

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,

Respondents

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.

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BRIEF OF RESPONDENTS

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I. INTRODUCTION

Dr. Alta Mahan solicited the transfer of patients from her then-current employer, Respondents, to her future employer, Appellants, while treating those patients at Respondents' clinic. Dr. Mahan also misappropriated Respondents' patients' names and addresses, determined by the jury to be trade secrets, and used that information to send a letter to more than 100 of Respondents' patients soliciting their transfer to Appellants' clinic. For her actions, Appellants compensated Dr. Mahan \$100 per patient referred throughout 2003, even after Appellants had full knowledge of Dr. Mahan's wrongful conduct, obtained in mid-2003.

The jury found that Dr. Mahan had breached her common law duty of loyalty to Respondents, tortiously interfered with Respondents' business relations with their patients, and willfully and maliciously misappropriated Respondents' trade secrets. Those findings are unchallenged and are verities on appeal. The jury also found that Appellants were jointly and severally liable for Dr. Mahan's misappropriation. The jury awarded Respondents \$89,000, jointly and severally as against Dr. Mahan and Appellants.

Following extensive briefing and argument, and in the exercise of its discretion, the trial court entered a judgment against Respondents for

exemplary damages and attorney's fees, based on their vicarious liability for Dr. Mahan's conduct.

The jury's verdict and the trial court's exemplary damage and attorney's fees awards are supported by substantial evidence in the record. The trial court did not err, and its decision should be affirmed by this Court.

II. STATEMENT OF THE CASE

Dr. Mary Jo Thola founded Sunset Chiropractic & Wellness Center in 1995. RP 86. She worked long hours during the first year of her practice to build a client base, including being on-call 24 hours per day, seven days per week to provide treatment. RP 87. Dr. Thola's relationships with many of the patients she developed were long-lived, with several staying for more than five years. RP 88; 5/12/05 RP 77 - 79; Ex. 35. In the years between the opening of Sunset Chiropractic in 1995 and November 2002, only 8 to 10 patients in total transferred from the Bonney Lake clinic to another clinic. RP 88; Ex. 35.

Dr. Thola hired Dr. Mahan as a chiropractic associate at Sunset Chiropractic in late Spring, 2000. RP 108 - 109, 122, 814, 816. At the time, Dr. Mahan was actively looking for a chiropractic associate position which could lead into a business opportunity for her. RP 357 - 358; Ex. 2.

As she noted on the resume that she sent to Dr. Thola, Dr. Mahan was looking for a “long term position as a chiropractic associate in an energetic, and positive chiropractic office. Potential desire to purchase or invest in the office.” RP 358; Ex. 2. Additionally, Dr. Mahan stated one of her primary goals was to “purchase, become partners, or begin my own chiropractic office.” *Id.*

Dr. Thola hired Dr. Mahan with the mutual expectation that Dr. Mahan was going to purchase Sunset Chiropractic in two to five years. RP 103 - 104, 108, 110. Under the terms of their employment relationship, Dr. Thola trusted Dr. Mahan to assist Dr. Thola in running the clinic and interacting with all of Dr. Thola's patients. RP 114; Ex. 4. Prior to October 16, 2002 Dr. Mahan continued to reinforce the mutual expectation and understanding that she was going to purchase Sunset Chiropractic, and Dr. Thola thus let Dr. Mahan actively participate in patient care so that she could develop a foothold in the clinic. RP 114 - 117.

For two years, Dr. Mahan continued in her role as an employee of Sunset Chiropractic with the expectation that she was going to purchase the clinic. RP 122 - 124, 826. In September 2002, Dr. Thola provided Dr. Mahan with confidential financial information about the clinic to facilitate their discussion about the purchase of the clinic. RP 124 - 134, 360 - 362;

Ex. 16.

By letter dated October 16, 2002, Dr. Mahan advised Dr. Thola that she was no longer interested in purchasing Sunset Chiropractic. RP 136 - 137; Ex. 17. In her letter, Dr. Mahan informed Dr. Thola that she would be leaving the country for a year. Ex. 17. Dr. Thola and members of her staff, including then-Chiropractic Assistant Maria Kissner, believed that Dr. Mahan and her husband would be moving to Mexico. RP 137, 139, 196, 205, 428 - 429, 737, 795; 5/12/05 RP 109. Ms. Kissner testified that she believed based upon conversations that she had heard that Dr. Mahan and her husband intended to open a scuba business in Mexico. RP 428 - 429. Dr. Thola had no knowledge of Dr. Mahan's intent to join Appellants' practice, just down the road. RP 138, 140, 196.

During the same time frame as Dr. Mahan was advising of her intent not to purchase Sunset Chiropractic, Dr. Martin Henschell called Dr. Mahan at home and set up a lunch meeting with her to discuss an offer of employment. RP 538. At the meeting, sometime prior to October 23, 2002, Dr. Mahan and Dr. Henschell discussed employment opportunities for Dr. Mahan at Henschell Chiropractic. RP 371 - 372, 400, 535.

After the lunch meeting, Dr. Henschell met with Dr. Mahan at her house and provided her with an offer of employment which included such

terms as salary, bonus, hours, and duties. RP 371 - 376, 400, 540; 5/19/05 RP 60; Ex. 23. Dr. Mahan responded in writing with specific questions and comments regarding employment with Henschell Chiropractic. RP 372 - 376, 400; Ex. 18.

Dr. Henschell did not have any issues with the terms proposed by Dr. Mahan, and incorporated those terms into Dr. Mahan's contract. RP 548 - 549, 551; Ex. 22. After receiving Dr. Mahan's October 23, 2002 terms, Dr. Henschell gave the contract to Linda Weingard to be typed up for signature. RP 489 - 491, 549; Ex. 22.

The employment contract is undated, and the date on which Dr. Mahan actually signed the contract with Dr. Henschell was disputed at trial; 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, and that Dr. Mahan had a verbal agreement regarding employment with Dr. Henschell in December 2002. RP 387. In preparation for her arrival, Henschell Chiropractic placed promotional materials in the clinic in December 2002 announcing Dr. Mahan as its new associate. RP 221 - 222, 226; CP 1422 - 1426.

On November 21, 2002, Dr. Mahan gave Dr. Thola a letter notifying Dr. Thola that she was resigning from her position as an

associate chiropractic at Sunset Chiropractic, and that her last date of employment would be on December 31, 2002. RP 139; Ex. 19. Dr. Mahan attended a Henschell Chiropractic staff meeting on December 9 or 10, 2002. RP 377 - 380, 422, 491; Ex. 23.

One provision that remained unchanged from Dr. Henschell's original offer of employment to Dr. Mahan in early October, and the final executed employment agreement was the \$100 per patient referred bonus. RP 543, 551 - 553. That provision states as follows:

For each new patient that is referred to Henschell Chiropractic by Dr. Alta Mahan, there will be a one hundred dollar (\$100) bonus. For example, if there is a family of five (5) that is referred by Associate, there will be a bonus of five hundred dollars (\$500).

RP 551; Ex. 22.

Dr. Mahan's employment agreement with Henschell Chiropractic also required as a condition of her employment that Dr. Mahan engage in marketing efforts on behalf of Henschell Chiropractic. RP 404, 561.

The \$100 per patient referral bonus Dr. Mahan received in 2003 was tied to Dr. Mahan's direct marketing efforts. Dr. Henschell testified at trial that Dr. Mahan would only receive a \$100 per patient bonus for patients that came to the clinic as a result of Dr. Mahan's marketing efforts alone. RP 557, 570 - 571, 638, 5/19/05 RP 75. Dr. Mahan would not

receive a bonus for patients responding to a mailing sent out by Appellants, even one announcing her arrival or featuring her picture. RP 557, 625, 637, 5/19/05 RP 76 - 77; Ex. 59. Nor would Dr. Mahan receive a bonus for patients responding to a newspaper ad that was paid for or conceived of by Appellants, even the one that announced Dr. Mahan's arrival at the clinic. RP 623, 625.

Dr. Mahan received a bonus for each Sunset Chiropractic patient who transferred care to Henschell Chiropractic as a result of Dr. Mahan's direct marketing efforts. Ex. 31. Dr. Mahan testified that she did very little of her own direct marketing in the first six months of 2003, but had yielded 83 transfers. 5/19/05 RP 27 - 29. Appellants paid Dr. Mahan \$100 per patient for each patient identified in Ex. 31, including those patients who had transferred their care in December 2002 or early 2003, a time frame during which Dr. Mahan testified she had not engaged in any direct marketing. 5/19/05 RP 27, 73 - 75; Ex. 25A, 25B, 31. These patients included Janice Whitehead (12/3/02 transfer), RP 590; Ex. 25A, 31; Valerie Vaughn (1/2/03 transfer), RP 595; Ex. 25B, 31; Michell Wittmier (1/23/03 transfer), RP 600; Ex. 25B, 31; and Martin Sandor (1/3/03 transfer), RP 609, Ex. 25B, 31, each of whom testified at trial.

Dr. Mahan continued to work at Sunset Chiropractic through

December 31, 2002. Ex. 19. During this time, Dr. Mahan wrote and posted a letter at Sunset Chiropractic notifying patients that she would be leaving the clinic and encouraging them to allow Sunset Chiropractic to continue to meet their chiropractic needs:

There will be a few changes in the year 2003, which we would like to bring to your attention at this time. I, Dr. Alta Mahan, will be leaving SUNSET CHIROPRACTIC and Wellness Center as of December 31, 2002. I want you to know that I value each of you and have enjoyed serving you chiropractic needs. I sincerely hope you will allow SUNSET CHIROPRACTIC to continue meeting those needs.

RP 140 - 144; Ex. 20.

The letter was drafted by Dr. Mahan, approved by Dr. Thola by telephone, and signed by both Dr. Mahan and Dr. Thola. RP 140 - 141; Ex. 20. Dr. Mahan never raised the issue of patient abandonment with Dr. Thola. RP 142 - 143.

Dr. Mahan wanted to mail a letter announcing her departure be mailed to every patient of Sunset Chiropractic, but Dr. Thola denied her request and instead allowed only the joint letter that was posted at Sunset Chiropractic. RP 141 - 142, 340 - 341, 407 - 410. Dr. Thola testified that she believed that with a posted letter, Sunset Chiropractic could control the information conveyed to patients, protecting Sunset's and Dr. Thola's

investment in Sunset's patient base, and could talk with patients about Sunset's desire to keep them and to make sure their chiropractic care needs were met, persuading those who might have considered transferring to stay. RP 143 - 144, 154, 200.

Some time in December, after Dr. Thola denied Dr. Mahan's request to do a mass mailing of her departure announcement to all of Sunset Chiropractic's patients, Dr. Mahan went through the patient files at Sunset Chiropractic and copied down patient information to take with her when she left the clinic. RP 382 - 384, 387.

Using names and addresses taken without permission and without Dr. Thola's knowledge from Sunset Chiropractic's files, Dr. Mahan wrote to more than 100 Sunset Chiropractic patients instructing them how to transfer their care to Henschell Chiropractic. RP 382 - 384, 387. Dr. Thola was away on vacation, and unaware of Dr. Mahan's activities. RP 382.

After she drafted the letter, Dr. Mahan contacted Linda Weingard, the Office Manager at Henschell Chiropractic by telephone at Henschell Chiropractic and read her the December 27, 2002 letter to ensure the information contained in the letter was accurate. 387 - 388, 484 - 485, 514. There was conflicting testimony at trial regarding whether Dr.

Mahan read the letter to Ms. Weingard before or after she sent it. RP 387 - 388, 484 - 485.

The December 27, 2002 letter closed with:

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!

RP 430 - 432; Ex. 21 [emphasis in original].

Dr. Mahan offered conflicting testimony at trial about whether she sent the December 27, 2002 letter only to patients who requested information about where Dr. Mahan would be practicing. There was testimony from both patients who had received the letter but who had not requested it, and from Dr. Mahan herself that she sent the letter to patients who did not request that they receive it, and to patients whom she did not treat between her resignation and her departure. RP 184 - 186, 386, 389, 410 - 411; 5/19/05 RP 6 - 7.

Between her resignation and her last day at Sunset Chiropractic, Dr. Mahan continued to treat patients at Sunset Chiropractic. Although she was treating patients at Sunset during December 2002, Dr. Mahan had

already verbally accepted Appellants' offer of employment, which included a \$100 per patient referral bonus. RP 381, 387. During this time, she began to solicit patients to transfer to Henschell Chiropractic while she was treating them at Sunset. RP 198 - 202, 332 - 339, 430. Maria Kissner overheard part of at least two of these discussions, which largely occurred behind closed treatment room doors. RP 332 - 339.

Several of the patients Dr. Mahan treated in December informed Ms. Kissner on their way out of the clinic that they would not be scheduling a next appointment with Sunset Chiropractic, because they were following Dr. Mahan to Henschell Chiropractic. RP 335 - 336, 355. One patient asked Ms. Kissner whether she was going to Henschell Chiropractic with Dr. Mahan, as well. RP 336. Dr. Thola was unaware and uninformed of Dr. Mahan's actions. RP 423.

In late December and early January, Sunset Chiropractic began receiving numerous patient transfer requests, all of which instructed it to send files to Henschell Chiropractic. RP 155; Ex. 25A, 25B. Both Appellants and Respondents maintained records of all patients who transferred from Sunset to Henschell. Ex. 25A - 25L, 31, 35, 42, 43.

Statistics regarding patient transfers were recorded and discussed during weekly Henschell Chiropractic staff meetings, attended by all

Henschell Chiropractic employees, including Dr. Henschell. RP 460, 466, 516 - 517, 524 - 525; Ex. 33, Ex. 42. Dramatic increases in new patients were discussed during these meetings, and Sunset Chiropractic patients were identified. RP 517 - 520.

According to Ms. Weingard, who maintained records of patient statistics, a transfer of 20 or more patients from a single clinic is unusual. RP 484. In January, 2003 Henschell Chiropractic had 85 new patients (Compared to October, November and December, 2002 new patient totals of 29, 21 and 18 new patients, respectively). RP 458 - 459, 566; Ex. 39. This was more than all new patient transfers in 2002. RP 566. Thirty-six of those January, 2003 new Henschell Chiropractic patients were Sunset Chiropractic patients. Ex. 25B.

In February, 2003 Henschell Chiropractic had 44 new patients. RP 458 - 459, Ex. 39. Sixteen of those 44 were Sunset Chiropractic patients. Ex. 25C. Henschell Chiropractic had never received more than 20 transfers in a month from any clinic other than Sunset Chiropractic. RP 484. According to Appellants' records, patient transfers from Sunset to Henschell totaled 6 in 2001, 22 in 2002, 133 in 2003, and 13 in the first six months of 2004. RP 569 - 570.

According to Dr. Mahan's own accounting, prepared at the request

of Dr. Henschell, as of June 24, 2003 123 patients had “come over directly as a result from [sic] [Dr. Mahan],” 80 of whom had been sent the December 27, 2002 letter. Ex. 31. As of November 2003, by Dr. Mahan’s accounting, 140 Sunset Patients had transferred their care to Henschell Chiropractic. RP 414. According to Respondents’ accounting, at least 169 patients transferred their care from Sunset to Henschell between December 2002 and December 2003. RP 155, 169, 248, 760, 5/12/05 RP 87 - 88; Ex. 25A - 25L, 31, 35, 43 [Summary at Appendix 1]. Appellants’ accounting of Sunset patient transfers in 2002 and 2003 is 155. RP 569 - 570.

Dr. Mahan’s calculation of the amount that Henschell Chiropractic had benefitted from the Sunset Chiropractic patients during the first six months of 2003 was \$28,711.72. RP 389 - 392; Ex. 31.

Dr. Mahan received bonuses for patient referrals in 2003 totaling \$18,000. RP 435 - 436. The process for calculating monthly bonuses was as follows: Dr. Mahan would make a list on a post-it note each month of patients she had referred, give that list to Dr. Henschell, and then Dr. Henschell would provide that list to Ms. Weingard to calculate Dr. Mahan’s bonus. RP 491 - 492, 500. Dr. Henschell signed each of Dr. Mahan’s bonus checks in 2003. RP 437.

The vast majority of referral bonuses arose from Sunset Chiropractic patients transferring their care to Henschell Chiropractic. RP 435 - 436. Dr. Mahan acknowledged the causal connection between her December 27, 2002 letter and the referrals to Henschell for which she was compensated. RP 396 - 398, 432.

In July 2003, after receiving a letter from Respondents' counsel enclosing the December 27, 2002 letter, Dr. Henschell asked Dr. Mahan and Ms. Weingard to make a list of all Sunset Chiropractic patients who had transferred to Henschell Chiropractic in the first six months of 2003. RP 485 - 487. Dr. Mahan and Ms. Weingard did so, identifying 123 patients, 80 of whom (by Dr. Mahan's reckoning to date) had received the December 27, 2002 letter. Ex. 31. RP 485 - 487, 572 - 573, 636.

Dr. Henschell did not require Dr. Mahan to disgorge or repay the bonuses she had received for the 123 patients identified in Ex. 31. RP 573 - 574. And, in fact, Appellants continued to pay Dr. Mahan the \$100 per patient bonus through the end of 2003, even after notice of the December 27, 2002 letter and after the lawsuit was filed, RP 425, because, as Dr. Henschell testified, "She didn't do anything wrong." RP 573 - 574, 611.

Respondents' expert witness, Neil Beaton, testified about the nature and extent of the damages to Respondents as a result of the transfer

of 169 patients from Sunset Chiropractic. 5/12/05 RP 6 - 77. Mr. Beaton testified that he was provided with a list of 169 patients who had transferred from Sunset to Henschell between December 2002 and December 2003. RP 27. Mr. Beaton testified that, in his expert opinion, Respondents had suffered harm in the amount of \$193,300 as a direct and proximate result of the loss of those 169 patients. 5/12/05 RP 36.

Dr. Thola testified that in addition to lost income, the loss of 169 patients also diminished Respondents' prospects of selling Sunset Chiropractic, and detrimentally affected the potential sale price if a buyer could be found, because her patient base had been so severely diminished. RP 155 - 157.

The jury returned a verdict in Respondents' favor on all but the breach of contract claim, finding that Dr. Mahan had breached her common law duties of loyalty and confidentiality, tortiously interfered with Respondents' business relations with their patients, and willfully and maliciously misappropriated Respondents' trade secrets. The jury concluded that Dr. Mahan had been unjustly enriched in the amount of \$16,900, and Appellants in the amount of \$28,712. The jury entered a verdict against Dr. Mahan and Appellants, jointly and severally, in the amount of \$89,000. CP 1042 - 1045.

Between the return of the verdict and the hearing on Respondents' motion for exemplary damages, Dr. Mahan filed for bankruptcy. CP 1438 - 1446. Respondents' continued the hearing on their motion to explore whether the verdict, based on willful and malicious conduct, was dischargeable in bankruptcy. CP 1438 - 1446. Thereafter, the Respondents re-noted the motion, seeking exemplary damages and attorney's fees against Appellants only, based upon their vicarious liability for Dr. Mahan's conduct. CP 1152 - 1176. Following extensive briefing and argument by Appellants and Respondents, the trial court awarded exemplary damages and attorney's fees against Respondents. 9/23/02 RP 3 - 32; CP 1466 - 1468.

III. ARGUMENT

A. **The Jury's Verdict and Award of Damages is Supported by Substantial Evidence and Should Not be Disturbed on Appeal**

The determination of damages is a constitutional function of the jury. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989). "To the jury is consigned under the constitution the ultimate power to weigh the evidence and determine facts – and the amount of damages in a particular case is an ultimate fact." *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971). Courts are reluctant to

set aside a jury determination as to the amount of damages and do so only rarely. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 32 - 33, 864 P.2d 921 (1991). Appellate review of a damage award is "most narrow and restrained." *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 269, 840 P.2d 860 (1992).

A reviewing court will strongly presume that the jury's verdict is correct. *Sofie*, 112 Wn.2d at 654; *Harry v. Green*, 103 Wn. App. 452, 14 P.3d 795 (2000). This Court may not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it, and the inferences to be drawn are for the jury, not a reviewing court. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107 - 108, 864 P.2d 937 (1994). "An appellate court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice." *Bunch v. Dept. of Youth Services*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005).

Substantial evidence sufficient to support a jury verdict is evidence of a character which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed. *Hojem v. Kelly*, 93

Wn.2d 143, 145, 606 P.2d 275 (1980). Substantial evidence may be direct or circumstantial. *Arnold v. Sanstol*, 43 Wn.2d 94, 99, 260 P.2d 327 (1953). Circumstantial evidence is not any less reliable than direct evidence. *State v. Brown*, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993).

"An inference is a logical conclusion or deduction from an established fact." *Martin v. Insurance Co. of North America*, 1 Wn. App. 218, 221, 460 P.2d 682 (1969). A verdict does not rest on speculation when founded on reasonable inferences drawn from circumstantial facts. *Arnold*, 43 Wn.2d 94; *Thompson v. Grays Harbor Comm'ty Hosp.*, 36 Wn. App. 300, 304, 675 P.2d 239 (1983).

Circumstantial evidence and inferences drawn therefrom are more than adequate to support the verdict the jury returned in Respondents' favor. *Lamphiear v. Skagit Corp.*, 6 Wn. App. 350, 356-57, 493 P.2d 1018 (1972); *see, also, Maryhill Museum of Fine Arts v. Emil's Concrete Construction Co.*, 50 Wn. App. 895, 904, 751 P.2d 866 (1998).

The jury heard testimony and considered evidence that established the identities of 193 patients who transferred their care from Sunset Chiropractic to Henschell Chiropractic between December 2002 and the end of December 2003. Appendix 1. According to Respondents' accounting, at least 169 patients transferred their care from Sunset to

Henschell between December 2002 and December 2003. RP 155, 169, 248, 760, 5/12/05 RP 87 - 88; Ex. 25A - 25L, 31, 35, 43; Appendix 1.

There are 193 different patients identified by name and/or initials in the record below, summarized in Appendix 1. Appellants' accounting of Sunset patient transfers in 2002 and 2003 is 155. RP 569 - 570.

Dr. Mahan's calculation of the amount that Henschell Chiropractic had benefitted from the Sunset Chiropractic patients during the first six months of 2003 was \$28,711.72. RP 389 - 392; Ex. 31. This is the amount by which the jury concluded Appellants had been unjustly enriched. CP 1044. Dr. Mahan received bonuses for patient referrals in 2003 totaling \$18,000. RP 435 - 436; CP 1044. Included in this amount was \$100 per patient referred from Sunset Chiropractic to Henschell Chiropractic, which the jury concluded based on substantial evidence resulted in an unjust enrichment of \$16,900 (169 x \$100). CP 1044.

There was substantial evidence regarding the causal relationship between Dr. Mahan's in-person solicitation and/or her December 27, 2002 solicitation letter and the transfer of patients from Sunset to Henschell. RP 198 - 202, 332 - 339, 355, 430; CP 1412 - 1420.

The jury heard the testimony of current Sunset patient June Jarvey that Dr. Mahan told her during a treatment in December 2002 that was

leaving Sunset, and gave Ms. Jarvey the impression that Dr. Mahan was asking her to transfer her care to her new employer. RP 185 - 186; CP 1392 - 1395. Ms. Jarvey did not recall asking Dr. Mahan to send her information about where she would be going, because Ms. Jarvey did not intend to transfer her care. RP 185; CP 1392 - 1395. Yet, Dr. Mahan sent Ms. Jarvey the December 27, 2002 solicitation letter. RP 185 - 186; CP 1392 - 1395.

The jury also heard the testimony of former Sunset patients Janice Whitehead (RP 587 - 590), Valerie Vaughn (RP 591 - 595), Michelle Wittmier (RP 595 - 600), Mark Lemme (RP 600 - 605), and Martin Sandor (RP 605 - 610) about the timing of their transfers, which, with the exception of Mr. Lemme, occurred in December 2002 or January 2003, after speaking with Dr. Mahan in person or receiving her December 27, 2002 solicitation letter. Ms. Vaughn testified that the “sole reason” she transferred care from Sunset to Henschell was because she received the December 27, 2002 letter. RP 594.

Dr. Thola testified that when Suzanne Smith came to Sunset Chiropractic to transfer her care to Henschell in May 2003, she brought the December 27, 2002 solicitation letter with her. 5/12/05 RP 85 - 86, RP 778; Ex. 21. Dr. Mahan conceded the causal link between her solicitation

letter and the transfer of patients from Sunset to Henschell. RP 396 - 398.

Proof of causation need not be made through direct evidence.

Alpine Industries, Inc. v. Gohl, 30 Wn. App. 750, 755, 637 P.2d 998 (1981); *Lamphiear*, 6 Wn. App. at 356. A jury may infer the proximate cause of an injury from circumstantial facts. *Lamphiear*, at 356. If a plaintiff proves that the defendant's fault was a cause of the plaintiff's damages, the plaintiff is not required to prove the *entire loss* was due to the defendant's fault. *Alpine Industries*, 30 Wn. App. at 755.

In *Alpine Industries*, the plaintiff presented substantial evidence of the fact and causation of damages through the testimony of its employees and selected customers, and its expert witnesses thereafter testified as to the amount of plaintiff's damages. The court concluded that Alpine had met its burden of proof and the verdict in its favor was supported by the evidence. *Alpine Industries*, at 755-56.

The nature of the proof required in a Uniform Trade Secrets Act case was squarely addressed in *Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514, 66 Cal. Rptr.2d 431 (Cal. App. 1997), a case cited with approval and relied upon by the Washington Supreme Court in *Ed Nowogroski Insurance, Inc. v. Rucker*, 137 Wn.2d 427, 440 at n4 and 441, 971 P.2d 936 (1999). In *Morlife*, as here in the trial below, the defendants argued

that solicitation could only be established by direct evidence on a customer-by-customer basis, and that the plaintiff had failed to present evidence that direct solicitation had occurred as to all affected Morlife customers. *Morlife*, 56 Cal. App.4th at 1527.

The *Morlife* court rejected that assertion as being "unfounded in either law or logic." The court found that the testimony of some of Morlife's former customers and from the other evidence offered by the plaintiff that the defendants engaged in a general pattern of solicitation was sufficient to support a finding that defendants had used plaintiff's customer list to solicit plaintiff's customers for a competitor. *Morlife*, at 1527. Here, as Respondent described in its written and oral offers of proof at trial, RP 638 - 645; CP 1428 - 1433, the testimony and evidence presented by Respondents was more than adequate to meet Respondents' burden of proving that Dr. Mahan's acts, for which Appellants are vicariously liable, were the cause of Respondents' damages. The direct and circumstantial evidence is sufficient to establish that Dr. Mahan engaged in a pattern and practice of solicitation of Respondents' patients that proximately caused the transfer of those patients.

There is substantial evidence in the record below, drawn from the records of Respondents, the records of Appellants, and the testimony of

witnesses at trial, to establish the transfer of 193 patients, well more than the 169 claimed by Respondents and determined by the jury to have transferred as a proximate cause of Dr. Mahan's acts.

Mr. Beaton's expert testimony provided a basis from which the jury reasonably could calculate its damage award. 5/12/05 RP 6 - 36. So, too, did Ex. 31, which showed, according to Appellants' own records, the actual amount of money by which Appellants had been unjustly enriched as of July 24, 2003. Mr. Beaton's expert testimony was properly admitted, following Respondents' offer of proof, and his testimony provided a basis from which the jury could make an award of damages within the range of that which was awarded.

Under the analysis articulated in *Morlife*, 56 Cal. App.4th at 1527, the evidence and the reasonable inferences drawn therefrom were sufficient to establish that Dr. Mahan's solicitation of patients, in person and through the mail, proximately caused the transfer of 169 patients from Sunset Chiropractic and Wellness Center to Henschell Chiropractic. Starting with the strong presumption that the jury's verdict was correct, *Sofie*, 112 Wn.2d at 654; *Harry*, 103 Wn. App. 452, and considering the range of substantial evidence in the record, the Court should affirm the jury's verdict and deny Appellants' request that the award be reversed and

the matter remanded to the trial court.

B. The Uniform Trade Secrets Act Did Not Supersede Claims Arising from Common Law Duties of Confidentiality and Loyalty

Appellants argue that the UTSA supercedes all causes of action arising from breaches of common law duties of confidentiality and loyalty, including unjust enrichment and tortious interference, relying on *Nowogroski*. This assertion is contrary to the plain language of the statute, and the cases that have construed it.

The UTSA provides, in pertinent part:

(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. . .

RCW 19.108.900 [emphasis added].

As the Comments to the Uniform Trade Secrets Act in the form adopted by the Washington Legislature in 1981 notes:

This Act is not a comprehensive remedy. It applies to duties imposed by law in order to protect competitively secret information. It does not apply to . . . duties imposed by law that are not dependent upon the existence of competitively significant secret information, *like an agent's duty of loyalty to his or her principal*.

See Comment, Section 7 to Uniform Trade Secrets Act With 1985 Amendments [emphasis added] [Appendix 2].

Thus, under the plain language of the statute, the adoption of the UTSA did not affect claims for breach of common law duties, such as the duty of loyalty, or claims for unjust enrichment and tortious interference that do not rely on the existence of competitively significant information. The Washington supreme court has held accordingly, finding that “the act merely displaces *conflicting* tort, restitutionary and other law regarding civil liability *for misappropriation*.” *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 48, 738 P.2d 665 (1987) [emphasis added].

In *Boeing*, the Boeing Company alleged breach of contract, breach of confidential relationship, and misappropriation of trade secrets in violation of the UTSA. The jury found for Boeing on the issues of breach of a contract, breach of confidential relationship, and misappropriation of trade secrets. Sierracin argued on appeal that the trial court erred by not consolidating all of those claims into a single claim for misappropriation under the UTSA. *Boeing*, 108 Wn.2d at 47 - 48. The supreme court rejected Sierracin’s argument, acknowledging that the UTSA allowed for common law claims for breach of duties related to confidential information not constituting trade secrets, and contractual claims arising

from breach of covenants precluding disclosure. *Boeing*, at 48.

In so finding, the *Boeing* court 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. *Boeing*, 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 & Electronics, Inc. v. Taylor*, 295 F. Supp.2d 1205, 1212 (E.D. Wa. 2003) (applying Washington law) (“PAE can assert claims for breach of contract and breach of common law duties of confidentiality and loyalty, and these claims are independent of its trade secrets claim.”).

The supreme court in *Nowogroski* specifically did not address the issue of whether the UTSA displaced claims for an employee’s breach of common law duties, such as that asserted by Respondents against Dr. Mahan, because the issue was not raised on appeal. *Nowogroski*, 137 Wn.2d at 427, 436. At the intermediate appellate level, the court reiterated that the UTSA does not affect tort liability that is not based upon misappropriation of a trade secret, but determined that all of Nowogroski’s claims arose from the defendants’ retention and use of Nowogroski’s trade

secrets and therefore the tort claims were displaced by the UTSA.

Nowogroski, 88 Wn. App. at 358.

That is not the case here. Respondents' claims of unjust enrichment, tortious interference and their common law claims for breach of the duty of loyalty did not arise solely from Dr. Mahan's misappropriation of Respondents' trade secrets. While secretly using Respondents' patient names and addresses and sending a solicitation letter to Respondents' patients during the term of Dr. Mahan's employment clearly violated Dr. Mahan's duties of confidentiality and loyalty but also constituted a UTSA violation, that was not the only conduct constituting breach of loyalty or tortious interference.

Dr. Mahan solicited Respondents' patients *in person* at Respondents' clinic while she was employed by Respondents, prior to her misappropriation of Respondents' trade secrets. Her in-person solicitation of patient transfers to a competitor – Appellants' clinic – during her employment with Respondents breached her duty of loyalty to Respondents and gives rise to a cause of action for breach of that duty that is not displaced by the UTSA. *Kiebertz & Associates, Inc. v. Rehn*, 68 Wn. App. 260, 265, 842 P.2d 985 (1992). Similarly, Dr. Mahan's conduct gives rise to a claim for tortious interference with Respondents' business

relations with their patients– unrelated to confidential information – that is not displaced by the UTSA.

Even in the absence of an agreement not to compete or solicit, 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, and the solicitation of customers for a rival business during the term of her employment. *Pacific Title, Inc. v. Pioneer National Title Insurance Co., Inc.*, 33 Wn. App. 874, 879, 658 P.2d 684 (1983), *citing* Restatement (Second) of Agency § 395 (1958)); *Kieburz*, 68 Wn. App. at 265-66 *quoting* Restatement (Second) of Agency § 393 (1958)).

Dr. Mahan, through her in-person solicitations of Respondents' patients, breached her duty of loyalty to Respondents. That breach is independent of her subsequent misappropriation of Respondents' trade secrets, and is not displaced by the UTSA. That same duty of loyalty formed the basis of Dr. Mahan's obligation not to use or disclose Respondents' trade secrets, giving rise to liability under the UTSA.

In soliciting the transfer of Respondents' patients to Appellants – Dr. Mahan's new employer – while she was treating them at Respondents' clinic, Dr. Mahan served two masters. In doing so, she breached her duty of loyalty to Respondents, wholly independent of the existence and

misappropriation of trade secrets. Dr. Mahan's service of her second master, Appellants, made them vicariously liable for her solicitation, as well as for her misappropriation and tortious interference.

C. Appellants are Vicariously Liable for Dr. Mahan's Willful and Malicious Conduct

1. Dr. Mahan Was Acting Within the Scope of Her Employment

Respondents established at trial that Appellants' vicarious liability arose from all conduct of Dr. Mahan undertaken in furtherance of Appellants' business, even that conduct which occurred in December 2002 while Dr. Mahan was still employed by Respondents but was acting in furtherance of Appellants' business. "[W]hen one party acts at the instance of and, in some material degree, under the direction and control of another," a principal-agent relationship arises, expressly or by implication. *Dep't Retirement Systems v. Kralman*, 73 Wn. App. 25, 29, 935 P.2d 628 (1994).

Appellants argue that they cannot be vicariously liable for Dr. Mahan's willful and malicious conduct prior to starting work at Henschell Chiropractic. Appellants claim that their liability cannot arise from Dr. Mahan's conduct prior to January 3, 2003, the date she signed her W-4 and began seeing patients at Henschell Chiropractic, because she was not

employed by Henschell Chiropractic prior to that date. But, at the time Dr. Mahan was soliciting Sunset Chiropractic patients in person at the clinic in December 2002, she had already orally accepted Appellants' offer of employment, an offer which required her to engage in marketing on Appellants' behalf and which compensated her for referrals she made to Henschell Chiropractic as a result of such marketing. RP 387, 551; Ex. 22. And, Appellants paid Dr. Mahan \$100 per patient for Sunset patients who transferred their care in December 2002 and January 2003, allegedly before Dr. Mahan had engaged in any "marketing" for Henschell Chiropractic. Appellants enjoyed the benefit of the income generated by such patients. Dr. Mahan was clearly furthering Appellants' interests when she was soliciting patients and misappropriating trade secrets.

The test is not, as Appellants would have the Court agree, whether the employee's conduct occurred on the employer's property or within business hours in order for vicarious liability to attach. Rather, the test in Washington for determining whether the employee was, at any given time, in the course of his employment, is "whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, or by specific direction of his employer; or, as sometimes stated, was engaged at the time in the furtherance of the

employer's interest.” *Elder v. Cisco Constr. Co.*, 52 Wn.2d 241, 245, 324 P.2d 1082 (1958).

“In following this test we have emphasized the importance of the benefit to the employer in the determination of the scope of employment.” *Dickinson v. Edwards*, 105 Wn.2d 457, 467, 716 P.2d 814 (1986).

Appellants are vicariously liable for the acts of its employee, Dr. Mahan, committed within the scope of her employment. *Dickinson*, at 466. Whether an employee is acting within the scope of her employment is an issue of fact for the jury. *Dickinson*, 105 Wn.2d at 466-67. The jury heard testimony and evidence on the sharply-contested issue of whether Dr. Mahan was acting within the scope of her employment, and concluded that she was. The jury’s factual determinations and credibility assessments may not be retried by this Court. *Pritchett v. Seattle*, 53 Wn.2d 521, 335 P.2d 31 (1959); *Heggen v. Seattle*, 47 Wn.2d 576, 288 P. 2d 830 (1955); *Rettinger v. Bresnahan*, 42 Wn.2d 631, 257 P.2d 633 (1953).

None of the cases upon which Appellants rely establishes that an employee cannot be acting within the scope of employment prior to the first day she shows up at work. The evidence below establishes that, as of mid-December, Dr. Mahan and Appellants had an oral agreement regarding employment, which included the \$100 per patient bonus. RP

387. Moreover, even if an employee acts without the knowledge or approval of the employer, or in violation of the employer's instructions, liability may still arise, and the determination of whether liability is imposed is determined by examining whether the employee was acting within the scope of his apparent or implied authority. *Dickinson*, at 467.

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 by the case on which Appellants rely, *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003).¹

It is similarly unsupported by *Robel v. Roundup Corporation*, 148 Wn.2d 35, 59 P.3d 611 (2002), in which our supreme court squarely addressed, and soundly rejected, that proposition:

Fred Meyer argued to the Court of Appeals that, "[i]n Washington, an employer is generally not, as a matter of

¹ The issue addressed in *Tegman* was "whether negligent defendants are jointly and severally liable for damages resulting from both negligent and intentional acts." *Tegman*, at 105. The court there was faced with apportioning fault under RCW 4.22.070, and came to the unremarkable conclusion that RCW 4.22.070 did not apply to intentional torts. Even if *Tegman* did support the proposition advocated by defendants Henschell, which it does not, in the case at bar, the acts for which defendants Henschell have been found by the jury to be vicariously and jointly and severally liable were both intentional torts. There is no negligent tort to which liability is ascribed to defendants Henschell and, consequently, *Tegman* simply does not apply.

law, liable for an intentional tort committed by an employee." Opening Br. of Appellant at 33 (citing *Kuehn v. White*, 24 Wn. App. 274, 278, 600 P.2d 679 (1979)). **This point of view gravely distorts the law of vicarious liability in this state. Our case law makes clear that, once an employee's underlying tort is established, the employer will be held vicariously liable if "the employee was acting within the scope of his employment."**

Robel, 148 Wn.2d at 52 - 53 [emphasis added].

The master is liable for the willful and malicious acts of his servant where they are done in the course of his employment and within its scope.

Dixon v. Haynes, 146 Wn. 163, 169, 262 P. 119 (1927).

Here, Dr. Mahan's underlying torts have been established: breach of her common law duties to Respondents, tortious interference with Respondents' business relations, and the willful and malicious misappropriation of Respondents' trade secrets. The jury also concluded that Dr. Mahan was acting within the scope of her employment or her agency, and held Appellants vicariously liable. The verdict is supported by the law and by substantial evidence, and must be affirmed.

2. Appellants had Constructive Knowledge of Dr. Mahan's Conduct

Knowledge or notice by or to an agent is imputed to her principal and the knowledge had by an agent will bind her principal. *Busk v. Hoard*, 65 Wn.2d 126, 134-35, 396 P.2d 171 (1964). And, if notification is given

to an agent who has, or appears to have authority “either to receive it, to take action on it, or to inform the principal or some other agent who has duties in regard to it,” then such notice is chargeable to the principal.

Roderick Timber Co. v. Willapa Harbor Cedar Products, Inc., 29 Wn.

App. 311, 317, 627 P.2d 1352 (1981).

There was substantial evidence below that Appellants had notice of Dr. Mahan’s solicitation of Respondents’ patients through Appellants’ agents, Dr. Mahan and Ms. Weingard. This knowledge is imputed to Henschell Chiropractic because Ms. Weingard and Dr. Mahan are Henschell Chiropractic’s agents. Dr. Henschell argued that Ms. Weingard was not authorized to bind Henschell Chiropractic and therefore Henschell Chiropractic could not be liable for any acquiescence of Ms. Weingard in the fact or substance of Dr. Mahan’s December 27, 2002 solicitation letter. But, this argument misses its mark.

The issue is not whether Ms. Weingard had actual or apparent authority to bind Appellants to a contractual obligation in order to find Appellants vicariously liable. The issue is whether Appellants had notice of Dr. Mahan’s conduct through Appellants’ agents, and ratified that conduct. The jury concluded that Appellants had notice and therefore knowledge of Dr. Mahan’s unlawful solicitation of Sunset Chiropractic

patients in December 2002 through the actual knowledge of both Dr. Mahan and Ms. Weingard; and through Appellants' notice and knowledge of both the large volume and the source of the transfer patients for which they authorized the payment of financial incentives to Dr. Mahan each month throughout 2003.

The jury concluded that Dr. Mahan and Ms. Weingard are agents of Appellants. Dr. Mahan's duties included bringing in new patients. RP 404, 551, 561; Ex. 22. Ms. Weingard's duties as Office Manager were extraordinarily broad, and included responsibility for correspondence. RP 445 - 453; Ex. 24. "She pretty much runs that [administrative] part of the office." 5/19/05 RP 54. She had, or appeared to have, authority to take action on Dr. Mahan's solicitation correspondence, sent on behalf of and for the benefit of Appellants, or to inform Appellants "or some other agent who has duties in regard to it." *Roderick Timber*, 29 Wn. App. at 317. Notice and knowledge of Dr. Mahan's solicitation activities is imputed to Appellants through its agents.

The instruction to the jury regarding imputed knowledge is consistent with Washington law, and, when considered in conjunction with the vicarious liability instruction and the rest of the jury instructions as a whole, properly informed the jury of the law to be applied. *Hue v.*

Farmboy Spray Co., Inc., 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

Respondents offered sufficient evidence to support the instruction and the jury's verdict.

Even if Appellants were unaware of Dr. Mahan's conduct in December 2002, they obtained full knowledge of that conduct in mid-2003, and then ratified that conduct by accepting the benefits of Dr. Mahan's conduct thereafter, and continuing to pay the \$100 per patient referral bonus for Sunset patients who transferred care.

3. Appellants Ratified Dr. Mahan's Conduct

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. *Bill McCurley Chevrolet, Inc. v. Rutz*, 61 Wn. App. 53, 57, 808 P.2d 1167 (1991). 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." *Riss v. Angel*, 131 Wn.2d 612, 636, 934 P.2d 669 (1997). Constructive knowledge of the act will suffice to support a determination of ratification. *Stroud v. Beck*, 49 Wn. App. 279, 286, 742 P.2d 735 (1987).

Appellants had actual and constructive knowledge of Dr. Mahan's solicitation beginning in December, 2002. By July, 2003 Appellants had been provided a list of Sunset Chiropractic patients who had been specifically targeted by Dr. Mahan for solicitation and for which Appellants had paid Dr. Mahan for her efforts under the express provisions of Dr. Mahan's employment agreement with Appellants.

Appellants knew through the statistics that were maintained by Henschell Chiropractic and discussed at weekly staff meetings that unusually large numbers of Sunset Chiropractic patients were transferring to Henschell Chiropractic in the early months of 2003. Appellants' compensation of Dr. Mahan for her efforts, and its acceptance of the benefits of those efforts in the form of increased revenues constitutes the affirmance by Appellants of Dr. Mahan's prior acts, done for the benefit of appellants and in their name. That affirmance constitutes the ratification by Appellants of Dr. Mahan's acts. *Riss*, 131 Wn.2d at 636.

The jury rejected Appellants' argument that Dr. Henschell did not ratify Dr. Mahan's conduct, instead crediting Dr. Henschell's testimony that he neither ceased paying Dr. Mahan \$100 per patient referred from Sunset Chiropractic, nor demanded that she disgorge the referral bonuses he had already paid her, after learning about her improper solicitation of

Sunset Chiropractic patients through his receipt of a demand letter from Respondents in mid-2003, *because he did not believe she had done anything wrong*. RP 611, 636. The jury's factual findings and credibility assessments may not be revisited on appeal.

The ratification instruction is consistent with Washington law. It allowed the parties to argue their theories of the case, did not mislead the jury, and, when the instructions are taken as a whole, properly informed the jury of the law to be applied. *Hue*, 127 Wn.2d at 92.

D. Appellants are Jointly and Severally Liable for the Full Amount of the Judgment, Including Exemplary Damages and Attorney's Fees

1. Segregation of Damages Among Causes of Action was Not Required

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. *State v. Paccar, Inc.*, 922 F. Supp. 421, 424 (W.D. Wash. 1996), *citing* Restatement (Second) of Torts, § 433A.

This is analogous to insurance cases where there is indivisible damage, such as a resulting bond default, but several potential causes, some covered under the policy and others not covered. *See, e.g., P.U.D.*

No. 1 v. International Insurance, 124 Wn.2d 789, 810, 881 P.2d 1020 (1994). In such cases, there is no way to allocate damages among the covered and uncovered causes, and the insurer must pay for the entire damage. *State Farm Fire & Casualty Co. v. English Cove Assoc., Inc.*, 121 Wn. App. 358, 370, 88 P.3d 986 (2004).

Here, there is indivisible damage – the harm caused to Respondents by the loss of 169 patients – that is not capable of reasonable, logical or practical division among the claims for breach of common law duties, tortious interference, and misappropriation of trade secrets. Each of the claims is inextricably tied to the others: Dr. Mahan’s common law duties of loyalty and confidentiality are the common law duties which give rise to an obligation to keep Respondents’ trade secrets confidential; the breach of the common law duties are the “improper means” of interfering with Respondents’ relationships with their patients which give rise to liability for tortious interference. Requiring segregation or allocation among claims would mean, in practical application, a segregation or allocation among the individual elements of a single claim. There is no such duty under Washington law.

A trial court’s refusal to submit a special verdict form to the jury, when (as here) it is based upon the facts of the case, is reviewed for abuse

of discretion. *State v. Azpitarte*, 95 Wn. App. 721, 726, 976 P.2d 1256 (1999). Essentially, when read as a whole and with the general charge, the special verdict must adequately present the contested issues to the jury in an unclouded, fair manner. *See Lahmann v. Sisters of St. Francis*, 55 Wn. App. 716, 723, 780 P.2d 868 (1989).

The Special Verdict Form provided to the jury here did just that. CP 1042 - 1044. The jury was not confused by the Special Verdict form. The jury submitted a written question to the court, asking whether questions 9 and 10 on the Special Verdict Form (whether Respondents were damages by Dr. Mahan's conduct and whether Dr. Mahan's actions were the proximate cause of Respondents' damages) applied to all of Dr. Mahan's actions, or just to questions 7 and 8, which immediately preceded 9 and 10. CP 1936 - 1937. (Questions 7 and 8 addressed the breach of contract action, for which the jury found in Dr. Mahan's favor.) Thus, the jury simply wanted to confirm that the damage and the proximate cause issue applied to all the claims, not just the breach of contract claim.

The jury showed no confusion. The Special Verdict Form, when read as a whole and with the general charge, the special verdict must adequately present the contested issues to the jury in an unclouded, fair manner. The failure to instruct that segregation was required, and the

failure to adopt any of the special verdict forms proposed by Appellants, was not error.

2. **The Conduct for Which Appellants Are Vicariously Liable Includes Dr. Mahan's Willful and Malicious Misappropriation**

By definition, joint and several liability permits Respondents to recover all of the damages and fees awarded them from a single defendant – Appellants. In the absence of Dr. Mahan's bankruptcy, Respondents would have been free to collect the entire award from either defendant, and that defendant would have had a cause of action for contribution against the non-paying defendant, to recover from the non-paying defendant any sums a court considering the contribution action concluded were more than the paying defendant's share, such as those amounts of the \$89,000 judgment for which the jury concluded each defendant had been separately, unjustly enriched.

The portion of the Special Verdict Form that imposed damages separately as against the Appellants and Dr. Mahan for unjust enrichment neither limited the amount of the award that Respondents could collect from either of them, nor rendered the use of the Special Verdict Form error. The liability imposed by the jury was joint and several in the amount of \$89,000. As between Appellants and Dr. Mahan, Dr. Mahan

was solely responsible for \$16,900 of the damage award, and Appellants were solely responsible for \$28,712.00. Appellants asserted a cross-claim for contribution in their Answer. CP 681. In such a contribution claim, Appellants would not be able to recover from Dr. Mahan the amount for which the jury concluded Appellants were individually liable. But, as between Respondents and Appellants, Respondents were free to recover the full amount of the damage award from either Dr. Mahan or Appellants.

Respondents profited from Dr. Mahan's willful and malicious misappropriation of Respondents' patients, and, indeed, were unjustly enriched thereby. The conduct that the jury determined was willful and malicious, Dr. Mahan's misappropriation of Respondents' trade secrets, is the very same conduct for which the jury determined that Appellants were jointly and severally liable, either because Dr. Mahan was acting in the scope of her employment, or because Appellants ratified her conduct, or both. CP 1044. The willful and malicious nature of Dr. Mahan's conduct cannot be separated from the conduct itself, for purposes of imposing vicarious liability.

For that reason, a special verdict form that inquired whether Appellants' conduct was willful and malicious would have been nonsensical, and its use error, because it was not Appellants' conduct that

formed the basis of Respondents' claims, it was Dr. Mahan's conduct, for which Appellants may be called to account.

Appellants' argument that the unjust enrichment awards are unsupportable because it "duplicates roughly 60% of the Henschells' so-called 'unjust enrichment'" is not supported by any facts in the record, and was not argued below. Nor is it supported by any citation to authority. Appellants' contention that the unjust enrichment elements of the \$89,000 damage award is somehow proof that "the jury plainly disregarded the court's instruction not to duplicate the damages" is unfounded and must be disregarded. The jury is presumed to have followed the instructions, and Appellants have not overcome that presumption. *State v. Willis*, 67 Wn.2d 681, 409 P.2d 669 (1966).

The UTSA vests the trial court with the discretion to award exemplary damages and attorney's fees to a prevailing plaintiff upon a finding by the jury of willful and malicious conduct by the misappropriating party. The standard of review for such an award is manifest abuse of discretion. *Boeing*, 108 Wn.2d at 65. Accordingly, the scope of appellate review is narrow. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 375, 798 P.2d 799 (1990).

The trial court determined, in the exercise of its discretion, that it

was appropriate to award exemplary damages and attorney's fees, that the appropriate amount was two times the jury's damage award, *and* that it was appropriate to enter such damages and fees against Appellants. CP 1336 - 1338; 9/23/05 RP 14 - 15, 27 - 29. The trial court concluded that it could not enter an award against Dr. Mahan, in light of her bankruptcy. 9/23/05 RP 30. The trial court did not abuse its discretion in determining whether, in what amount, and against whom to award exemplary damages and attorney's fees. The trial court's decision was not error, and should be affirmed.

E. Respondents Did Not Have an Obligation to Segregate Attorney's fees for Claims Arising from the Same Common Core of Facts as the UTSA Claim

The UTSA provides for an award of reasonable attorney's fees to the prevailing plaintiff upon a finding by the jury of willful and malicious misappropriation. RCW 19.108.030(2). Washington courts calculating fees and costs and expenses available under the UTSA have applied a lodestar analysis. *Boeing*, 108 Wn.2d at 64, *citing Bowers v. Transamerica Title Insurance Co.*, 100 Wn.2d 581, 596-97, 675 P.2d 193 (1983).

Appellants contend that Respondents were only entitled to those fees incurred in proving and prosecuting their UTSA claim, and suggest

that a reasonable amount for such fees total \$75,000. But, it is clear from *Boeing*, 108 Wn.2d at 49, also UTSA case, that Respondents are entitled to attorney's fees for issues that can be "fairly related" to the UTSA claim that gives rise to a fee award. Here, as was described in great detail in Respondents' fee petition and supporting documentation, and during argument on the Respondents' motion, that includes fees associated with Respondents' claims for breach of the common law duty of loyalty, tortious interference, and unjust enrichment. CP 1046 - 1269, 1298 - 1338, 1455 - 1465, 1469 - 1550; 9/23/02 RP 15 - 27.

As this Court and our Supreme Court have recently determined, when recovery of attorney's fees is authorized for less than all of the claims for which judgment is entered, segregation of fees and claims need not be undertaken if the claims are so interrelated that no reasonable segregation can be made. *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 692 - 93, 132 P.3d 115 (2006); *Dice v. City of Montesano*, 131 Wn. App. 675, 690 - 91, 128 P.3d 1253 (2006). That is clearly the case here, and the court below so found. 9/23/05 RP 21 - 22, 29. The trial court's finding was not an abuse of discretion, and the fee award should be affirmed.

An element of Plaintiffs' UTSA claim was proof of misappropriation. A trade secret has been misappropriated if it has been

disclosed or used without the express or implied consent by a person who, at the time of disclosure or use, knew or had reason to know his or her knowledge of the trade secret was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use. “Improper means” under the UTSA includes, among other things, the breach or inducement of a breach of a duty to maintain secrecy. The duty to maintain secrecy may be a common law duty owed by an employee to an employer.

Because there was no written confidentiality or non-competition agreement here, in order to prove misappropriation by Dr. Mahan, Respondents had to establish both the existence and the breach of common law duties owed by Dr. Mahan to Respondents. Thus, Respondents’ common law claim for breach of the duty of loyalty (which involved the duty not to compete and the duty not to use confidential information) were not only related to Respondents’ UTSA claim, but were an essential element of the UTSA claim.

Similarly, an element of Respondents’ tortious interference claim was proof of interference by Dr. Mahan for an improper purpose or by improper means. “Improper means” means an interference that violates, among other things, a statute (such as the UTSA) or a recognized rule of common law (such as the common law duty of loyalty). Clearly,

Respondents' tortious interference claim arose out of the same course of conduct as the UTSA claim, and involved a common core of facts and related legal theories.

Additionally, an element of Respondents' damages under the UTSA was amounts by which Dr. Mahan and Appellants had been unjustly enriched. Respondents' claims for unjust enrichment cannot be separated from the claim of damages for unjust enrichment asserted under the UTSA.

Finally, in order for liability to attach against defendants Appellants for Dr. Mahan's conduct under the UTSA, Respondents had to establish that Appellants had authorized or ratified Dr. Mahan's conduct, in order for vicariously liability to arise. All of the fees incurred in establishing vicarious liability are an essential element of Respondents' claims against Appellants under the UTSA.

With the exception of the breach of contract claim, each of Respondents' claims are inextricably linked to the UTSA. Much of Respondents' counsel's time was devoted to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis between the UTSA claim, the common-law duty of loyalty claim, the tortious interference claim, and the unjust enrichment claim. There was

no obligation to segregate. *Mayer*, 156 Wn.2d at 693; *Dice*, 131 Wn. App. at 691. The trial court's award should be affirmed.

V. REQUEST FOR ATTORNEY'S FEES AND EXPENSES ON APPEAL

The UTSA provides for an award of attorney's fees at the trial court level where the misappropriation of trade secrets is willful and malicious. RCW 19.108.040. Respondents are also entitled to a fee award for prevailing on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 825, 828 P.2d 549 (1992) (where statute authorizes recovery of attorney's fees at trial, attorney's fees on appeal are recoverable); *Boeing*, 108 Wn.2d at 46 (attorney's fees at trial and on appeal under RCW 19.108.040); *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 424, 58 P.3d 292 (2002) (prevailing party entitled to attorney's fees and expenses both at trial and on appeal under RCW 19.108.040; party who prevails in part is entitled to attorney fees for its successful claims).

Respondents request an award of attorney's fees and expenses on appeal pursuant to RAP 18.1, RCW 19.108.040, and the cases cited herein. Respondents were awarded fees and statutory expenses below pursuant to RCW 19.108.040, and such fees and expenses should be awarded by this Court.

VI. CONCLUSION

Appellants have failed to establish that the trial court erred. The judgment below should be affirmed, and Respondents should be awarded their attorney's fees and expenses on appeal.

Respectfully submitted this 31st day of July, 2006.

By 
Connie Sue Martin, WSBA No. 26525
Attorney at Law
P.O. Box 182
Vaughn, WA 98394-0182
(253) 884-9976
Attorneys for Respondents

APPENDIX 1

Summary of the Record Regarding Patient Transfers

	First Name	Last Name	Cite to Record
1.	Christina	B.	Ex. 43
2.	Patty	B.	Ex. 43
3.	H.	Balthis	Ex. 31
4.	Richard	Brenner	Ex. 25A, Ex. 35, Ex. 43, RP 784, 5/19 RP 73
5.	Laureen (Lori)	Brockner	Ex. 25C, Ex. 31, Ex. 35, Ex. 43
6.	Jack	Brown	Ex. 25K, Ex. 35, Ex. 43
7.	Leonard	Brown	Ex. 25A, Ex. 31, Ex. 35, Ex. 43, RP 337 - 38, 353, 784, 5/12 RP 78
8.	Jamie	C.	Ex. 43
9.	Alice	Christel	Ex. 25B, Ex. 35, Ex. 43, RP 781, 5/19 RP 98 - 100
10.	Richard	Cobb	Ex. 35, RP 774
11.	Michale	D.	Ex. 43
12.	Mike	Dawson	Ex. 25B, Ex. 31, Ex. 35, Ex. 43
13.	Joanie	Denison	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 782, 799
14.	Robert	Denison	Ex. 31, Ex. 43
15.	Ryan	Denison	Ex. 43
16.	Phil	Diede	Ex. 31, Ex. 43
17.	Vickie	Diede	Ex. 25F, Ex. 31, Ex. 35, Ex. 43, RP 777
18.	Christina	Doll	Ex. 25A, Ex. 31, Ex. 35, Ex. 43, RP 784
19.	David	Doll	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 784
20.	Lee	Doll	Ex. 25A, Ex. 31, Ex. 35, Ex. 43, RP 784
21.	Lucas	Doll	Ex. 25A, Ex. 31, Ex. 35, Ex. 43, RP 784
22.	Glinda	Dowdy	Ex. 25B, Ex. 31, Ex. 35, Ex.

	First Name	Last Name	Cite to Record
			43, RP 782
23.	Michael	Dowdy	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 782
24.	Loren	Dunn	Ex. 25A, Ex. 35, Ex. 43, RP 784 - 85
25.	Rachel	E.	Ex. 43
26.	Patricia (Tricia)	Eagle	Ex. 25G, Ex. 31, ex. 35, RP 777
27.	Cathy	Elder	Ex. 25G, Ex. 35, Ex. 43, RP 776
28.	Gary	Elzenga	Ex. 25A, Ex. 31, Ex. 35, Ex. 43, RP 784
29.	Dan	Emmel	Ex. 31, Ex. 43, RP 333 - 34, 336, 347 - 48
30.	Davette	Eneboe	Ex. 31, Ex. 43
31.	Donna	Eneboe	Ex. 31, Ex. 43
32.	Jeff	Eneboe	Ex. 31, Ex. 43
33.	Joann	Eneboe	Ex. 31, Ex. 35, Ex. 43
34.	Paul	Eneboe	Ex. 31, Ex. 35, Ex. 43
35.	Rhonda	Eneboe	Ex. 31, Ex. 35, Ex. 43
36.	Monya	Evenson	Ex. 43
37.	Marci	Finch	Ex. 25F, Ex. 35, Ex. 43, RP 334, 778
38.	Eric	Francis	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 783
39.	Jen	Francis	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 783
40.	D.	Frantz	Ex. 31
41.	Hope	Frederick-Hyatt	Ex. 43
42.	Kathy	Frederick-Hyatt	Ex. 31, Ex. 43
43.	Ann	Freiberger	Ex. 25B, Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 781, 799
44.	Brian	Freiberger	Ex. 25B, Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 781
45.	Jeff	Ford	Ex. 25G, Ex. 35, Ex. 43, RP 777

	First Name	Last Name	Cite to Record
46.	Shawna	Ford	Ex. 25G, Ex. 35, Ex. 43, RP 777
47.	Chloe	Foreman	Ex. 25L, Ex. 35, RP 775
48.	Laura	Foreman	Ex. 25L, Ex. 35, RP 775
49.	Nick	Foreman	Ex. 25I, Ex. 35, Ex. 43, RP 775
50.	Leandra	G.	Ex. 43
51.	Sharon	Gentry	Ex. 25G, Ex. 35, Ex. 43, RP 776
52.	Barbie	H.	Ex. 43
53.	Dan	H.	Ex. 43
54.	Stacey	H.	Ex. 43
55.	Melissa	Harris	Ex. 31, Ex. 43
56.	R.	Harris	Ex. 31
57.	Jim	Hart	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 782, 5/12 RP 78
58.	Pam	J.	Ex. 43
59.	Aubrey	Jennings	Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 780
60.	Anna	Johnson	Ex. 31, Ex. 43
61.	Keith	Johnson	Ex. 31, Ex. 43
62.	Gary	Jones	Ex. 31, Ex. 43
63.	Pat	Jones	Ex. 31, Ex. 43
64.	Shauna	Jones	Ex. 43
65.	Heidi	K.	Ex. 43
66.	Leona	K.	Ex. 43
67.	Richard	K.	Ex. 43
68.	Brandon	Kaufman	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 783
69.	Ben	Krack	Ex. 25D, Ex. 31, Ex. 35, Ex. 43, RP 779
70.	Laurence (Larry)	Krack	Ex. 31, Ex. 43
71.	Cynthia	L.	Ex. 43
72.	Jessica	L.	Ex. 43
73.	Jon	L.	Ex. 43
74.	Anna	Larsen	Ex. 25B, Ex. 31, Ex. 35, Ex.

	First Name	Last Name	Cite to Record
			43, RP 783
75.	Adam	Lemme	Ex. 25D, Ex. 31, Ex. 35, Ex. 43, RP 347, 602 - 603, 779
76.	Anita	Lemme	Ex. 25D, Ex. 31, Ex. 35, Ex. 43, RP 335, 347, 602 - 603, 779
77.	Marc	Lemme	Ex. 25D, Ex. 31, Ex. 35, Ex. 43, RP 334 - 35, 338, 346, 600 - 605, 779
78.	Shaina	Lemme	Ex. 25D, Ex. 31, Ex. 35, Ex. 43, RP 335, 338, 347, 602 - 603, 779
79.	Robert	Lind	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 781
80.	Andrea	Lofaso	Ex. 31, Ex. 43
81.	Becky	Lofaso	Ex. 31, Ex. 43
82.	Charles	Lofaso	Ex. 31, Ex. 43
83.	R.	Lofaso	Ex. 31
84.	Tony	Lofaso	Ex. 25D, Ex. 31, Ex. 35, Ex. 43, RP 779
85.	Andrew	Ludwick	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 783
86.	James	Ludwick	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 783
87.	Ken	Ludwick	Ex. 43
88.	Jodi	Luther	Ex. 31, Ex. 35, Ex. 43
89.	Julie	M.	Ex. 43
90.	Richie	M.	Ex. 43
91.	Wayne	M.	Ex. 43
92.	Shannon	Mayfield-Porter	Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 781
93.	Jason	McFadden	Ex. 25A, Ex. 35, Ex. 43, RP 334, 344, 354 - 55, 784
94.	Joe	Mendoza	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 334
95.	Ellen	Minier	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 783
96.	Brittney	Moorehouse	Ex. 43

	First Name	Last Name	Cite to Record
97.	Bill	Moreland	Ex. 43
98.	Diane	Moreland	Ex. 43
99.	Christi	Morgan	Ex. 25A, Ex. 31, Ex. 35, Ex. 43 , RP 784
100.	R.	Morgan	Ex. 31
101.	C.	Morton	Ex. 31
102.	Jared	N.	Ex. 43
103.	Mariah	N.	Ex. 43
104.	Ryan	Neal	Ex. 43
105.	Nickole	Neuman	Ex. 25G, Ex. 31, Ex. 35, RP 771 - 72, 777
106.	Rob	Neuman	Ex. 25G, Ex. 31, Ex. 35, Ex. 43, RP 771 - 72, 777
107.	Val	Neuman	Ex. 25G, Ex. 31, Ex. 35, Ex. 43, RP 771 - 72, 777
108.	Aaron	O'Malley	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 783 - 84
109.	Ashley	Orr	Ex. 25C, Ex. 31, Ex. 35, Ex. 43
110.	Greg	Orr	Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 780
111.	Hannah	Orr	Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 780
112.	Mary Ann	Orr	Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 780
113.	Karen	P.	RP 334
114.	Katie	P.	Ex. 43
115.	Patti	P.	Ex. 43
116.	Yvonne	P.	Ex. 31, Ex. 43
117.	Bridget	Packer	Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 780
118.	Troy	Packnet	Ex. 35, RP 776
119.	Vicky	Pakul	Ex. 31, Ex. 43
120.	James	Percival	Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 780
121.	MarcyLynn Severson	Percival	Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 780
122.	Jessica	Pollard	Ex. 25J, Ex. 35, Ex. 43, RP

	First Name	Last Name	Cite to Record
			776
123.	Carol	Powers	Ex. 25A, Ex. 31, Ex. 35, Ex. 43, RP 335, 337, 346, 784
124.	Brian	R.	Ex. 43
125.	Laura	R.	Ex. 43
126.	Leonard	R.	Ex. 43
127.	Penny	R.	Ex. 43
128.	Phil	R.	Ex. 43
129.	Sandra	R.	Ex. 43
130.	Jean	Rambish	Ex. 25B, Ex. 31, Ex. 43
131.	Roberta	Rambish	Ex. 25B, Ex. 35, Ex. 43
132.	Travis	Reed	Ex. 31, Ex. 43
133.	Chuck	Rehberg	Ex. 25H, Ex. 35, Ex. 43, RP 776
134.	Dave	Rembert	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 782
135.	Eric	Richardson	Ex. 31, Ex. 35, Ex. 43, RP 783
136.	Greg	Ross	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 334 - 35, 782
137.	Harold	S.	Ex. 43
138.	Jean	S.	Ex. 43
139.	Robin	S.	Ex. 43
140.	Kathy	Sandor	Ex. 25F, Ex. 31, Ex. 35, Ex. 43, RP 607, 778
141.	Marty	Sandor	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 605 - 610, 783, 5/12 RP 78
142.	Linda	Schamb	Ex. 43
143.	Michele	Schaper	Ex. 43
144.	Nancy Jo	Schmitt	Ex. 43
145.	Carole	Sharpe	Ex. 25E, Ex. 31, Ex. 35, Ex. 43, RP 335, 346, 353, 355, 778, 5/12 RP 79
146.	Clifford	Sharpe	Ex. 25E, Ex. 31, Ex. 35, Ex. 43, RP 778, 5/12 RP 79
147.	Skip	Sharpe	Ex. 43

	First Name	Last Name	Cite to Record
148.	Suzanne	Smith	Ex. 25F, Ex. 31, Ex. 35, Ex. 43, RP 152 - 53, 778, 5/12 RP 85 - 87
149.	Angie	Sorgar	Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 780
150.	Robert	Sorgar	Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 780 - 81
151.	Robin	Sorgar	Ex. 31
152.	Donald Michael	Sowa	Ex. 25F, Ex. 31, Ex. 35, Ex. 43, RP 777
153.	Pam	Sowa	Ex. 25G, Ex. 31, Ex. 35, Ex. 43, RP 776
154.	Gloria	Spicer	Ex. 25E, Ex. 31, Ex. 35, Ex. 43, RP 778
155.	Teresa	Spicer	Ex. 25B, 25C, Ex. 31, Ex. 35, Ex. 43, RP 781
156.	Beau	Stanfield	Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 779
157.	Blake	Stanfield	Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 779
158.	Dan	Stanfield	Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 779, 5/12 RP 78
159.	Jan	Stanfield	Ex. 25B, Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 781, 5/12 RP 72
160.	Megan	Steinman-Neal	Ex. 25G, Ex. 35, Ex. 43, RP 776
161.	Katrina	Svoboda	Ex. 31, Ex. 43
162.	Joe	Swenson	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 783
163.	Robert (Bob)	Tamm	Ex. 31, Ex. 43
164.	E.	Thaves	Ex. 31
165.	Loren	Thaves	Ex. 35, Ex. 35, Ex. 43
166.	Roberta	Thaves	Ex. 35, Ex. 35, Ex. 43
167.	Aaren	Thompson	Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 780, 5/12 RP 78
168.	Mary	Tracy	Ex. 25B, Ex. 35, Ex. 43, RP 783

	First Name	Last Name	Cite to Record
169.	Debra	Truax	Ex. 31, Ex. 43
170.	Val	Vaughn	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 334, 338, 346, 591 - 95, 784
171.	Dan	W.	Ex. 43
172.	Ed	W.	Ex. 43
173.	Jordon	W.	Ex. 43
174.	Karen	W.	Ex. 43
175.	Willam Spencer	Ward	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 335, 337, 343, 346, 349
176.	Clay	Watkins	Ex. 25E, Ex. 31, Ex. 35, Ex. 43, RP 778, 5/12 RP 79
177.	J.	Wattes	Ex. 31
178.	Kaila	Wheat	Ex. 31, Ex. 43
179.	Kevin	Wheat	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 782
180.	Shannon	Wheat	Ex. 25B, Ex. 31, Ex. 35, Ex. 43
181.	Janice	Whitehead	Ex. 25A, Ex. 31, Ex. 35, Ex. 43, RP 587 - 90, 785, 5/12 RP 78, 5/19 RP 74, 80
182.	Lisa	Whitehead	Ex. 25D, Ex. 31, Ex. 35, Ex. 43, RP 778
183.	Yvonne	Wilbur	Ex. 25I, Ex. 31, Ex. 35, Ex. 43, RP 775
184.	Chris	Wiley	Ex. 25B, Ex. 35, RP 781
185.	Jen	Wiley	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 781 - 82
186.	Lisa	Wiley	Ex. 25B, Ex. 31, Ex. 35, Ex. 43, RP 782
187.	Michelle	Wittmeir	Ex. 25B, Ex. 25C, Ex. 31, Ex. 35, Ex. 43, RP 595 - 600, 781
188.	Mark	Womack	Ex. 31, Ex. 43
189.	Tristan	Womack	Ex. 31, Ex. 43
190.	Susan	Z.	Ex. 43
191.	Luke	Zeman	Ex. 25G, Ex. 31, Ex. 35, Ex.

	First Name	Last Name	Cite to Record
			43, RP 777
192.	Maria	Zeman	Ex. 25D, Ex. 31, Ex. 35, Ex. 43, RP 778, 5/12 RP 78
193.	Wanda	Zeman	Ex. 25D, Ex. 35, Ex. 43, RP 778, 5/12 RP 78
Dr. Thola testified that she lost 169 (or more) patients, and that she provided a list of patients lost to expert witness Neil Beaton.			RP 169, 248, 760, 5/12 RP 87 - 88

Number of patients identified in Exhibit 25A - L alone	99
Number of additional patients identified in Exhibit 31 (not identified in Ex. 25)	39
Number of additional patients identified in Exhibit 35 (not identified in Exs. 25 or 31)	4
Number of additional patients identified in Exhibit 43 (not identified in Exs. 25, 31 or 43)	50
Number of additional patients identified in witness testimony (not identified in exhibits)	1
TOTAL	193
Number of patients identified in multiple places in the record	133

APPENDIX 2

UNIFORM TRADE SECRETS ACT
WITH 1985 AMENDMENTS

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-FOURTH YEAR
IN MINNEAPOLIS, MINNESOTA
AUGUST 2 – 9, 1985

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
Baltimore, Maryland, February 11, 1986

UNIFORM TRADE SECRETS ACT WITH 1985 AMENDMENTS

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Trade Secrets Act with 1985 Amendments was as follows:

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ROBERT H. CORNELL, 25th Floor, 50 California Street, San Francisco, CA 94111
RICHARD COSWAY, University of Washington, School of Law, Seattle, WA 98105
RICHARD F. DOLE, JR., University of Houston, Law Center, 4800 Calhoun, Houston,
TX 77004
CARLYLE C. RING, JR., Room 322-D, 5390 Cherokee Avenue, Alexandria,
VA 22312, *President (Member Ex Officio)*
WILLIAM J. PIERCE, University of Michigan, School of Law, Ann Arbor, MI 48109,
Executive Director

Final, approved copies of this Act and copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
645 North Michigan Avenue, Suite 510
Chicago, Illinois 60611
(312) 321-9710

**UNIFORM TRADE SECRETS ACT
WITH 1985 AMENDMENTS**

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SECTION 3. DAMAGES

SECTION 4. ATTORNEY'S FEES

SECTION 5. PRESERVATION OF SECRECY

SECTION 6. STATUTE OF LIMITATIONS

SECTION 7. EFFECT ON OTHER LAW

SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION

SECTION 9. SHORT TITLE

SECTION 10. SEVERABILITY

SECTION 11. TIME OF TAKING EFFECT

SECTION 12. REPEAL

UNIFORM TRADE SECRETS ACT WITH 1985 AMENDMENTS

(The 1985 Amendments are Indicated
by Underscore and Strikeout)

PREFATORY NOTE

A valid patent provides a legal monopoly for seventeen years in exchange for public disclosure of an invention. If, however, the courts ultimately decide that the Patent Office improperly issued a patent, an invention will have been disclosed to competitors with no corresponding benefit. In view of the substantial number of patents that are invalidated by the courts, many businesses now elect to protect commercially valuable information through reliance upon the state law of trade secret protection. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974), which establishes that neither the Patent Clause of the United States Constitution nor the federal patent laws pre-empt state trade secret protection for patentable or unpatentable information, may well have increased the extent of this reliance.

The recent decision in *Aronson v. Quick Point Pencil Co.*, 99 S.Ct. 1096, 201 USPQ 1 (1979) reaffirmed *Kewanee* and held that federal patent law is not a barrier to a contract in which someone agrees to pay a continuing royalty in exchange for the disclosure of trade secrets concerning a product.

Notwithstanding the commercial importance of state trade secret law to interstate business, this law has not developed satisfactorily. In the first place, its development is uneven. Although there typically are a substantial number of reported decisions in states that are commercial centers, this is not the case in less populous and more agricultural jurisdictions. Secondly, even in states in which there has been significant litigation, there is undue uncertainty concerning the parameters of trade secret protection, and the appropriate remedies for misappropriation of a trade secret. One commentator observed:

“Under technological and economic pressures, industry continues to rely on trade secret protection despite the doubtful and confused status of both common law and statutory remedies. Clear, uniform trade secret protection is urgently needed. . . .”

Comment, “Theft of Trade Secrets: The Need for a Statutory Solution”, 120 U.Pa.L.Rev. 378, 380-81 (1971).

In spite of this need, the most widely accepted rules of trade secret law, § 757 of the Restatement of Torts, were among the sections omitted from the Restatement of Torts, 2d (1978).

The Uniform Act codifies the basic principles of common law trade secret protection, preserving its essential distinctions from patent law. Under both the Act and common law principles, for example, more than one person can be entitled to trade secret protection with respect to the same information, and analysis involving the “reverse engineering” of a lawfully obtained product in order to discover a trade secret is permissible. *Compare* Uniform Act, Section 1(2) (misappropriation means acquisition of a trade secret by means that should be known to be improper and unauthorized disclosure or use of information that one should know is the trade secret of another) *with Miller v. Owens-Illinois, Inc.*, 187 USPQ 47, 48 (D.Md.1975) (alternative holding) (prior, independent discovery a complete defense to liability for misappropriation) *and Wesley-Jessen, Inc., v. Reynolds*, 182 USPQ 135, 144-45, (N.D.Ill.1974) (alternative holding) (unrestricted sale and lease of camera that could be reversed engineered in several days to reveal alleged trade secrets preclude relief for misappropriation).

For liability to exist under this Act, a Section 1(4) trade secret must exist and either a person’s acquisition of the trade secret, disclosure of the trade secret to others, or use of the trade secret must be improper under Section 1(2). The mere copying of an unpatented item is not actionable.

Like traditional trade secret law, the Uniform Act contains general concepts. The contribution of the Uniform Act is substitution of unitary definitions of trade secret and trade secret misappropriation, and a single statute of limitations for the various property, quasi-contractual, and violation of fiduciary relationship theories of noncontractual liability utilized at common law. The Uniform Act also codifies the results of the better reasoned cases concerning the remedies for trade secret misappropriation.

The History of the Special Committee on the Uniform Trade Secrets Act

On February 17, 1968, the Conference’s subcommittee on Scope and Program reported to the Conference’s Executive Committee as follows:

“14. Uniform Trade Secrets Protection Act.

This matter came to the subcommittee from the Patent Law Section of the American Bar Association from President Pierce, Commissioner Joiner and Allison Dunham. It appears that in 1966 the Patent Section of the American

Bar Association extensively discussed a resolution to the effect that ‘the ABA favors the enactment of a uniform state law to protect against the wrongful disclosure or wrongful appropriation of trade secrets, know-how or other information maintained in confidence by another.’ It was decided, however, not to put such a resolution to a vote at that time but that the appropriate Patent Section Committee would further consider the problem. In determining what would be appropriate for the Conference to do at this juncture, the following points should be considered:

(1) At the present much is going on by way of statutory development, both federally and in the states.

(2) There is a fundamental policy conflict still unresolved in that the current state statutes that protect trade secrets tend to keep innovations secret, while our federal patent policy is generally designed to encourage public disclosure of innovations. It may be possible to devise a sensible compromise between these two basic policies that will work, but to do so demands coordination of the statutory reform efforts of both the federal government and the states.

(3) The Section on Patents, the ABA group that is closest to this problem, is not yet ready to take a definite position.

It is recommended that a special committee be appointed to investigate the question of the drafting of a uniform act relating to trade secret protection and to establish liaison with the Patent Law Section, the Corporation, Banking and Business Law Section, and the Antitrust Law Section of the American Bar Association.”

The Executive Committee, at its Midyear Meeting held February 17 and 18, 1968, in Chicago, Illinois, “voted to authorize the appointment of a Special Committee on Uniform Trade Secrets Protection Act to investigate the question of drafting an act on the subject with instructions to establish liaison with the Patent Law Section, the Corporation, Banking and Business Law Section, and the Antitrust Law Section of the American Bar Association.” Pursuant to that action, a Special Committee was appointed, which included Professor Richard Cosway of Seattle, Washington, who is the only original Committee member to serve to the present day. The following year saw substantial changes in the membership of the Committee. Professor Richard F. Dole, Jr., of Iowa City, Iowa, became a member then and has served as a member ever since.

The work of the Committee went before the Conference first on Thursday afternoon, August 10, 1972, when it was one of three Acts considered on first reading. Thereafter, for a variety of reasons, the Committee became inactive, and,

regrettably, its original Chairman died on December 7, 1974. In 1976, the Committee became active again and presented a Fifth Tentative Draft of its proposed bill at the 1978 Annual Meeting of the National Conference of Commissioners on Uniform State Laws.

Despite the fact that there had previously been a first reading, the Committee was of the opinion that, because of the lapse of time, the 1978 presentation should also be considered a first reading. The Conference concurred, and the bill was proposed for final reading and adoption at the 1979 Annual Meeting.

On August 9, 1979, the Act was approved and recommended for enactment in all the states. Following discussions with members of the bar and bench, the Special Committee proposed amendments to Sections 2(b), 3(a), 7 and 11 that clarified the intent of the 1979 Official Text. On August 8, 1985, these four clarifying amendments were approved and recommended for enactment in all the states.

UNIFORM TRADE SECRETS ACT WITH 1985 AMENDMENTS

SECTION 1. DEFINITIONS. As used in this [Act], unless the context requires otherwise:

(1) “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;

(2) “Misappropriation” means:

(i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(ii) disclosure or use of a trade secret of another without express or implied consent by a person who

(A) used improper means to acquire knowledge of the trade secret;
or

(B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was

(I) derived from or through a person who had utilized improper means to acquire it;

(II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) 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.

(3) “Person” means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(4) “Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) 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

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Comment

One of the broadly stated policies behind trade secret law is “the maintenance of standards of commercial ethics.” *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974). The Restatement of Torts, Section 757, Comment (f), notes: “A complete catalogue of improper means is not possible,” but Section 1(1) includes a partial listing.

Proper means include:

1. Discovery by independent invention;
2. Discovery by “reverse engineering”, that is, by starting with the known product and working backward to find the method by which it was developed. The acquisition of the known product must, of course, also be by a fair and honest means, such as purchase of the item on the open market for reverse engineering to be lawful;
3. Discovery under a license from the owner of the trade secret;
4. Observation of the item in public use or on public display;
5. Obtaining the trade secret from published literature.

Improper means could include otherwise lawful conduct which is improper under the circumstances; *e.g.*, an airplane overflight used as aerial reconnaissance to determine the competitor’s plant layout during construction of the plant. *E. I. du Pont de Nemours & Co., Inc. v. Christopher*, 431 F.2d 1012 (CA5, 1970), cert. den. 400 U.S. 1024 (1970). Because the trade secret can be destroyed through public knowledge, the unauthorized disclosure of a trade secret is also a misappropriation.

The type of accident or mistake that can result in a misappropriation under Section 1(2)(ii)(C) involves conduct by a person seeking relief that does not

constitute a failure of efforts that are reasonable under the circumstances to maintain its secrecy under Section 1(4)(ii).

The definition of “trade secret” contains a reasonable departure from the Restatement of Torts (First) definition which required that a trade secret be “continuously used in one’s business.” The broader definition in the proposed Act extends protection to a plaintiff who has not yet had an opportunity or acquired the means to put a trade secret to use. The definition includes information that has commercial value from a negative viewpoint, for example the results of lengthy and expensive research which proves that a certain process will **not** work could be of great value to a competitor.

Cf. Telex Corp. v. IBM Corp., 510 F.2d 894 (CA10, 1975) per curiam, cert. dismissed 423 U.S. 802 (1975) (liability imposed for developmental cost savings with respect to product not marketed). Because a trade secret need not be exclusive to confer a competitive advantage, different independent developers can acquire rights in the same trade secret.

The words “method, technique” are intended to include the concept of “know-how.”

The language “not being generally known to and not being readily ascertainable by proper means by other persons” does not require that information be generally known to the public for trade secret rights to be lost. If the principal person persons who can obtain economic benefit from information is are aware of it, there is no trade secret. A method of casting metal, for example, may be unknown to the general public but readily known within the foundry industry.

Information is readily ascertainable if it is available in trade journals, reference books, or published materials. Often, the nature of a product lends itself to being readily copied as soon as it is available on the market. On the other hand, if reverse engineering is lengthy and expensive, a person who discovers the trade secret through reverse engineering can have a trade secret in the information obtained from reverse engineering.

Finally, reasonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on “need to know basis”, and controlling plant access. On the other hand, public disclosure of information through display, trade journal publications, advertising, or other carelessness can preclude protection.

The efforts required to maintain secrecy are those “reasonable under the circumstances.” The courts do not require that extreme and unduly expensive

procedures be taken to protect trade secrets against flagrant industrial espionage. See *E. I. du Pont de Nemours & Co., Inc. v. Christopher*, supra. It follows that reasonable use of a trade secret including controlled disclosure to employees and licensees is consistent with the requirement of relative secrecy.

SECTION 2. INJUNCTIVE RELIEF.

(a) 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.

(b) ~~If the court determines that it would be unreasonable to prohibit future use~~ In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time ~~the~~ for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

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

Comment

Injunctions restraining future use and disclosure of misappropriated trade secrets frequently are sought. Although punitive perpetual injunctions have been granted, *e.g.*, *Elcor Chemical Corp. v. Agri-Sul, Inc.*, 494 S.W.2d 204 (Tex.Civ.App.1973), Section 2(a) of this Act adopts the position of the trend of authority limiting the duration of injunctive relief to the extent of the temporal advantage over good faith competitors gained by a misappropriator. See, *e.g.*, *K-2 Ski Co. v. Head Ski Co., Inc.*, 506 F.2d 471 (CA9, 1974) (maximum appropriate duration of both temporary and permanent injunctive relief is period of time it would have taken defendant to discover trade secrets lawfully through either independent development or reverse engineering of plaintiff's products).

The general principle of Section 2(a) and (b) is that an injunction should last for as long as is necessary, but no longer than is necessary, to eliminate the commercial advantage or "lead time" with respect to good faith competitors that a person has obtained through misappropriation. Subject to any additional period of restraint necessary to negate lead time, an injunction accordingly should terminate

when a former trade secret becomes either generally known to good faith competitors or generally knowable to them because of the lawful availability of products that can be reverse engineered to reveal a trade secret.

For example, assume that A has a valuable trade secret of which B and C, the other industry members, are originally unaware. If B subsequently misappropriates the trade secret and is enjoined from use, but C later lawfully reverse engineers the trade secret, the injunction restraining B is subject to termination as soon as B's lead time has been dissipated. All of the persons who could derive economic value from use of the information are now aware of it, and there is no longer a trade secret under Section 1(4). It would be anti-competitive to continue to restrain B after any lead time that B had derived from misappropriation had been removed.

If a misappropriator either has not taken advantage of lead time or good faith competitors already have caught up with a misappropriator at the time that a case is decided, future disclosure and use of a former trade secret by a misappropriator will not damage a trade secret owner and no injunctive restraint of future disclosure and use is appropriate. See, e.g., *Northern Petrochemical Co. v. Tomlinson*, 484 F.2d 1057 (CA7, 1973) (affirming trial court's denial of preliminary injunction in part because an explosion at its plant prevented an alleged misappropriator from taking advantage of lead time); *Kubik, Inc. v. Hull*, 185 USPQ 391 (Mich.App.1974) (discoverability of trade secret by lawful reverse engineering made by injunctive relief punitive rather than compensatory).

Section 2(b) deals with ~~a distinguishable~~ the special situation in which future use by a misappropriator will damage a trade secret owner but an injunction against future use nevertheless is ~~unreasonable under the particular~~ inappropriate due to exceptional circumstances of a case. ~~Situations in which this unreasonableness can exist~~ Exceptional circumstances include the existence of an overriding public interest which requires the denial of a prohibitory injunction against future damaging use and a person's reasonable reliance upon acquisition of a misappropriated trade secret in good faith and without reason to know of its prior misappropriation that would be prejudiced by a prohibitory injunction against future damaging use. *Republic Aviation Corp. v. Schenk*, 152 USPQ 830 (N.Y.Sup.Ct.1967) illustrates the public interest justification for withholding prohibitory injunctive relief. The court considered that enjoining a misappropriator from supplying the U.S. with an aircraft weapons control system would have endangered military personnel in Viet Nam. The prejudice to a good faith third party justification for withholding prohibitory injunctive relief can arise upon a trade secret owner's notification to a good faith third party that the third party has knowledge of a trade secret as a result of misappropriation by another. This notice suffices to make the third party a misappropriator thereafter under Section

1(2)(ii)(B)(1). In weighing an aggrieved person's interests and the interests of a third party who has relied in good faith upon his or her ability to utilize information, a court may conclude that restraining future use of the information by the third party is unwarranted. With respect to innocent acquirers of misappropriated trade secrets, Section 2(b) is consistent with the principle of 4 Restatement Torts (First) § 758(b) (1939), but rejects the Restatement's literal conferral of absolute immunity upon all third parties who have paid value in good faith for a trade secret misappropriated by another. The position taken by the Uniform Act is supported by *Forest Laboratories, Inc. v. Pillsbury Co.*, 452 F.2d 621 (CA7, 1971) in which a defendant's purchase of assets of a corporation to which a trade secret had been disclosed in confidence was not considered to confer immunity upon the defendant.

When Section 2(b) applies, a court ~~is given~~ has discretion to substitute an injunction conditioning future use upon payment of a reasonable royalty for an injunction prohibiting future use. Like all injunctive relief for misappropriation, a royalty order injunction is appropriate only if a misappropriator has obtained a competitive advantage through misappropriation and only for the duration of that competitive advantage. In some situations, typically those involving good faith acquirers of trade secrets misappropriated by others, a court may conclude that the same considerations that render a prohibitory injunction against future use inappropriate also render a royalty order injunction inappropriate. See, generally, *Prince Manufacturing, Inc. v. Automatic Partner, Inc.*, 198 USPQ 618 (N.J.Super.Ct.1976) (purchaser of misappropriator's assets from receiver after trade secret disclosed to public through sale of product not subject to liability for misappropriation).

A royalty order injunction under Section 2(b) should be distinguished from a reasonable royalty alternative measure of damages under Section 3(a). See the Comment to Section 3 for discussion of the differences in the remedies.

Section 2(c) authorizes mandatory injunctions requiring that a misappropriator return the fruits of misappropriation to an aggrieved person, *e.g.*, the return of stolen blueprints or the surrender of surreptitious photographs or recordings.

Where more than one person is entitled to trade secret protection with respect to the same information, only that one from whom misappropriation occurred is entitled to a remedy.

SECTION 3. DAMAGES.

(a) ~~In addition to or in lieu of injunctive relief~~ Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant may is entitled to recover damages for the actual loss caused by misappropriation. A complainant also may recover for Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

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

Comment

Like injunctive relief, a monetary recovery for trade secret misappropriation is appropriate only for the period in which information is entitled to protection as a trade secret, plus the additional period, if any, in which a misappropriator retains an advantage over good faith competitors because of misappropriation. Actual damage to a complainant and unjust benefit to a misappropriator are caused by misappropriation during this time alone. See *Conmar Products Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150 (CA2, 1949) (no remedy for period subsequent to disclosure of trade secret by issued patent); *Carboline Co. v. Jarboe*, 454 S.W.2d 540 (Mo.1970) (recoverable monetary relief limited to period that it would have taken misappropriator to discover trade secret without misappropriation). A claim for actual damages and net profits can be combined with a claim for injunctive relief, but, if both claims are granted, the injunctive relief ordinarily will preclude a monetary award for a period in which the injunction is effective.

As long as there is no double counting, Section 3(a) adopts the principle of the recent cases allowing recovery of both a complainant's actual losses and a misappropriator's unjust benefit that are caused by misappropriation. *E.g.*, *Tri-Tron International v. Velto*, 525 F.2d 432 (CA9, 1975) (complainant's loss and misappropriator's benefit can be combined). Because certain cases may have sanctioned double counting in a combined award of losses and unjust benefit, *e.g.*, *Telex Corp. v. IBM Corp.*, 510 F.2d 894 (CA10, 1975) (per curiam), cert. dismissed, 423 U.S. 802 (1975) (IBM recovered rentals lost due to displacement by misappropriator's products without deduction for expenses saved by displacement; as a result of rough approximations adopted by the trial judge, IBM also may have

recovered developmental costs saved by misappropriator through misappropriation with respect to the same customers), the Act adopts an express prohibition upon the counting of the same item as both a loss to a complainant and an unjust benefit to a misappropriator.

As an alternative to all other methods of measuring damages caused by a misappropriator's past conduct, a complainant can request that damages be based upon a demonstrably reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret. In order to justify this alternative measure of damages, there must be competent evidence of the amount of a reasonable royalty.

The reasonable royalty alternative measure of damages for a misappropriator's past conduct under Section 3(a) is readily distinguishable from a Section 2(b) royalty order injunction, which conditions a misappropriator's future ability to use a trade secret upon payment of a reasonable royalty. A Section 2(b) royalty order injunction is appropriate only in exceptional circumstances; whereas a reasonable royalty measure of damages is a general option. Because Section 3(a) damages are awarded for a misappropriator's past conduct and a Section 2(b) royalty order injunction regulates a misappropriator's future conduct, both remedies cannot be awarded for the same conduct. If a royalty order injunction is appropriate because of a person's material and prejudicial change of position prior to having reason to know that a trade secret has been acquired from a misappropriator, damages, moreover, should not be awarded for past conduct that occurred prior to notice that a misappropriated trade secret has been acquired.

Monetary relief can be appropriate whether or not injunctive relief is granted under Section 2. If a person charged with misappropriation has **acquired materially and prejudicially changed position in reliance upon** knowledge of a trade secret **acquired in good faith and without reason to know** of its misappropriation by another, however, the same considerations that can justify denial of all injunctive relief also can justify denial of all monetary relief. See *Conmar Products Corp. v. Universal Slide Fastener Co.*, 172 F.2d 1950 (CA2, 1949) (no relief against new employer of employee subject to contractual obligation not to disclose former employer's trade secrets where new employer innocently had committed \$40,000 to develop the trade secrets prior to notice of misappropriation).

If willful and malicious misappropriation is found to exist, Section 3(b) authorizes the court to award a complainant exemplary damages in addition to the actual recovery under Section 3(a) an amount not exceeding twice that recovery. This provision follows federal patent law in leaving discretionary trebling to the judge even though there may be a jury, *compare* 35 U.S.C. Section 284 (1976).

Whenever more than one person is entitled to trade secret protection with respect to the same information, only that one from whom misappropriation occurred is entitled to a remedy.

SECTION 4. ATTORNEY'S FEES. If (i) a claim of misappropriation is made in bad faith, (ii) a motion to terminate an injunction is made or resisted in bad faith, or (iii) willful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party.

Comment

Section 4 allows a court to award reasonable attorney fees to a prevailing party in specified circumstances as a deterrent to specious claims of misappropriation, to specious efforts by a misappropriator to terminate injunctive relief, and to willful and malicious misappropriation. In the latter situation, the court should take into consideration the extent to which a complainant will recover exemplary damages in determining whether additional attorney's fees should be awarded. Again, patent law is followed in allowing the judge to determine whether attorney's fees should be awarded even if there is a jury, *compare* 35 U.S.C. Section 285 (1976).

SECTION 5. PRESERVATION OF SECRECY. In an action under this [Act], a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

Comment

If reasonable assurances of maintenance of secrecy could not be given, meritorious trade secret litigation would be chilled. In fashioning safeguards of confidentiality, a court must ensure that a respondent is provided sufficient information to present a defense and a trier of fact sufficient information to resolve the merits. In addition to the illustrative techniques specified in the statute, courts have protected secrecy in these cases by restricting disclosures to a party's counsel and his or her assistants and by appointing a disinterested expert as a special master to hear secret information and report conclusions to the court.

SECTION 6. STATUTE OF LIMITATIONS. An action for misappropriation must be brought within 3 years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

Comment

There presently is a conflict of authority as to whether trade secret misappropriation is a continuing wrong. Compare *Monolith Portland Midwest Co. v. Kaiser Aluminum & Chemical Corp.*, 407 F.2d 288 (CA9, 1969) (not a continuing wrong under California law – limitation period upon all recovery begins upon initial misappropriation) with *Underwater Storage, Inc. v. U. S. Rubber Co.*, 371 F.2d 950 (CA9, 1966), cert. den., 386 U.S. 911 (1967) (continuing wrong under general principles – limitation period with respect to a specific act of misappropriation begins at the time that the act of misappropriation occurs).

This Act rejects a continuing wrong approach to the statute of limitations but delays the commencement of the limitation period until an aggrieved person discovers or reasonably should have discovered the existence of misappropriation. If objectively reasonable notice of misappropriation exists, three years is sufficient time to vindicate one's legal rights.

SECTION 7. EFFECT ON OTHER LAW.

(a) ~~This~~ Except as provided in subsection (b), this [Act] displaces conflicting tort, restitutionary, and other law of this State ~~pertaining to~~ providing civil ~~liability~~ remedies for misappropriation of a trade secret.

(b) This [Act] does not affect:

(1) ~~contractual or other civil liability or relief that is~~ remedies, whether or not based upon misappropriation of a trade secret; or

(2) ~~criminal liability for~~ other civil remedies that are not based upon misappropriation of a trade secret: ~~; or~~

(3) criminal remedies, whether or not based upon misappropriation of a trade secret.

Comment

This Act ~~is not a comprehensive remedy~~ does not deal with criminal remedies for trade secret misappropriation and is not a comprehensive statement of civil remedies. It applies to ~~duties imposed by law in order~~ a duty to protect competitively significant secret information that is imposed by law. It does not apply to ~~duties~~ a duty voluntarily assumed through an express or an implied-in-fact contract. The enforceability of covenants not to disclose trade secrets and covenants not to compete that are intended to protect trade secrets, for example, ~~are~~ is governed by other law. The Act also does not apply to ~~duties~~ a duty imposed by law that ~~are~~ is not dependent upon the existence of competitively significant secret information, like an agent's duty of loyalty to his or her principal.

SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 9. SHORT TITLE. This [Act] may be cited as the Uniform Trade Secrets Act.

SECTION 10. SEVERABILITY. If any provision of this [Act] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 11. TIME OF TAKING EFFECT. This [Act] takes effect on _____, and does not apply to misappropriation occurring prior to the effective date. With respect to a continuing misappropriation that began prior to the effective date, the [Act] also does not apply to the continuing misappropriation that occurs after the effective date.

Comment

The Act applies exclusively to misappropriation that begins after its effective date. Neither misappropriation that began and ended before the effective date nor misappropriation that began before the effective date and continued thereafter is subject to the Act.

SECTION 12. REPEAL. The following Acts and parts of Acts are repealed:

(1)

(2)

(3)

CERTIFICATE OF SERVICE

I caused to be served on August 1, 2006 a true and correct copy of the document to which this certificate is attached upon the following counsel of record in the manner listed below:

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FILED
COURT OF APPEALS
Aug 1
06 JUL 31 AM 9:13
STATE OF WASHINGTON
BY _____
SERVITY

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

SIGNED July 31, 2006, at Gig Harbor, Washington.



Connie Sue Martin