



Steven Cole Salon

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A motion for summary judgment may be granted when there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law.¹ Here, there are genuine issues of material fact whether respondents violated the Uniform Trade Secrets Act, whether the former employees breached the duty of loyalty to Steven Cole Salon (SCS), and whether respondents intentionally interfered with beneficial business expectancies. Accordingly, we reverse, in part, the summary dismissal in favor of respondents, Salon Lotus and the former employees of SCS.

SCS and its owner, Steven Cordell, appeal the trial court's summary judgment order dismissing claims against Salon Lotus and four former employees of SCS. Because of the burdens governing our review of summary judgment, we state the facts in the light most favorable to the non-moving party.

SCS is a hair salon located in Seattle's Greenwood neighborhood. The salon, founded in 2002 by Steven Cordell, provides hair, face, and body treatments and services. Cordell describes the SCS business model as a small, high-end salon, offering affordable services while providing a high level of service.

SCS hired defendant Jazmine Shannon as a color technician in 2002. At the beginning of her employment, SCS executed an employment agreement with Shannon. The copy of the agreement in the record states that it is a "two-year" agreement, but also indicates that it began on October 14, 2001, and was to end on October 13, 2004. This discrepancy is irrelevant to our analysis. The agreement included a provision that specifically prohibited disclosure of confidential business information, including client information. Shannon remained an SCS employee until approximately April 1, 2006, when she left to establish a competing salon, Salon Lotus.

SCS hired defendant Shylo McKay as a hair designer in 2002. The record indicates that she signed an agreement similar to the one signed by Shannon. McKay left SCS's employment sometime around April 1, 2006, to establish Salon Lotus.

SCS employed defendant Michelle Moore as an office manager in 2004. The record indicates that she executed a similar agreement to those of the other employees. Moore left SCS sometime around May 2006 to establish Salon Lotus.

SCS hired defendant Nike Jawando as a color technician in 2004. SCS also executed an employment



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agreement with her. Jawando left SCS employment on June 19, 2006, to join Salon Lotus.

While at SCS, all of these employees had access to SCS's client database and other business information including internal plans, marketing strategies, service and product pricing, vendor contracts and pricing, and employment contracts.

Salon Lotus is located in the Green Lake area, approximately 1.4 miles from SCS. The salon provides hair, waxing, and skin care services. Similar to SCS, Salon Lotus touts its designers as "highly skilled in specialized designer haircuts, framing your face and matching your bone structure."

SCS sued Salon Lotus and the former employees of SCS for violation of the Uniform Trade Secrets Act, breach of the former employees' duty of loyalty, and intentional interference with business expectancies of SCS with its customers. The trial court granted the motion for summary judgment by Salon Lotus and the former employees of SCS.

SUMMARY JUDGMENT

SCS argues that the trial court improperly granted defendants' motion, dismissing all of its claims. Because there are genuine issues of material fact, we agree.

A motion for summary judgment may be granted when there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law.² The burden is on the moving party to show there is no genuine issue of material fact.³ A defendant moving for summary judgment can meet this initial burden by "showing"--that is, point out to the [court]--that there is an absence of evidence to support the nonmoving party's case."⁴ If the moving party is the defendant and meets this showing, then the inquiry shifts to the party with the burden of proof at trial.⁵ "The 'facts' required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient."⁶

We construe all facts and reasonable inferences from them in the light most favorable to the nonmoving party.⁷ If the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the court should grant the motion.⁸ We review de novo a summary judgment order.⁹

Uniform Trade Secrets Act

Here, Salon Lotus moved for summary judgment and, thus, had the burden to show that no genuine issues of material fact existed on any element of the claim and that it was entitled to judgment as a matter of law. Salon Lotus argued that SCS failed to produce any factual evidence to support the elements of its claim, including damages. By pointing out the alleged absence of evidence, Salon Lotus met its burden.¹⁰



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The burden then shifted to SCS to show that it had produced competent evidence supporting all elements of its claim. Specifically, to defeat summary judgment, SCS had to produce factual evidence showing that its client list is a trade secret under the act, that defendants misappropriated the secret, and that SCS was damaged as a result. We focus on the client list because counsel at oral argument indicated that was the essence of appellants' claims.

Trade Secret Element

Under the act, information is protected as a trade secret if it

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.¹¹

Washington law recognizes that a customer list is one of the types of information that can be protected as a trade secret if it meets the criteria of the act.¹² But trade secret protection will not generally attach to customer lists where the information is readily ascertainable.¹³

Here, to support this element, SCS produced copies of employment agreements signed by Shannon and McKay and a declaration from Cordell. The agreements required the respective employees to keep business information, including customer names, confidential.

Cordell stated in his declaration that he executed employment agreements with all the former employees. For purposes of this case, that includes Shannon, McKay, Jawando, and Moore. It is irrelevant that the record before us does not contain copies of all the agreements. Cordell's declaration puts that material fact at issue.

We note that whether these agreements expired of their own terms by the time of the actions is irrelevant to the materiality of those documents. At minimum, they show that SCS regarded the client list as confidential information and that it took steps to keep that information confidential by requiring the employees to sign the agreements.

Additionally, by stipulation, the information covered by the nondisclosure provision in the agreements is central to the "good will" of SCS. Good will is a valuable aspect of a business.¹⁴ Thus, it is reasonable to conclude that SCS's client list is kept confidential because it has actual or potential economic value.

The record also contains evidence that Natalie Beckmann, one of SCS's clients who Salon Lotus solicited by mail, kept her personal contact information confidential and unlisted. This evidence



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shows that SCS's client list, containing unlisted personal contact information and consumer preferences, was also not readily ascertainable.

SCS has produced factual evidence in the form of documents and declaration testimony showing that its client list satisfies the criteria of the act. Washington law is clear that the determination whether specific information is a trade secret is a factual question.¹⁵ These issues are genuine issues of material fact for trial and, on this record, are not subject to treatment by summary dismissal.

Relying on a Pennsylvania case, *Renee Beauty Salons, Inc. v. BloseVenable*,¹⁶ Salon Lotus argues that a salon's client list cannot be protected as a trade secret. That argument is unpersuasive and we reject it. Because the Renee Beauty court did not analyze whether client information could be protected under the UTSA or any similar statute, it offers no helpful guidance here.

Misappropriation Element

A person violates the act by misappropriating a trade secret. Misappropriation is defined by the act in relevant part as:

(b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
....

(ii) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was (A) derived from or through a person who had utilized improper means to acquire it, (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use¹⁷

The statute also defines "improper means" to include "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy" ¹⁸

To support this element of its claim, SCS presented declarations from two clients, Beckmann and Ana Santos-Drechsler, and copies of Salon Lotus's marketing materials that targeted SCS clients. Viewed in a light most favorable to SCS, this evidence and the reasonable inferences drawn from it adequately support SCS's claim that defendants "misappropriated" its client information. The evidence suggests that defendants obtained SCS's client names and addresses under circumstances giving rise to a duty to limit their use or through a person who had a duty to maintain the secrecy of the information. Certainly, the signed employment agreements put defendants on notice that the information was confidential and belonged to SCS, despite having regular access to it while employees.

The evidence also indicates that Jawando, while still an employee, used SCS's property to benefit



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Salon Lotus. Moreover, when Salon Lotus sent solicitations to SCS clients (for Jawando or for other purposes), it appears that it could have used the client information without permission. This evidence raises genuine issues of material fact for trial.

Damages Element

At oral argument, counsel for defendants argued that CR 56(e) compelled dismissal of the action because SCS has failed to show more than allegations of damage by the alleged actions of the defendants. We disagree.

A plaintiff claiming damages has the burden to present evidence from which damages can be determined on some rational basis other than by pure speculation and conjecture.¹⁹ Lost profits must be proved with reasonable certainty.²⁰ Damages that are remote and speculative cannot be recovered.²¹ The requirement to prove damages with reasonable certainty is concerned with proof of the fact of damage rather than the amount.²²

Here, SCS relies on Cordell's declaration for proof of damages. Cordell, the founder and owner of SCS, stated:

As a result of Defendants' taking and use of important, material, and confidential information, including client lists, I have suffered lost revenue and sustained damage to the value of my business.²³

This evidence in the record by way of declaration of the owner of SCS not only alleges damages, but also permits the reasonable inference that Cordell may have lost revenue due to the loss of at least one customer. To the extent further evidence is required at trial, the parties have the opportunity to develop further evidence by additional discovery on remand. There is no authority to support the proposition that at the summary judgment stage an owner of a business must specify the amount of damages. All that is required at this stage is to establish the fact of damages. Cordell's declaration is sufficient.

In sum, genuine issues of material fact remain for trial. Accordingly, summary judgment on this claim was improper.

Duty of Loyalty

SCS argues that the trial court erred in dismissing its claims that all individual defendants breached the duty of loyalty owed to SCS. We agree that the claim against Jawando was improperly dismissed.

Common law agency doctrine is relevant to all employment relationships as it defines, among other things, the duties that the employer and employee owe to each other. In such a relationship, the employee or "agent" owes fiduciary duties to the employer or "principal." One of these fiduciary



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duties is the "duty to act loyally for the principal's benefit in all matters connected with the agency relationship."²⁴ This duty prevents a current employee from competing with the employer or assisting others to compete with the employer.²⁵ It also prevents an employee from using the employer's property, including confidential information, for the employee's or another's purposes.²⁶

Here, SCS argues that defendants Shannon, McKay, Jawando, and Moore, violated the duty of loyalty owed to SCS while employed. Specifically, SCS argues that while defendants were still employees, they solicited SCS customers for Salon Lotus.

SCS relies solely on Beckmann's declaration to support this claim. Beckmann received a post card from Salon Lotus postmarked the same day that Jawando colored her hair at SCS. The card announced Jawando as Salon Lotus's newest artist and solicited Beckmann's business, asking her to continue as one of Jawando's clients. Viewed in the light most favorable to SCS, this evidence shows that Jawando, while still an employee, used SCS's property (client names and addresses) to benefit Salon Lotus and to compete with her employer. This evidence adequately supports SCS's claim against Jawando. However, the record contains no evidence that any of the other defendants solicited SCS clients for Salon Lotus while employed by SCS.

Similarly, SCS failed to produce any evidence showing that "confidential proprietary business information" was stolen or used by other defendants while they owed SCS a duty of loyalty. SCS also fails to produce evidence that defendants violated the duty of loyalty by secretly looking for an office and making plans for their competitive venture during work time.

In sum, SCS only produced evidence showing that Jawando violated her duty of loyalty while an SCS employee. Although the trial court properly dismissed the duty of loyalty claims against all other defendants, dismissal of Jawando was not proper.

Intentional Interference with Business Expectancy SCS argues that the trial court erred in dismissing its claim of intentional interference with contractual relations or business expectancies. We agree.

To prove a prima facie case of tortious interference with contractual relations or business expectancy, the plaintiff must show: (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of the relationship or expectancy; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resulting damage.²⁷

Because this tort action is based on wrongful interference, something less than a binding enforceable contract is required.²⁸

To support element one, SCS argues that it had a reasonable expectation of doing business with its existing clients in the future. Cordell's declaration supports this. He stated that the salon has grown



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since 2002 to include "many long-standing and regular clients." Over that time, the salon also expanded its services and received accolades and honors. It is reasonable to infer from this evidence that SCS had a business expectancy in its clients.

For element two, defendants' knowledge of the expectancies, SCS again supports this with Cordell's declaration. He stated that he hired Shannon, Jawando, McKay, and Moore in 2002 and that they left SCS in 2005 and 2006.

It is reasonable to infer that, as key employees of the business, defendants knew that SCS had developed a successful "long-standing and regular client" base over that time.

For element three, SCS argues that defendants intentionally interfered with its business expectancies by targeting SCS clients to leave SCS and patronize Salon Lotus. The record contains copies of cards and mailings that Salon Lotus allegedly mailed to SCS clients. Notably, nothing in the record shows that the names and addresses on the many copies of Salon Lotus's mailings are, in fact, SCS's client names and addresses. However, because these materials form the basis of the complaint, it can be inferred that they contain SCS's clients' information.

Furthermore, Drechsler's declaration stated that Salon Lotus mailed her a card soliciting her business and then called her home in an attempt to schedule her next appointment at Salon Lotus rather than SCS. This evidence is sufficient to show that defendants intentionally attempted to take clients away from SCS.

For element four, SCS had the burden to show that defendants not only intentionally interfered, but also that they had a duty not to interfere, e.g., the interference was for an improper purpose or accomplished by wrongful means.²⁹

Here, the record shows that defendants signed contracts agreeing not to disclose or use at any time SCS's client information. To the extent that the record shows defendants took and used confidential SCS client information in violation of their agreements, the UTSA, and, in Jawando's case, in breach of her duty of loyalty, the evidence is sufficient to show that defendants had a duty not to interfere.

For element five, damages, SCS relied on Cordell's declaration. As discussed earlier, this is sufficient factual evidence to show damages for purposes of summary judgment. Moreover, Cordell's declaration also provides evidence that defendants' actions were the proximate cause of the damage to his business.

Because there is evidence in the record on which a fact finder could have found the existence of all five elements of this claim, the trial court erred in dismissing it.

We reverse in part the summary judgment order and remand for appropriate further proceedings.



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1. CR 56(c).
2. CR 56(c).
3. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).
4. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986)).
5. Young, 112 Wn.2d at 225.
6. Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988).
7. York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 302, 178 P.3d 995 (2008).
8. Id.
9. Id.
10. See Young, 112 Wn.2d at 225.
11. RCW 19.108.010 (4)(a)-(b).
12. Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 440, 971 P.2d 936 (1999).
13. Id. at 441.
14. J. L. Cooper & Co. v. Anchor Securities Co., 9 Wn.2d 45, 54, 113 P.2d 845 (1941).
15. Nowogroski, 137 Wn.2d at 436.
16. 438 Pa. Super. 601, 652 A.2d 1345 (1995).
17. RCW 19.108.010(2).
18. RCW 19.108.010(1) (emphasis added).
19. O'Brien v. Larson, 11 Wn. App. 52, 54, 521 P.2d 228 (1974).
20. Id.



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21. Id.

22. Golf Landscaping, Inc. v. Century Constr., 39 Wn. App. 895, 903, 696 P.2d 590 (1984).

23. Clerk's Papers at 298.

24. Restatement (Third) of Agency § 8.01 (2006).

25. Restatement (Third) of Agency § 8.04 (2006).

26. Restatement (Third) of Agency § 8.05 (2006).

27. Pleas v. City of Seattle, 112 Wn.2d 794, 800, 803-04, 774 P.2d 1158 (1989).

28. Scymanski v. Dufault, 80 Wn.2d 77, 83, 491 P.2d 1050 (1971).

29. See Kieburtz & Assocs. v. Rehn, 68 Wn. App. 260, 267, 842 P.2d 985 (1992) (Plaintiff must show that defendant had a "duty of noninterference," meaning that he interfered for an improper purpose or used improper means.).

