supreme Court No. 2005-067, 2006 N.H. LEXIS 106 (Slip Op., July 26, 2006).....	15
<i>Niece v. Elmview Group Home</i> , 131 Wn.2d 39, 929 P.2d 420 (1997).....	18

<i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35, 59 P.3d 611 (2002).....	18
<i>Smith v. Hansen, Hansen &amp; Johnson, Inc.</i> , 63 Wn. App. 355, 818 P.2d 1127 (1991).....	20
<i>Snyder v. Medical Serv. Corp. of E. Wash.</i> , 145 Wn.2d 233, 35 P.3d 1158 (2001).....	18
<i>Tegman v. Accident &amp; Medical Investigations Corp.</i> , 150 Wn.2d 102, 75 P.3d 497 (2003) .....	18

**STATE STATUTES**

RCW 19.108.030(2) .....	24
RCW 19.108.900(2) .....	13
RCW 19.108.900 .....	8, 9, 11, 12
RCW 19.108.910 .....	16

**MISCELLANEOUS**

3 Am.Jur.2d <i>Agency</i> § 195, at 698 (1986).....	20
---	----

## INTRODUCTION

This appeal raises several legal issues clustering around Mahan's UTSA violation. The crucial issue is whether the UTSA displaced Mahan's other tort and restitutionary theories. *Rucker* and the majority of courts around the country considering this issue hold that other legal theories "conflict" with the UTSA when they are based solely upon, or to the extent that they are based upon, the same facts that establish the UTSA violation. When this happens, the UTSA displaces the other legal theories because the UTSA's purpose is to create one uniform cause of action for trade-secret misappropriations.

Thola argued to the jury that Mahan's trade-secret misappropriation also proved Thola's other theories. The jury returned a liability verdict on all but one of Thola's theories. The trial court repeatedly refused to require segregation of damages, despite the conflict, and even though the Henschells were not liable on one of Thola's successful theories.

The trial court erred in all respects. The result is an unfair trial and an unjust verdict. This Court should reverse and remand for trial on all issues. At a minimum, it must reverse the damages award as undifferentiated, unsupported and internally inconsistent.

## REPLY RE STATEMENT OF THE CASE

Thola does not directly challenge any factual statement in the opening brief, but nonetheless she restates the facts. Unfortunately, her restatement is inaccurate in crucial (and minor) respects. This reply points out only the most glaring errors.

First, Thola asserts that in the years between “1995 and November 2002, only 8 to 10 patients **in total** transferred from the Bonney Lake clinic to another clinic. RP 88; Ex 35.” BR 2 (emphasis added). At the cited page, however, Thola said that 8-to-10 patients transferred **per year**. RP 88. Exhibit 35 begins in December 2002, and does not support Thola’s assertion.

Second, Thola says her September 16, 2002 letter offering to sell Mahan the practice contained “confidential financial information.” BR 3-4. But the letter is a partial offer to sell, demanding \$335,000, wholly financed by Mahan, and over \$60,000 a year in rent. Ex 16.<sup>1</sup> Thola did not disclose any confidential financial information about Sunset to Mahan, but rather demanded that she agree to buy the practice within 30 days without first having it appraised. *Id.*

---

<sup>1</sup> Exhibit 16 is attached to this reply as Appendix I (Appendices A through H are attached to the Henschells’ opening brief).

Third, Thola asserts that Mahan said she “would be leaving the country for a year” in her October 16, 2002 letter rejecting Thola’s offer. BA 4 (citing Ex 17); *see also* RP 136-37, 205 (in October 2002, Thola thought Mahan was leaving in 2003). But Mahan’s letter actually says she will be “leaving for one year, beginning the first of the year 2004” – over a year hence. Ex 17. Thola could not honestly say that based on Mahan’s letter, she thought Mahan was leaving in 2003. Indeed, Thola claimed to have been “shocked” and to have had no idea that Mahan was leaving Sunset when Mahan gave her notice in mid-November 2002. RP 139. At the very least, both statements cannot be true.

Fourth, Thola asserts that “it was not disputed that Dr. Henschell extended a **written offer** of employment to Dr. Mahan prior to Dr. Mahan’s tender of her resignation from Sunset Chiropractic . . . .” BR 5 (citing RP 387) (emphasis ours). Mahan and Henschell had “a verbal agreement” at this time, not a written agreement. RP 387. This assertion is unsupported by the record.

Fifth, in the context of implying that Mahan’s patient-notification letter resulted in all of the transfers from Sunset to Henschell, Thola notes that several patients testified at trial. BR 7. She fails to mention, however, that all six patients who testified said

either (a) Mahan's letter had nothing to do with my transfer, or (b) I got Mahan's letter and did not transfer. See BA 16-17.

Sixth, and perhaps most disturbingly, Thola asserts that Mahan "began to solicit patients to transfer to Henschell Chiropractic while she was treating them at Sunset. RP 198 - 202, 332 - 339, 430." BR 11. This assertion grossly overstates the record Thola cites. At RP 198-202, Thola stated that on December 18<sup>th</sup> or 19<sup>th</sup>, a patient "blurted out" that she "found out" Mahan was going to Henschell Chiropractic. This in no way establishes that Mahan "began to solicit patients to transfer to Henschell Chiropractic while she was treating them at Sunset." BR 11.

At RP 332-39, Thola's chiropractic-assistant Kissner testified that between December 16 and 24, 2002, Mahan spent more time than usual with some unidentified patients, some of whom then transferred to Henschell. Kissner overheard Mahan speaking excitedly to one patient regarding future plans at Henschell Chiropractic as they came out of the treatment room. *Id.* Kissner also overheard a second patient tell Mahan, "I haven't decided yet" whether she would "follow" Mahan. *Id.* But Kissner could not hear anything being said in Mahan's closed treatment room. RP 331.

Kissner's testimony is consistent with Mahan's testimony that when patients asked where she was going in response to the letter posted at Sunset, she generally told them that she would take their names and numbers and contact them later. BA 11. Perhaps five or six patients pressed her on where she was going, so she told them. *Id.* That is not "soliciting patients."

At RP 430-31, Mahan reiterated that she had told a few insistent patients where she was going. By insisting on the incomplete posting at Sunset, Thola forced Mahan to either put off her patients' natural inquiries about where she was going, tell them the truth, or lie to them. Since she could not do the latter, Mahan tried putting them off; but with a very few patients, she broke down and told the truth. Reluctantly but truthfully responding to insistent patient inquiries is not "soliciting patients."

Seventh, Thola makes much of the large influx of new patients at Henschell Chiropractic in early 2003 (*e.g.*, BR 12-13), but Thola's own numbers belie her insinuation that Henschell "had to know" this influx was due to Mahan's misappropriations. In January 2003, Henschell had 85 new patients, but 58% of those came from other sources (BR 12); in February 2003, 64% of the 44 new patients came from non-Mahan sources. *Id.*

Eighth, Thola again overstates the record at BR 14, claiming that Mahan “acknowledged the causal connection between her December 27, 2002 letter and the referrals to Henschell for which she was compensated. RP 396-98, 432.” But Mahan denied that patients transferred “because of that . . . letter” (RP 396); and admitted that it “did produce some referrals” (RP 397); but asserted that those patients transferred “as a choice [as] to whom they wanted to see for their doctor” (RP 432). Fairly reading her testimony as a whole, Mahan never “acknowledged” – but rather denied – that the letter itself caused a single transfer.

Ninth and finally, Thola repeatedly acknowledges Mahan’s testimony that only 80 of the transferring patients received her letter. BR 13, 14. Thola provided (and cites) no evidence to the contrary. Thus, her claim that 169 patients transferred “as a result of” the letter is wholly unsupported.

#### **REPLY RE ARGUMENT**

Thola begins with a fusillade of standards of review, which seems to be aimed at a substantial evidence argument raised in one paragraph at page 43 of the opening brief. BR 16-24. Most of the general legal statements are accurate, though not very helpful

here. This appeal rests on the trial court's several legal errors, which are addressed below in the order they were raised.

Thola also badly mischaracterizes the record about Valerie Vaughn, who testified that while Thola had injured her, she liked "Dr. Alta's" adjustments. RP 591-93. Here is what Thola says:

Ms. Vaughn testified that the "sole reason" she transferred care from Sunset to Henschell was because she received [Mahan's] December 27, 2002 [notification] letter. RP 594.<sup>2</sup>

BR 20. Here is what Valerie Vaughn actually said (RP 593):

- Q. Okay. And when was it that you were thinking about changing offices?
- A. After my not real good experience with Dr. Thola.
- Q. Okay. How did you learn where Dr. Alta was located?
- A. She did send out a notice of where she was going.
- Q. Okay. And was that the sole reason that you went to go see Dr. Alta?
- A. Because of the letter?
- Q. Yes, ma'am.
- A. Yeah, because I liked the way she treated me.
- Q. Okay. Would you have followed Dr. Alta if you hadn't received the letter?
- A. Yes.

---

<sup>2</sup> Thola's cite to RP 594 is a typo, as nothing even remotely resembling Thola's assertion appears there. Thola meant to cite RP 593.

The thrust of the remainder of Thola's Argument § A is that appellate courts affirm jury verdicts supported by substantial evidence and that mere inferences from circumstantial evidence are enough. But a jury cannot reach a just verdict where, as here, it is not properly instructed on the law, and the evidence is very thin. The trial court committed numerous legal errors that deprived the Henschells of a fair trial. This Court should reverse.

**A. The Court must reverse because the UTSA displaced Thola's conflicting tort and restitutionary claims, where Thola argued to the jury that it should find a breach of loyalty, intentional interference and unjust enrichment based on Mahan's trade-secret misappropriations.**

The Henschells first noted that the Uniform Trade Secrets Act displaced Thola's duty of loyalty, intentional interference, and unjust enrichment claims. BA 25-28 (citing, *inter alia*, RCW 19.108.900; ***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**"). Simply put, Thola could "not rely on acts that constitute trade secret misappropriation to support [her] other causes of action." ***Rucker***, 88 Wn. App. at 358. Thola does not dispute ***Rucker***'s pertinence.

On the contrary, Thola apparently concedes that "secretly using . . . patient names and addresses and sending a solicitation

letter . . . clearly violated Dr. Mahan’s duties of confidentiality<sup>3</sup> and loyalty but also constituted a UTSA violation . . . .” BR 27. Indeed, she goes so far as to argue (in relation to a fee award issue the Henschells never raised, *see infra*, § E) “here, the harm [among the various claims] is not capable of reasonable, logical or practical division.” BR 38. And as further discussed below, Thola argued to the jury that Mahan’s trade-secret misappropriation proved breach of loyalty, intentional interference and unjust enrichment.

Thus, the jury found a UTSA violation, and then improperly found a breach of loyalty based on the same facts constituting a UTSA violation, directly contrary to RCW 19.108.900(1) and ***Rucker***. Since the trial court refused (over objections) to preclude this result, and since the court refused to have the jury segregate the damages (making it impossible to determine precisely how much damages are based on which claim) this Court should reverse and remand for a new trial under proper instructions.

Thola also attempts to draw exceedingly fine distinctions that make no difference. For instance, she claims that “Mahan solicited

---

<sup>3</sup> The jury rejected Thola’s confidentiality claim because Thola had no confidentiality agreement with Mahan; Thola failed to cross-appeal this issue, so it is no longer in the case.

Respondents' patients *in person* at Respondents' clinic while she was employed by Respondents, prior to her misappropriation of Respondents' trade secrets." BR 27. As noted above, Thola overstates the record. One witness overheard two snippets of conversation, neither of which proves by a preponderance of the evidence that Mahan solicited patients at Sunset.

More importantly, however, Thola's argument is disingenuous: She repeatedly argued to the jury that they should find a breach of the duty of loyalty based on the alleged trade-secret misappropriation:

The first claim is the breach of the common law duty of employment [*sic*]. . . .

. . .

So if you accept Mr. Pieck's argument that there's a difference and distinction must be made between being an active employee before December 27 or before December 24<sup>th</sup> and not being an active employee, it doesn't matter for purposes of deciding whether or not **when Dr. Mahan assembled patient names and addresses and sent out that letter to more than a hundred of them whether she was violating her duty of loyalty.**

. . .

. . . [Mahan] wanted 41 days with her resignation out in the open so she could start telling patients she was leaving and where she was going **and start assembling names and addresses so she could send them the December 27, 2002 letter.** . . .

...

Dr. Mahan admits that without Dr. Thola's permission and without Dr. Thola's knowledge **she assembled patient names and addresses from the active treatment cards**

....

RP 859-63. It is true that Thola also argued about the Kissner testimony (*id.*), but that is not the question.

Rather, the question is whether the trial court erred in refusing to instruct the jury that it may not find a breach of loyalty based on a trade-secret misappropriation. ***Rucker***, 88 Wn. App. at 358. Again, the UTSA unambiguously "does not affect . . . Contractual or other civil liability **that is not based upon misappropriation of a trade secret.**" RCW 19.108.900(2)(a) (emphasis ours). But where, as here, other civil liability is "based upon misappropriation of a trade secret," the other claims are displaced. This Court should reverse.

The same is true for Thola's intentional interference and unjust enrichment claims, on which Thola argued:

The next claim is for tortious interference with business relations [*sic*], Jury Instruction No. 20. . . .

...

So what do we have? By her own admission Dr. Mahan **sent out over one hundred letters. . . . She went through the patient treatment cards at Sunset and**

**copied down patient information and used that information to send her letters. . . . [more like this].**

...

Unjust enrichment. . . .

...

What's the unjust enrichment? Because they didn't pay to develop those patients . . . Dr. Mahan took through two weeks of her conduct **and December 27, 2002 letter.**

RP 880-83, 905-06. Indeed, in support of her intentional interference and unjust enrichment claims, Thola mainly argued the trade-secret misappropriation evidence. RP 880-83, 905-06. And she offers no other evidence in her appellate brief.

Thus, even assuming *arguendo* that the jury "could have" found a breach of loyalty, intentional interference or unjust enrichment based on skimpy, speculative testimony, Thola relied upon the trade-secret misappropriation to support her other tort claims. The trial court therefore materially erred in failing to instruct the jury that it may not rely on the misappropriation evidence to establish other tort liability. **Rucker**, 88 Wn. App. at 358; RCW 19.108.900. This Court should reverse and remand for a new trial.

Thola erroneously relies on **Boeing Co. v. Sierracin Corp.**, 108 Wn.2d 38, 48, 738 P.2d 665 (1987), which is inapposite. BR 25-26. There, Sierracin had more than 270 contractual/

confidentiality agreements with Boeing for cockpit windows. 108 Wn.2d at 42-43. Yet when Boeing took its business elsewhere, Sierracin continued to use Boeing's proprietary documents to compete with Boeing, to manufacture and sell windows to others in the "after market," and also to seek FAA authorization to manufacture and sell the same windows. *Id.* The jury found that Sierracin breached its contractual and confidentiality obligations, and misappropriated Boeing's trade secrets. *Id.* at 44-45.

On appeal, Sierracin argued that the trial court erred in not "consolidating" the breach of contract, confidentiality and trade secret claims, but the Court rejected this claim. 108 Wn.2d at 48. This is correct: nothing in the UTSA requires or allows consolidation of such claims. And while ***Boeing*** did recognize that a confidentiality claim can exist independent of both contracts and trade secrets, that is because they are based on independent facts.

That is, the jury could find (a) breach of the contractual agreements (which are unaffected by the UTSA under RCW 19.108.900(2)) based on Sierracin's attempts to directly compete with Boeing; (b) breach of its common law confidentiality obligations based on its use of Boeing's proprietary information to obtain FAA authorization; and (c) misappropriation of trade secrets based on its

continuing to manufacture the windows according to Boeing's plans. There was no evidence or argument that Boeing (like Thola) tried to roll the claims together. Thus, the **Boeing** trial court would have erred in "consolidating" Boeing's claims based on Sierracin's independently-illegal activities.

By contrast, here the jury simply rejected Thola's breach of confidentiality claim, and the Henschells never asked the trial court to "consolidate" her other claims, so **Boeing** is inapposite. In contrast to Sierracin, the Henschells asked the court either to dismiss the tort claims or to instruct the jury that it could not base any recovery for the other torts on violations of the UTSA. This is precisely what the UTSA requires, as **Rucker** (decided after **Boeing**) specifically holds. **Boeing** is not to the contrary.

Thola nonetheless argues that **Boeing** "recognized that a confidential relationship giving rise to common law duties not to disclose information can exist independently of trade secrets and therefore **neither conflict with nor are displaced by the UTSA.**" BR 26 (emphasis ours) (citing **Boeing**, 108 Wn.2d at 48 (citing **E.I. du Pont de Nemours Powder Co. v. Masland**, 244 U.S. 100, 102, 37 S. Ct. 575, 61 L. Ed. 1016 (1917); **Island Air, Inc. v. LaBar**, 18 Wn. App. 129, 138-39, 566 P.2d 972 (1977)); see also **Pacific**

***Aerospace & Elec., Inc. v. Taylor***, 295 F. Supp. 2d 1205, 1212 (E.D. Wa. 2003)). As noted, ***Boeing*** does not support the emphasized portion, nor do the other cited cases. The 1917 United States Supreme Court case and ***Island Air*** considered breaches of confidence, but say nothing about the UTSA. In *dicta*, the District Court in ***Pacific Aerospace*** quotes language from ***Boeing*** suggesting that contractual and confidential relations claims can be independent from trade secrets claims. 295 F. Supp.2d at 1211-12. But the court was addressing whether any confidences existed, not a displacement claim. *Id.* These cases are is unhelpful here.

By contrast, the ***Rucker*** rule – that Thola could not base her other tort claims on facts constituting trade-secret misappropriation – is consistent with the majority rule among jurisdictions adopting the UTSA. See, e.g., ***Mortgage Specialists, Inc. v. Davey***, New Hampshire Supreme Court No. 2005-067, 2006 N.H. Lexis 106 (Slip Op., July 26, 2006) (“***Davey***”), and cases cited therein. Those courts hold that when a trade-secret misappropriation is alleged, other tort claims relying on the same common core of facts are displaced under the plain language of the UTSA. See, e.g., ***Davey***, Slip Op. at 29 (citations omitted):

In determining whether a claim “conflicts” with the UTSA, we agree with the majority of courts, which have looked to the facts alleged or proved in support of the claim and have found that the claim is preempted when it is “based solely on, or to the extent [that it is] based on, the allegation or the factual showings of [. . .] misappropriation of a trade secret.”

As noted in the opening brief, uniformity is crucial under the UTSA. BA 26 (citing RCW 19.108.910). This Court should maintain Washington’s adherence to the majority rule under *Rucker*.

Moreover, Thola’s argument is yet another distinction without a difference. While it may be true that a “breach of confidence” claim “can exist independently,” here (as noted above) the jury rejected the confidentiality claim, and Thola actually argued that the duty of loyalty, intentional interference and unjust enrichment claims were not independent of the misappropriation claim. Since the jury had no instructions preventing them from mixing-up the various claims, this Court must reverse and remand for a new trial.

Thola also cites *Kieburz & Assocs., Inc. v. Rehn*, 68 Wn. App. 260, 265, 842 P.2d 985 (1992) for the proposition that Mahan’s “in-person solicitation . . . gives rise to a cause of action for breach of that duty [of loyalty] that is not displaced by the UTSA.” BR 27. Yet *Kieburz* neither cites nor discusses the UTSA. It is irrelevant here.

**B. The Henschells cannot be liable for Mahan’s willful and malicious trade-secret misappropriation, nor for fees and exemplary damages.**

The Henschells next maintained that they could not be liable for Mahan’s conduct that the jury found willful and malicious. BA 29-35. Whether viewed under the rubrics of master/servant or agency, Mahan was working for Thola, not the Henschells, when she misappropriated Thola’s trade secrets. *Id.* *A fortiori*, the Henschells could not be liable for fees and exemplary damages under the UTSA, where the jury did not find their conduct willful or malicious.<sup>4</sup> *Id.*

Thola’s main response seems to be that Mahan’s trade-secret misappropriation was “marketing” for Henschell Chiropractic. BR 29-33. This defies logic, suggesting an unwise and unwarranted expansion of the scope-of-employment doctrine. Thola does not deny that Mahan was her employee and that Dr. Henschell had no idea Mahan was misappropriating trade secrets while working for Thola. There is absolutely no evidence that the Henschells had anything to do with Mahan’s actions, notwithstanding Mahan’s reading her letter to a Henschell

---

<sup>4</sup> Thola does not respond here to the damages/fees argument; her erstwhile responses are dealt with *infra*.

Chiropractic Assistant: it is undisputed that, at the time of the call, Mahan had already misappropriated Thola's trade secrets, but told the Assistant nothing about having done so, and did not allow the Assistant to make any changes to Mahan's letter.

Thola strikes out at a straw man in asserting that the "proposition advocated by Appellants that an employer cannot be found to be jointly and severally liable for the willful and malicious, intentional acts of an employee is not supported . . . ." BR 32-33 (citing **Tegman v. Accident & Med. Investigations Corp.**, 150 Wn.2d 102, 75 P.3d 497 (2003); **Robel v. Roundup Corp.**, 148 Wn.2d 35, 59 P.3d 611 (2002)). **Robel** correctly rejects the idea that an employer cannot be liable for its employee's willful, malicious and intentional torts, but the Henschells never argued to the contrary. Rather, the Henschells' point is that future employers (like the Henschells) cannot be liable for their future employee's (Mahan's) willful, malicious and intentional misconduct outside the scope of her (future) employment. BA 31-32 (citing **Robel, supra**; **Niece v. Elmview Group Home**, 131 Wn.2d 39, 56, 929 P.2d 420 (1997); **Snyder v. Med. Serv. Corp. of E. Wash.**, 145 Wn.2d 233, 242-43, 35 P.3d 1158 (2001); **Hein v. Chrysler Corp.**, 45 Wn.2d 586, 600, 277 P.2d 708 (1954); **Kuehn v. White**, 24 Wn. App. 274,

277-81, 600 P.2d 679 (1979)). This is black letter law to which Thola has no answer.

Thola also strikes out on the agency theory. BR 33-36. She swings and misses three times: First, she misses that the issue is not whether Mahan<sup>5</sup> was the Henschells' agent after beginning employment with them, but whether she was acting as their agent when she committed the misappropriation. BA 33-35. Second, she misses that the jury had to find Mahan Thola's employee in order to find a breach of Mahan's duty of loyalty. Third, she misses that Mahan could not have been the Henschells' agent when they had never authorized her to do anything and had no control over her.

Thola also argues that Mahan's phone call to Weingard makes the Henschells vicariously liable for Mahan's misconduct. BR 33-36. But while Thola here recognizes that the "issue is whether Appellants had notice of Dr. Mahan's conduct through" Weingard (BR 34), she then fails to cite any evidence that they did. BR 33-36. Mahan told Weingard nothing about her secret extraction of patients' names and addresses; Weingard obviously could not communicate information that she never had. Mahan

---

<sup>5</sup> Thola also talks about Chiropractic-Assistant Weingard here, an agency theory not argued to the jury; this claim is addressed immediately below.

also told the Henschells nothing about her misconduct, and none of Mahan's patient-notification letters reached the Henschells' files. While there was a large influx of patients in January and February, the majority of those came from other sources, as explained above. Thola's agency pitch is a no-hitter.

**C. The Henschells could not ratify Mahan's willful, malicious and intentional misconduct because they did not have full knowledge of the facts at the relevant time.**

The Henschells next pointed out that they did not and could not ratify Mahan's willful, malicious and intentional misconduct. BA 35-39.<sup>6</sup> The trial court's erroneous instructions permitted the jury to improperly conclude that if Weingard merely knew of Mahan's "act" (which might mean simply writing her patient-notification letter) then the Henschells ratified her trade-secret misappropriation. *Id.* In any event, no evidence established that the Henschells accepted any patients with full knowledge of the relevant facts, so they did not ratify Mahan's misconduct. *Id.*

---

<sup>6</sup> Citing ***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); ***Smith v. Hansen, Hansen & Johnson, Inc.***, 63 Wn. App. 355, 369, 818 P.2d 1127 (1991), *rev. denied*, 118 Wn.2d 1023, 827 P.2d 1392 (1992); ***Barnes v. Treece***, 15 Wn. App. 437, 443, 549 P.2d 1152 (1976).

Failing to confront the instructional error, Thola argues that the Henschells “had actual and constructive knowledge of Dr. Mahan’s solicitation beginning in December, 2002.” BR 37 (citation omitted in original). This vague assertion is both untrue and irrelevant. It is untrue if it suggests that the Henschells had actual or constructive knowledge of Mahan’s trade-secret misappropriation – no such evidence exists. And it is thus irrelevant because mere knowledge of her “solicitation” (if such they had) – with no knowledge of her willful and malicious misappropriation – is not enough: there is nothing wrong with a doctor under no non-compete agreement seeking to keep her patients after she moves her practice. The Henschells knew nothing about the relevant act – secretly taking patient names and addresses – so they are not vicariously liable.

Thola again relies on the unusual influx of patients in January and February (BR 37), but again, that was an across-the-board increase, with the clear majority of new patients coming from other sources than Sunset. This is not substantial evidence that the Henschells had full knowledge of Mahan’s misconduct. Had the jury been correctly instructed, it could not have reached this verdict.

**D. Thola's intentional interference and unjust enrichment claims also fail.**

The Henschells next argued that Thola's intentional interference and unjust enrichment claims fail because (a) the UTSA displaces them; (b) the Henschells are not liable for intentional misconduct outside the scope of employment; (c) the Henschells had no knowledge of Mahan's misconduct; and (d) it is not "unjust" to accept payment for services rendered. BA 40-41. Thola has no response. See BR. The Court should reverse.

**E. At a minimum, the Court must reverse on damages.**

Lastly, the Henschells argued that the Court should reverse on damages, for numerous reasons: (a) the undifferentiated \$89,000 verdict includes damages for breach of loyalty, for which the Henschells are not vicariously liable; (b) when the verdict came in, Thola represented to the trial court that it should subtract the unjust enrichment awards from the \$89,000, but later sought and achieved a judgment for the full amount, doubled; (c) the evidence does not support the amount and the unjust enrichment awards plainly duplicate each other; and (d) the Henschells are not liable for willful and malicious conduct outside the scope of employment, so they are not liable for fees and exemplary damages under the

UTSA. BA 41-44. Any one of these reasons is sufficient to reverse on damages, and together they are overwhelming.

Incredibly, Thola's main response is that "Segregation or apportionment of damages for harm among two or more causes is inappropriate where, **as here**, the harm is not capable of reasonable, logical or practical division." BR 38-41 (emphasis ours). As noted above, this essentially concedes the Henschells' main claim, that the UTSA displaces the other tort claims. As relevant here, Thola may not recover damages for breach of loyalty, and intentional interference, and unjust enrichment, and trade-secret misappropriation where, as here, they are all essentially the same claim with a different name. The Court should reverse the entire case, but must at least reverse the damages.

Without directly addressing the issue raised, Thola also defends her Special Verdict form. BR 40. The issue is whether the court had to instruct to jury not to overlap the claims? It did. Thola's response misses the point, and is irrelevant here.

Thola next defends the exemplary damages and fees, an issue raised earlier in the opening brief (BA 34-35), but again Thola misses the two essential, independently sufficient points. BR 41-44. First, since the Henschells cannot be vicariously liable for

Mahan's willful, malicious and intentional acts before coming to work for them, they cannot be vicariously liable for exemplary damages and fees. Second, since the statute requires "a finding by the jury of willful and malicious misconduct by the misappropriating party" (as Thola admits at BR 43) a court may not impose exemplary damages or fees against a party whom the jury never found willful or malicious. RCW 19.108.030(2). Thola has no response, and the Court should reverse on this issue.

**F. The Henschells did not assign error to the trial court's fee award, so Thola responds to nothing, and she is not entitled to fees on appeal.**

Thola adds an additional, lengthy response to an argument never made. BR 44-48. She defends the trial court's fee award, but the Henschells assigned no error and raised no such issue. BA 2-4. Of course, if the Court reverses, the fee award falls.

Thola also seeks fees on appeal due to Mahan's willful and malicious trade-secret misappropriation. BR 48. For all of the reasons stated above, *a fortiori* she is not entitled to appellate fees. If the Court reverses and remands, any fee award should abide the outcome of the new trial.

**CONCLUSION**

For the reasons stated above, the Court should reverse and remand for a new trial. At the very least, the Court should reverse the damages award and remand for a new trial on damages. Fees should abide the outcome.

DATED this 21<sup>st</sup> day of September 2006.

The Stephens Law Firm



J. Roderik Stephens  
WSBA 14538  
P.O. Box 159  
Kent, WA 98035-0159  
(253) 852-8757

Wiggins & Masters, p.l.l.c.



Kenneth W. Masters  
WSBA 22278  
Shelby R. Frost Lemmel  
WSBA 33099  
241 Madison Avenue North  
Bainbridge Island, WA 98110  
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 21<sup>st</sup> day of September 2006, to the following counsel of record at the following addresses:

Attorney for Defendants

John C. Peick  
Peick Farver, P.S.  
1813 115<sup>th</sup> Avenue NE  
Bellevue, WA 98004-3002

Attorney for Respondents

Constance Susan M. Martin  
Marten Law Group PLLC  
1191 2nd Ave Ste 2200  
Seattle, WA 98101-3421

Co-Counsel for Appellants

J. Roderik Stephens  
The Stephens Law Firm  
P.O. Box 159  
Kent, WA 98035-0159

FILED  
COURT OF APPEALS  
06 SEP 22 AM 11:37  
STATE OF WASHINGTON  
BY JS  
CLERK

  
\_\_\_\_\_  
Kenneth W. Masters, WSBA 22278  
Attorney for Appellants Henschell

Date: September 18, 2002

Dr. Alta,

Here are some numbers I have compiled for purchase of the business of Sunset Chiropractic and Wellness Center. Following is a partial list of what I have in mind.

Business: Includes all equipment, but is limited to personal items such as books, antiques, some posters, and some front desk items which will be negotiable.

The lease is as follows: 2700 sq. feet

For lease of the building complete with sublease rights to all sq footage except current space used for chiropractic clinic.

This does not include utilities, but does include real estate taxes and insurance  
Storage in back building is not included in square footage.

Purchase price: \$335,000.00 Three Hundred Thirty Five thousand dollars and 00 cents.  
Full amount to be financed by buyer.

Lease Price: \$1.90 per square foot per month for a period of three years. Lease price to be negotiated no later than one month before beginning of fourth year. The average increase will be no greater than six percent of the current lease and will occur for 3 year intervals.

You have one month from this date to make your decision pertaining to the purchase of the practice, as I have other doctors interested as well at this time. I will accept your answer no later than **October 18, 2002**. If you have other questions or concerns, I need to have them in writing on or before **October 11, 2002** so we may rectify them before the due date.

Upon signing "letter of intent to purchase" with a substantial down payment, the practice will be appraised for final dollar amount if final dollar amount cannot be agreed upon by the buyer and seller.

I would hope that you will not share this information with any other person except your family as it would jeopardize the success/ failure of the practice.

Thank you for your strict confidence in advance.  
I look forward to hearing from you.

Sincerely,

  
Dr. MaryJo Thola, DC

THO 00002

APPENDIX I

KHSAP Bank  
finance only in west side

X-Ray 185  
mike w/  
wash X-ray

Processor new

Date: September 18, 2002

won't appraise  
till letter of  
intent signed

Dr. Alta,

Here are some numbers I have compiled for purchase of the business of Sunset  
Chiropractic and Wellness Center. Following in a partial list of what I have in mind.

Business: Includes all equipment, but is limited to personal items such as books, antiques,  
some posters, and some front desk items which will be negotiable.

- Tables  
2 tables

The lease is as follows: 2700 sq. feet 1# / sq. foot. 5130.00 Rent/month  
For lease of the building complete with sublease rights to all sq footage except current  
space used for chiropractic clinic.

450000  
sign

This does not include utilities, but does include real estate taxes and insurance  
Storage in back building in not included in square footage.

has to stay  
upstairs as  
Rental.

Purchase price: \$335,000.00 Three Hundred Thirty Five thousand dollars and 00 cents.

Full amount to be financed by buyer.

Lease Price: \$1.90 per square foot per month for a period of three years. Lease price to  
be negotiated no later than one month before beginning of fourth year. The average  
increase will be no greater than six percent of the current lease and will concur for 3 year  
intervals.

5,130.00/month  
Rent.

You have one month from this date to make your decision pertaining to the purchase of  
the practice, as I have other doctors interested as well at this time. I will accept your  
answer no later than October 18, 2002. If you have other questions or concerns, I need to  
have them in writing on or before October 11, 2002 so we may rectify them before the  
due date.

650.00  
signature

Upon signing "letter of intent to purchase" with a substantial down payment, the practice  
will be appraised for final dollar amount if final dollar amount cannot be agreed upon by  
the buyer and seller.

If I want  
practice  
appraised then  
I pay for it.

I would hope that you will not share this information with any other person except your  
family as it would jeopardize the success/ failure of the practice.

Thank you for your strict confidence in advance.  
I look forward to hearing from you.

20% down  
By next year

Sincerely,

*Dr. MaryJo Thola*  
Dr. MaryJo Thola, DC

30 days Notice  
65 4/10/02

ice sales.com

450/year

21 outstanding - No Accounts Receivable

APPENDIX I

RCW 19.108.020. Remedies for misappropriation--Injunction, royalty

(1) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

(2) If the court determines that it would be unreasonable to prohibit future use, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.

(3) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

RCW 19.108.030. Remedies for misappropriation--Damages

(1) In addition to or in lieu of injunctive relief, a complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.

(2) If wilful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (1).

RCW 19.108.900. Effect of chapter on other law

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

(2) This chapter does not affect:

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

(b) Criminal liability for misappropriation of a trade secret.

RCW 19.108.910. Construction of uniform act

This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

RCW 19.108.930. Effective date--Application--1981 c 286

This chapter takes effect on January 1, 1982, and does not apply to misappropriation occurring prior to the effective date.