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# TRADE SECRET THEFT & EMPLOYER VICARIOUS LIABILITY IN *HAGEN V. BURMEISTER & ASSOCIATES, INC.*

Tanya J. Dobash<sup>†</sup>

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## I. INTRODUCTION

In *Hagen v. Burmeister & Associates, Inc.*,<sup>1</sup> the Minnesota Supreme Court considered for the first time the issue of employer vicarious liability for an employee's violation of the Minnesota Uniform Trade Secret Act (MUTSA).<sup>2</sup> The underlying issue of

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1. 633 N.W.2d 497 (Minn. 2001).

2. MINN. STAT. § 325C.01-325C.07 (2001).

theft of another person's property is rooted in antiquity and certainly predates our modern judicial systems. The doctrine of employer vicarious liability evolved more recently but is now embedded in the American tort system.

The perils of piracy, plunder, theft and robbery have impeded commerce for centuries<sup>3</sup> and have produced a variety of questions in every system of jurisprudence.<sup>4</sup> The Rhodians reduced maritime law into a code in order to apply principles of justice to the risks of navigation and commerce, and the Romans subsequently preserved or reformed these laws.<sup>5</sup> As commerce recovered from its decline in the dark ages, the laws began to again address commercial concerns in order to foster this activity. Many claimed to be the first to establish a theory of mutual rights of traders and to secure redress of commercial injuries.<sup>6</sup> Protection of trade secret commercial property was somewhat slower to emerge than protections for other commercial property due to the intangible nature of the subject matter.<sup>7</sup> In the United States, trade secret law began to emerge in the 1800s. In its 1868 opinion of *Peabody v. Norfolk*,<sup>8</sup> which shaped United States trade secret law, the Massachusetts Supreme Judicial Court stated, "[i]t is the policy of the law, for the advantage of the public, to encourage and protect invention and commercial enterprise."<sup>9</sup>

Fast-forward to the present, the age of technology, a free-wheeling era in which information, innovative ideas, computer

3. See 3 HENRY HALLAM, *HISTORY OF EUROPE DURING THE MIDDLE AGES* 44-45 (1899) (describing obstacles to trade in the Middle Ages).

4. *Id.* at 61; Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241, 251 n.54 (1998) (stating that "secrets might have received some protection in Roman law, although the matter is open to some dispute") (citing A. Arthur Schiller, *Trade Secrets and the Roman Law: The Actio Servi Corrupti*, 30 COLUM. L. REV. 837 (1930)).

5. See HALLAM, *supra* note 3, at 61.

6. *Id.* at 51-52 (discussing how the occupation of merchant became more honorable and placed on footing with landed proprietors and describing how commerce became leading subject of English statutes from accession of Edward III); *id.* at 45 ("Robbery, indeed, is the constant theme both of the Capitularies and of the Anglo-Saxon laws; one has more reason to wonder at the intrepid thirst for lucre, which induced a very few merchants to exchange the products of different regions, than to ask why no general spirit of commercial activity prevailed."); *id.* at 62-63 (discussing early codes and regulations, including Il Consolato del Mare).

7. Bone, *supra* note 4, at 252.

8. 98 Mass. 452 (1868).

9. *Id.* at 457; Bone, *supra* note 4, at 252 (discussing *Peabody v. Norfolk*, 98 Mass. 452 (1868) and history of trade secret law).

code and other intangibles can be a company's most valuable assets.<sup>10</sup> Novel technologies, innovation, internet and other communication advances have expanded the world's horizons, sparked ground-breaking commercial opportunities and created a whole new breed of industrial competition.<sup>11</sup> Rather than raiding cargo and freight, competitors and others ransack companies for blueprints, software code, formulations, research and development, plans, ideas, information and data.<sup>12</sup> Corporate espionage is a common and costly hazard, with the theft of trade secrets and other intellectual property rights in the United States costing companies billions of dollars.<sup>13</sup> Service industries have sprung to

10. Bone, *supra* note 4, at 243.

11. See *Raytheon Co. Settles Corporate Spy Case with AGES Group*, WALL ST. J., May 13, 1999, at A18 (reporting Raytheon's settlement regarding alleged corporate espionage in an unsuccessful attempt to undermine competitor's bid for \$450 million contract to service U.S. military aircraft). According to David Forbes, chairman of Quo Vadis International, a Denver-based security consulting company:

A big reason corporate spying has increased recently is that competition among businesses has gotten fiercer. As American society in general has become more aggressive, even hostile, and less tolerant, those behaviors have extended to businesses, as well . . . . You can't separate the way people see society and politics from the way they see the conduct of a corporation.

Paula Moore, *Workplace Violence Not Worst Threat*, DENV. BUS. J., Aug. 24, 2001, at 3A.

12. See *Company News: Medinol Accuses Boston Scientific of Theft and Fraud*, N.Y. TIMES, Apr. 6, 2001, at C4 (reporting Medinol Ltd.'s accusations that competitor Boston Scientific Corporation stole technology for stents used in artery-clearing angioplasties); Paul Elias, *Prosecutors Stumble in Efforts to Battle Biotech Espionage*, ASSOC. PRESS NEWswire, August 5, 2002 (reporting various trade secret smuggling cases, including lab employees stealing vials of biological materials, Alzheimer's disease research, nuclear weapons data, and newly discovered genes); Andrew Harris, *Missouri Jury Awards \$118 Million*, NAT'L L.J., Mar. 25, 2002, at A25 (reporting finding against Hartford Life Ins. Co. for theft of method of managing corporate life insurance investments); *Technology Briefing Software: Avant Executives Sentenced*, N.Y. TIMES, July 26, 2001, at C4 (reporting sentencing of six executives of Avant Corporation for stealing source code for routing from software rival Cadence Design Systems).

13. See Lilli Hsieh et al., *Intellectual Property Crimes*, 35 AM. CRIM. L. REV. 899, 900 (1998); Darren S. Tucker, *The Federal Government's War on Economic Espionage*, 18 U. PA. J. INT'L ECON. L. 1109, 1119-21 (1997) (stating that according to 1998 National Institute of Justice study, 48% of high-tech companies have been victim of trade secrets theft and describing estimated U.S. corporate trade secret loss estimates as \$2 billion to \$260 billion, and \$400 billion if overseas operations are included, along with one to six million lost jobs); Neil King Jr. & Jess Bravin, *Call It Mission Impossible Inc.—Corporate-Spying Firms Thrive*, WALL ST. J., July 3, 2000, at B1 (citing PriceWaterhouseCoopers study showing theft of proprietary information

life, specializing in both performing “competitive intelligence” services<sup>14</sup> and in combating industrial espionage.<sup>15</sup> Our federal and state governments have also responded by adapting existing laws and remedies to the changing situations and enacting fresh legislation targeted at theft of trade secrets and other intellectual property.<sup>16</sup>

Companies are especially vulnerable to theft of trade secrets by former employees.<sup>17</sup> According to one expert, ninety percent of

cost Fortune 1000 companies \$45 billion in 1999); Elias, *supra* note 12 (reporting allegedly that stolen vials of biological “glue” used in stem cell experiments worth \$1 billion “in the right hands”); Riva Richmond, *Rising Layoffs Are a Boon to Internet Security Firms*, WALL ST. J., June 5, 2001, at B11F (“The CSI/FBI survey showed 186 companies lost \$377.8 million from computer crime in the past year. Financial fraud and data theft, both of which typically involve insiders, accounted for 65% of those losses.”).

14. Harry Wingo, Note, *Dumpster Diving and the Ethical Blindspot of Trade Secret Law*, 16 YALE L. & POL’Y REV. 195, 215 (1997) (noting that [c]ompetitive intelligence has become so common place [sic] that it is considered an industry complete with its own professional association—the Society of Competitive Intelligence Professionals (SCIP)”); *Competition Drives Industrial Spying; Espionage: Some Companies May Skirt Ethics, Laws to Keep an Eye on Their Rivals*, L.A. TIMES, Sept. 3, 2001, at C3 (describing market intelligence and corporate espionage services). The intelligence industry stresses the difference between “competitive intelligence” and “industrial espionage”; according to the Society of Competitive Intelligence Professionals, “[c]ompetitive intelligence is the legal and ethical collection and analysis of information about the competitive environment . . . . Corporate espionage implies the theft of trade secrets, which is both illegal and unethical.” *Id.* According to Kroll Inc., “[t]he market for business intelligence is worth about \$2 billion a year worldwide, including services ranging from detective work to clipping news articles.” *Id.*

15. See, e.g., Richmond, *supra* note 13 (describing internet security firms’ booming business resulting from massive layoffs in computer industry); King & Bravin, *supra* note 13, at B1 (discussing “competitive intelligence” subindustry); American Society for Industrial Security, *Educational Sessions*, SEC. MGMT., July 1, 2002, at 96 (listing numerous corporate security consultants and seminars regarding industrial security, including protection of trade secrets).

16. See generally Hsieh, *supra* note 13 (analyzing various intellectual property crime concepts and legislation, including Economic Espionage Act of 1996, National Stolen Property Act of 1934, Uniform Trade Secrets Act (amended 1985), mail and wire fraud statutes, Racketeer Influenced and Corrupt Organizations Act of 1994 (RICO), Trademark Counterfeiting Act, Copyright Felony Act of 1984, and the Database Protection Bill of 1998-99 (not passed into law)).

17. See Bone, *supra* note 4, at 244 (stating that majority of trade secret cases involve disloyal employees) (citing 1 Roger M. Milgrim, MILGRIM ON TRADE SECRETS § 5.02[1] (1996)); *Ex-Lucent Scientists Indicted for Plotting Theft of Trade Secrets*, WALL ST. J., June 1, 2001, at B8 (reporting charges against two former research scientists at Lucent Technologies Inc. for conspiracy to steal Lucent trade secrets for use in their own business); Richmond, *supra* note 13, at B11F.

trade secret theft and other corporate crime involves a senior employee.<sup>18</sup> Not only do many employees have access to a company's trade secrets and the ability to easily copy and transmit them, but employees are more educated, mobile and change jobs much more often today.<sup>19</sup> Increased relocations, mergers, acquisitions, restructurings, layoffs and firings have also contributed to loss of job security, as well as to "layoff rage," which often results in a corresponding loss of sense of loyalty to the former employer.<sup>20</sup> Greed also motivates trade secret theft.<sup>21</sup> As a result, employees have increased opportunities and motivation to

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18. Moore, *supra* note 11, at 3A (quoting Bruce Wimmer, head of Pinkerton Consulting & Investigations security services company). According to Wimmer:

[M]any companies don't realize, or they deny, how exposed they are to thieves who are on the payroll. One reason for that, and why internal crime can be so successful, is that senior company people who have access to the most valuable information and products are often involved . . . . And that's hard for the company to admit because it trusts senior staff. It can't not trust them.

*Id.*

19. Peter J.G. Toren, *The Prosecution of Trade Secrets Under Federal Law*, 22 PEPP. L. REV. 59, 60 (1994); *see also*, Tucker, *supra* note 13, at 1114 (discussing ease of stealing intangible property, increased employee access to trade secrets, greater opportunities to gain knowledge of trade secrets through changing jobs, and advances in communications); Erin M. Davis, Comment, *The Doctrine of Respondeat Superior: An Application to Employers' Liability for the Computer or Internet Crimes Committed by Their Employees*, 12 ALB. L.J. SCI. & TECH. 683, 688 (2002) (observing that "computer technology in the workplace creates a unique opportunity for employees to engage in activities that are contrary to their employer's interests and business goals"); Mark Ishman, Comment, *Computer Crimes and the Respondeat Superior Doctrine: Employers Beware*, 6 B.U. J. SCI. & TECH. L. 6, ¶ 6 (2000) (describing ease of emailing documents, business strategies and other information); Stephen Labaton, *Downturn and Shift in Population Feed Boom in White-Collar Crime*, N.Y. TIMES, June 2, 2002, at A1 (discussing increased education level of society as reason for increase in trade secret theft, fraud and white collar crime over other crime: "The take is better and the punishment is generally less"); Moore, *supra* note 11, at 3A.

20. Toren, *supra* note 19, at 61 n.7; Richmond, *supra* note 13, at B11F (describing former employees' acts of revenge, including theft of trade secrets and quoting internet security expert: "Golden parachutes and promises of recommendations that companies often barter for graceful exits—and swift escorts to the door—aren't always enough . . . . 'We're seeing what former employees are trying to do right after they've signed the release and collected the severance.'" (quoting Tom Noonan, Chief Executive, Internet Security Systems)).

21. Ted Brindis & Dennis K. Berman, *Three Charged in Lucent Software Theft—Suspects Allegedly Planned to Sell Internet Data Software for Voice Data in China*, WALL ST. J., May 4, 2001, at A3 (describing Lucent employees' formation of their own company, joint venture with Chinese telecom, and theft of Lucent's PathStar system software blueprints, worth "hundreds of millions" of dollars, in hopes of becoming "Cisco of China").

take, disclose or use their former employers' trade secrets and confidential or proprietary information.

In some cases, the new employer is involved in or aware of the employee's misappropriation of the former employer's information, or later ratifies the employee's misconduct,<sup>22</sup> giving rise to a host of liabilities that are not the subject of this article. However, in many other instances, the new employer is unaware of the employee's misconduct and may have explicitly prohibited such activity. Even in cases in which the new employer did not intentionally engage in, promote, or even know about, the theft or use of the former employer's trade secrets, the new employer might still be held liable for the employee's actions under various theories of recovery, including the common law theory of respondeat superior or vicarious liability.<sup>23</sup>

Masters have long been held responsible for their servants' actions, even those actions the master has forbidden.<sup>24</sup> In early

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22. *Tennant Co. v. Advance Mach. Co.*, 355 N.W.2d 720, 724 (Minn. Ct. App. 1984) (quoting *Hale v. Farmers Ins. Exch.*, 42 Cal. Ct. App.3d 681, 692-93 (1974)).

Anything which convincingly shows the intention of the principal to adopt or approve the act in question is sufficient. It may also be shown by implication . . . "where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus done in his name . . . else he will be bound by the act as having ratified it by implication."

*Id.*

23. See Joel M. Androphy et al., *General Corporate Criminal Liability*, 60 TEX. B.J. 121, 126-28 (1997) (stating that employer may be held liable even if employee acted contrary to corporate policy or instructions); John E. Davidson, *Reconciling the Tension Between Employer Liability and Employer Privacy*, 8 GEO. MASON U. CIV. RTS. L.J., 145, 180 (1998) (recognizing trend to hold innocent employer liable for employee's wrongful activities).

24. Oliver Wendell Holmes, Jr., *Agency*, 4 HARV. L. REV. 345, 348 (1891); see also Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale To Blackstone*, 45 EMORY L.J. 437, 463 (1996) (noting "incorporation into the common law of the doctrine of the vicarious liability of employers for harm caused by negligent acts of their servants (respondeat superior)").

This development was also a contribution of Lord Holt, who imported it into the common law chiefly from maritime law, which was then understood as part of the law of nations. See *Boson v. Sandford*, 91 Eng. Rep. 382 (1691), a maritime case brought by owners of cargo against the owners of a ship for damage done to the cargo while it was under the supervision of the ship's master. The owners of the ship disavowed liability, because they had not personally undertaken to ship the goods, but Lord Holt held that 'whoever employs another is answerable for

times, the family or mercantile household included servants, often chosen when young and remaining until death. In this context, the household or business was regarded as a unit, and the act of any member of the unit was the responsibility of its head.<sup>25</sup> From its Roman origins to the early English incarnations, the theory of respondeat superior, meaning literally “let the superior reply,” was typically invoked to hold the master responsible only for those acts of his servant that were commanded by him, or that were negligently performed by the servant in furtherance of the master’s endeavors.<sup>26</sup> However, around 1700, the English common law expanded the legal theory of vicarious liability for the unauthorized and even forbidden acts of the servant as they were incidental to, or foreseeable in light of, the nature of the servant’s work.<sup>27</sup> This

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him, and undertakes for his care to all that make use of him.’

*Id.* at 463 n.50. Similarly, countries have been held responsible for their citizen’s unlawful acts. Under the laws of Marseilles and other jurisdictions if a foreign citizen stole from a citizen of that jurisdiction, the thief’s government and its other citizens were held responsible for the theft. *See* HALLAM, *supra* note 3, at 63-64.

25. *See* RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a (1958) (discussing history of agency law).

26. Laura L. Hirschfeld, *Legal Drugs? Not Without Legal Reform: The Impact of Drug Legalization on Employers Under Current Theories of Enterprise Liability*, 7 CORNELL J. L. & PUB. POL’Y 757, 760 (1998); *see also id.* at 780 n.70 (citing Holmes, *supra* note 24, at 355 (finding a basis for the concept of respondeat superior in English law as far back as the Norman Conquest)); John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 335 (1894) (observing “[w]e are safe in concluding that by the end of the 1200s . . . the master could pretty generally exonerate himself by pleading that he had not commanded or consented to the act . . .”) (citation omitted).

27. *See* Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1746 (1996) (describing series of opinions, mostly by Justice Holt, that adopted vicarious liability and noting that none of these cases involved personal injury) (citing *Boson v. Sandford*, 87 Eng. Rep. 212 (1689); *Hern v. Nichols*, 91 Eng. Rep. 256 (1709); *Lane v. Cotton*, 88 Eng. Rep. 853 (1701); *Jones v. Hart*, 91 Eng. Rep. 382 (1698); *Turberville v. Stampe*, 91 Eng. Rep. 1072 (1697)). Professor Schwartz continues to describe the doctrine’s rocky start:

In any event, employer vicarious liability, having been accepted in England in the early 1700s, was then accepted by American courts in the early 1800s. Still, there were some hesitations. For example, the doctrine was rejected, at least at first, in New Hampshire. Also, when courts faced the issue of the employer’s vicarious liability to an injured employee, the courts, in adopting the fellow-servant rule, gave the vicarious liability doctrine a distinctly narrow interpretation. Furthermore, over time a number of leading American analysts expressed doubts about vicarious liability.

*Id.* at 1746-47 (citations omitted).



development caused great apprehension among English scholars and jurists since there was little precedent in English, Roman, or even Germanic law for imposing liability on one who had no legal or moral fault in the action. But the rationale that the master and servant were “one person” prevailed.<sup>28</sup>

The twentieth century ushered in new approaches to vicarious liability law that were based primarily on economic policies that many scholars have questioned and that some have characterized as grounded in nineteenth century socialist and communist philosophies,<sup>29</sup> reliance on dicta and misinterpretations of

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28. See Hirschfeld, *supra* note 26, at 781 n.72 (citing Holmes, *supra* note 24, at 350 (arguing that this particular justification arose from the imposition of liability on the head of the household for the acts of a slave or wife, both of which were considered possessions, or chattels, of the master, and not free persons)); see also Wigmore, *supra* note 26, at 317 (stating “[t]he doer of a deed was responsible whether he acted innocently or inadvertently, because he was the doer . . . the owner of an animal, the master of a slave, was responsible because he was associated with it as owner, as master.”).

29. See Hirschfeld, *supra* note 26, at 785; see also *id.* at 785-90 (discussing evolution of “deep pocket” or “long purse” justification for vicarious liability and its socialistic roots and criticizing disregard of precedent). Professor Hirschfeld observes the notion that because the employer can pay, the employer should pay, has trumped all other justifications according to the socialist theories that underlie the twentieth century American law of vicarious liability. *Id.* at 790. Hirschfeld examines the socialistic rhetoric of, among others, Professor Warren Seavey:

[A]lthough it is in conformity with the spirit of our times to believe that if one is successful enough either to operate a business or to employ servants, in addition to the income taxes taking off the upper layers of soft living, he should pay for the misfortunes caused others by his business or household. This, of itself, may not be a sufficiently strong reason. . . . To-day, however, we realize that the loss from accident usually falls upon the community as a whole . . . . The business enterprise, until it becomes insolvent, can shift losses imposed upon it because of harm to third persons to the consumers who ultimately pay . . . . It is this which is leading to the extension of absolute liability.

*Id.* at 790 (quoting Warren A. Seavey, *Speculations as to “Respondeat Superior,”* in HAR. LEGAL ESSAYS 433 (1934)). Furthermore, “Professor Laski grounded his . . . justifications for respondeat superior in the popular socialist philosophy of his day, proclaiming a ‘social interpretation of negligence’ and a ‘frankly communal application of the law,’ with the ‘promotion of social solidarity’ as its end.” *Id.* at 786 (citing Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 112 (1916)). Professor Laski also stated:

[T]he employer is himself no more a public servant . . . . If that employer is himself compelled to bear the burden of his servant’s torts even when he himself is personally without fault, it is because in a social distribution of profit and loss, the balance of least disturbance seems thereby best obtained.

*Id.* at 787-88 (citing Laski, *supra*, at 112).

precedent.<sup>30</sup> Despite the fact that the Industrial Revolution shattered the old master-servant model and introduced the modern concept of “employment,”<sup>31</sup> the vicarious liability doctrine is alive and well today, albeit with updated justifications discussed in further detail below.

Minnesota and other jurisdictions have previously considered employer liability for its employee’s theft of trade secrets,<sup>32</sup> but in

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30. See Hirschfeld, *supra* note 26, at 788 n.109 (citing Professor Thomas Baty); Rhett B. Franklin, Comment, *Pouring New Wine into an Old Bottle: A Recommendation for Determining Liability of an Employer Under Respondeat Superior*, 39 S.D. L. REV. 570, 574 n.34 (1994) (stating that modern phase of the doctrine of respondeat superior stems from the dicta of Lord Holt). Professor Hirschfeld stated:

In his book entitled *Vicarious Liability*, Professor Thomas Baty argues that the two English cases most often cited for the origin of the “modern” notion of respondeat superior—*Turberville v. Stampe*, 91 Eng. Rep. 1072 (1697), and *Hern v. Nichols*, 91 Eng. Rep. 256 (1709)—were misinterpreted. THOMAS BATY, *VICARIOUS LIABILITY* 21-22 (1916). Baty maintains that *Turberville v. Stampe* was not a respondeat superior case at all, but a case of absolute liability—the non-delegable duty to safely maintain the use of fire on one’s premises. See *id.* at 19-20. He also points out that *Hern v. Nichols* sounded not in tort, but in contract, and that the buyer of nonconforming goods in that case would have had recourse against the seller in any event. See *id.* at 11-12. Baty insists that later judges relied not upon the actual principles of law in those cases, but upon Lord Holt’s dicta: “These two cases of contract and of absolute public duty are irrelevant . . . . What one would like to know is the precise process by which Holt’s dicta acquired the force of law between, say, 1698 and 1725.” *Id.* at 28. Having established that to his satisfaction, Baty concludes that respondeat superior is “a principle dubious in origin and unjust in operation . . .” and that “it will, I think, be clear to most students that the doctrine of the employer’s responsibility was due to no considered theory of civil liability, and to no survival of early mediaeval notions, but was derived from an inconsiderate use of precedents and a blind reliance on the slightest word of an eminent judge.” *Id.* at 29. Evidently it was not as clear to everyone else as it was to Baty, and he ultimately lost the argument—at least for the time being.

Hirschfeld, *supra* note 26, at 788 n.109.

31. See Richard R. Carlson, *Why The Law Still Can’t Tell an Employee When It Sees One and How It Ought To Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 303-04 (2001) (discussing Blackstone’s commentaries on master-servant relationship, evolution of employment relationship and Industrial Revolution) (citing MATTHEW W. FINKEN ET AL., *LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE* 3-10 (2d ed. 1996)); Hirschfeld, *supra* note 26, at 781.

32. See, e.g., *Kasner v. Gage*, 281 Minn. 149, 149, 161 N.W.2d 40, 41 (1968) (considering vicarious liability claim for agent’s misappropriation of competitor’s business records); *Newport News Indus. v. Dynamic Testing, Inc.*, 130 F. Supp.2d 745, 753-54 (E.D. Va. 2001) (holding that under Virginia Uniform Trade Secrets Act, new employer could be liable for employee’s wrongful disclosure of former employer’s trade secrets under theory of respondeat superior); *Cont’l Data Sys.*,

*Hagen v. Burmeister & Associates, Inc.*,<sup>33</sup> the Minnesota Supreme Court evaluated for the first time vicarious liability for violation of the Minnesota Uniform Trade Secret Act. This article discusses the evolution of the two bodies of law, misappropriation of trade secrets and vicarious liability involved in *Hagen*, and how the Minnesota Supreme Court approached these issues.

## II. CIVIL MISAPPROPRIATION OF TRADE SECRETS

### A. Introduction

Trade secrets and other information have become very valuable assets, and many businesses attempt to protect their confidential information by requiring employees, business partners and other third parties to sign nondisclosure and non-competition agreements. The beauty of the nondisclosure agreement lies in the fact that the parties define the information covered and agree on the restrictions on use and disclosure of this information.<sup>34</sup> Similarly, the parties agree on the time, scope and geographical restrictions in a non-competition agreement. If the receiving party breaches its obligations under the confidentiality or non-competition agreement, the disclosing party has a breach of contract claim. Many commentators believe that these types of agreements protect trade secrets far better than the common law of trade secrets.<sup>35</sup>

Prior to 1860, breach of contract—assuming a contract existed—was the only basis of recovery for wrongful use or disclosure of secret information.<sup>36</sup> “Trade secret law” is distinct

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*Inc. v. Exxon Corp.*, 638 F.Supp. 432, 442-43 (E.D.Pa. 1986) (considering in vicarious liability action whether software program misappropriated by former employee constituted protectable trade secret); *Chanay v. Chittenden*, 563 P.2d 287, 294 (Ariz. 1977) (observing possibility of new employer’s liability for new secretary’s misappropriation of former employer’s trade secrets if committed in the course of employment).

33. 633 N.W.2d 497 (Minn. 2001).

34. However, courts may not always enforce such agreements according to their terms. Bone, *supra* note 4, at 244.

35. Patrick Garry, *The Relationship between Employment Agreements and Trade Secret Litigation in Minnesota: The Evolution of Trade Secret Law from Cherne to Electro-Craft*, 11 WM. MITCHELL L. REV. 501, 525 (1985); Bone, *supra* note 4, at 301-02.

36. Bone, *supra* note 4, at 251-52.

Prior to 1860, courts simply dealt with specific legal issues in the course of deciding suits involving express agreements not to use or disclose

from contract law.<sup>37</sup> Simply put, trade secret law recognizes that regardless of whether a confidentiality agreement exists, certain information that rises to the level of “trade secrets” is property and theft of that property may result in civil (or criminal) liability.<sup>38</sup> However, the burden of proving the elements of a trade secret claim is much higher than enforcing a valid confidentiality or non-compete agreement. This section deals with the tort of trade secret theft, rather than contract law, as it applies to trade secrets.

Trade secret law evolved as an embodiment of natural principals of property.<sup>39</sup> The public policies underlying trade secret laws today are: (1) the maintenance of commercial morality; (2) the encouragement of invention and innovation; and (3) the protection of the fundamental right of privacy of the trade secret owner.<sup>40</sup>

Generally, two elements must be satisfied in order to establish a trade secret infringement claim: (1) the information qualifies as a “trade secret,” and (2) the defendant wrongfully obtained, used or disclosed the information—whether by breach of confidence, theft, bribery, misrepresentation or other improper means.<sup>41</sup> Courts have long struggled with determining whether a certain piece of information qualifies as a trade secret or should be treated as a

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secret information. These issues included whether courts of equity had jurisdiction to grant injunctive relief (they did), and whether agreements not to use or disclose were void as unlawful restraints on trade (they were not). All these issues were decided on the basis of established legal principles, though they were decided with some difficulty due to the intangible nature of the new subject matter. No court tried to expound a general theory, but by the middle of the nineteenth century, there were enough suggestions in the opinions for a general theory to emerge.

*Id.* (citations omitted).

37. *Id.* at 244.

38. *See id.* at 245.

39. *Id.* at 253-54 (describing evolution of trade secret law). The development of trade secret law and its historical rationales are not the topic of this article, as they are covered in excellent detail elsewhere. *See id.* at 252-60.

40. 1 MELVIN F. JAGER, TRADE SECRETS LAW § 1.05, at 1-15 (1997); *see also* Bone, *supra* note 4, at 261-83 (analyzing various policy arguments for trade secret law, including increasing incentives to create and reducing the level of private investment in discovering and protecting secrets as well as the transactions costs associated with value-enhancing transfers); Tucker, *supra* note 13, at 1121 (describing reduction in incentives for innovative behavior as effect of economic espionage).

41. *Jostens, Inc. v. Nat'l Computer Sys., Inc.*, 318 N.W.2d 691, 701 (Minn. 1982).

matter of general knowledge.<sup>42</sup> Both the Restatement of Torts and the Uniform Trade Secrets Act emerged to provide uniform guidelines for determining protectable trade secret status. The First Restatement of Torts<sup>43</sup> reduced the conflicting and unwieldy body of precedent down to a fairly clear definition and set of liability rules.<sup>44</sup> Later the Uniform Trade Secrets Act ("UTSA")<sup>45</sup> emerged, and several states, including Minnesota, enacted their versions of this act. Minnesota adopted its version of the UTSA on August 1, 1980.<sup>46</sup> Minnesota was the first state to do so, but others soon followed.<sup>47</sup> Most recently, the American Law Institute's Third Restatement of Unfair Competition has jumped into the fray and attempted to codify trade secret doctrine.<sup>48</sup>

*B. Minnesota Trade Secret Law Before the Minnesota Uniform Trade Secrets Act*

The common law of trade secrets in Minnesota prior to adoption of the Minnesota Uniform Trade Secrets Act ("MUTSA") was defined primarily by two cases, *Cherne Industrial, Inc. v. Grounds & Associates, Inc.*<sup>49</sup> and *Jostens, Inc. v. National Computer Systems*.<sup>50</sup> In *Cherne*, the Minnesota Supreme Court developed a definition of "trade secret," basically adopting the four-part test of the Restatement of Torts section 757. To be a trade secret the information must: (1) not be generally known or readily ascertainable; (2) provide a competitive advantage; (3) have been developed at plaintiff's expense; and (4) be the subject of plaintiff's intent to keep it confidential.<sup>51</sup>

42. Alois Valerian Gross, Annotation, *What is "Trade Secret" so as to Render Actionable Under State Law Its Use or Disclosure by Former Employee*, 59 A.L.R.4th 641 § 2(a) (1988).

43. RESTATEMENT (FIRST) OF TORTS (1939).

44. Bone, *supra* note 4, at 247.

45. UNIF. TRADE SECRETS ACT, 14 U.L.A. 433 (1985). The National Conference of Commissioners on Uniform Laws drafted the Act, and the American Bar Association approved it in 1979. Bone, *supra* note 4, at 247 n.18.

46. MINN. STAT. §§ 325C.01-.08 (2001).

47. See MINN. STAT. ANN. § 325C, Refs & Annos (2002 Electronic Update) (indicating that Louisiana, Kansas, Arkansas, Washington, Idaho, Delaware and Indiana adopted versions in the following 2 years, with a total of 44 jurisdictions having adopted UTSA in 2002).

48. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 39-45 (1995).

49. 278 N.W.2d 81 (Minn. 1979).

50. 318 N.W.2d 691 (Minn. 1982).

51. *Cherne Indus., Inc. v. Grounds & Assoc., Inc.*, 278 N.W.2d 81, 90 (Minn. 1979). The *Cherne* court used this same definition to determine what constituted

In *Jostens*, the Minnesota Supreme Court applied a three-part test for establishing a cause of action for misappropriation of a trade secret: (1) a trade secret must exist based on the *Cherne* test; (2) the defendant must have acquired the information as a result of a confidential relationship; and (3) the defendant must have used or disclosed the trade secret.<sup>52</sup> In *Jostens*, the court found that the system at issue failed to meet two of the four requirements of the *Cherne* test for a trade secret: the system was readily ascertainable because it was not novel, and the plaintiff did not show an intent to keep the system secret.<sup>53</sup>

C. *The Minnesota Legal Landscape After Adoption of the Minnesota Uniform Trade Secrets Act*

As stated above, in 1980, Minnesota adopted the MUTSA, which is basically similar to the *Cherne* and *Jostens* tests. Among other things,<sup>54</sup> the MUTSA provided statutory definitions for “trade secret,”<sup>55</sup> “misappropriation”<sup>56</sup> and “improper means.”<sup>57</sup>

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“confidential information” for purposes of the plaintiff’s contract claim. *Id.* at 89-90.

52. *Jostens, Inc. v. Nat’l Computer Sys.*, 318 N.W.2d 691, 701-02 (Minn. 1982) (citing three-prong test in *Eutectic Welding Alloys Corp. v. West*, 281 Minn. 13, 18, 160 N.W.2d 566, 570 (1968)).

53. *Id.* at 698-701.

54. The MUTSA also provides for money damages, injunctive relief, punitive damages and attorneys’ fee in certain cases. MINN. STAT. §§ 325C.02-325C.04 (2001).

55. MINN. STAT. § 325C.01 subd. 5 (2001).

“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.

The existence of a trade secret is not negated merely because an employee or other person has acquired the trade secret without express or specific notice that it is a trade secret if, under all the circumstances, the employee or other person knows or has reason to know that the owner intends or expects the secrecy of the type of information comprising the trade secret to be maintained.

*Id.*

56. MINN. STAT. § 325C.01 subd. 3 (2001).

“Misappropriation” means:

The MUTSA was intended to carry forward, explain and clarify the existing Minnesota common law, not replace it. The MUTSA itself states that it displaces *conflicting* Minnesota law by providing civil remedies for misappropriation of a trade secret.<sup>58</sup> The act further explicitly states that it does not affect “(1) contractual remedies whether or not based upon misappropriation of a trade secret; (2) 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.”<sup>59</sup>

In 1983, in *Electro-Craft Corp. v. Controlled Motion, Inc.*, the Minnesota Supreme Court applied the MUTSA to a case involving allegations that former employees of the plaintiff, a specialized motor manufacturer, misappropriated the plaintiff's trade secrets for use in starting up their own company to compete with the plaintiff.<sup>60</sup> All of the accused employees had signed confidentiality agreements when they were hired, but not non-compete agreements.<sup>61</sup>

(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 the discloser's or user's 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 the discloser's or user's 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.

*Id.*

57. MINN. STAT. § 325C.01 subd. 2 (2001). “‘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.” *Id.*

58. MINN. STAT. § 325C.07(a).

59. MINN. STAT. § 325C.07(b).

60. *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 893-96 (Minn. 1983).

61. *Id.* at 895.

The *Electro-Craft* court emphasized that the existing common law regarding trade secret misappropriation still applied, except to the extent it was modified by the MUTSA.<sup>62</sup> In order to establish a claim, the plaintiff must show (1) the existence of a “trade secret,” and (2) “misappropriation” of that trade secret.<sup>63</sup> This is basically the *Jostens* test with the second and third elements (wrongful acquisition and use/disclosure) combined and enhanced.

The court first considered whether a trade secret existed. It looked to the MUTSA definition and broke it down into three mandatory components: (1) whether the information was not generally known to and not readily ascertainable by proper means by other persons; (2) whether the information had some independent economic value; and (3) whether reasonable efforts had been made to maintain its secrecy.<sup>64</sup> The *Electro-Craft* court found that the first two requirements of the “trade secret” definition were present,<sup>65</sup> but that the plaintiff failed to establish the third requirement, secrecy.<sup>66</sup>

The court provided guidance with respect to each of these components of the MUTSA trade secret definition. First, the system satisfied the “not generally known or readily ascertainable” requirement because it was a unique combination of features that could not be readily reverse engineered.<sup>67</sup> The complexity and detail of the data affected ascertainability.<sup>68</sup> Also, novelty is not a requirement to the same extent as it is with patents, but some novelty is required.<sup>69</sup> The court noted that the law of trade secrets does not protect talent or expertise, only secret information.<sup>70</sup>

Next, the court interpreted the “independent economic value” requirement as analogous to the common law “competitive advantage” requirement.<sup>71</sup> The court observed that this does not require that the owner of the trade secret be the only one in the market because several developers of the same information, for example, may have trade secrets in that information.<sup>72</sup> Rather, this

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62. *Id.* at 898.

63. *Id.* at 897.

64. *Id.* at 899-901.

65. *Id.*

66. *Id.* at 903.

67. *Id.* at 899.

68. *Id.*

69. *Id.*

70. *Id.* at 900.

71. *Id.*

72. *Id.*



component can be satisfied by a showing that an outsider would gain a valuable share of the market by obtaining that information.<sup>73</sup> This element can also be established by evidence that the owner would lose value if the outsider, armed with the owner's information, could enter the market—thereby cutting into the owner's market share—“without a substantial development expense.”<sup>74</sup>

Last, the court explained that a showing of actual, continuing efforts to maintain secrecy, not just intent, is essential to satisfy the secrecy component.<sup>75</sup> It relied heavily on existing common law in its analysis and emphasized that it is critical that the owner itself continuously treated the information as confidential and that the owner informed its employees in no uncertain terms that the information at issue was secret and should not be disclosed.<sup>76</sup> The court considered the owner's physical security measures (efforts to protect information from discovery by outsiders, such as use of guards, locks, filing practices, disposal practices, etc.) and confidentiality procedures (efforts to inform employees and others of confidential nature of information, such as confidentiality notifications to employees and third parties, policies, confidentiality markings on documents, access, etc.) but noted that the level of measures required would vary on a case by case basis.<sup>77</sup> The court concluded that the owner's relaxed physical security measures and confidentiality measures failed to demonstrate any effort to maintain secrecy,<sup>78</sup> and therefore the information could not be considered a trade secret.<sup>79</sup>

The *Electro-Craft* court also considered the “misappropriation” requirement even though the court was not required to reach this

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73. *Id.*

74. *Id.* at 900-01.

75. *Id.* at 901.

76. *Id.* at 901-02.

77. *Id.*

78. *Id.* at 901-03. The court noted that some entrances were unlocked, the badge system had been abandoned, discarded drawings and plans for the motors were simply thrown away rather than destroyed, motor drawings were not kept in a central or locked location, none of the technical documents were marked “confidential” and drawings and other confidential information were sent to customers and vendors without special marking, the owner never issued a policy regarding what it considered confidential, and the public had been invited to observe the manufacturing process during an “open house.” *Id.* at 902-03.

79. *Id.* at 902.

issue.<sup>80</sup> Under the MUTSA, misappropriation requires some showing that the acquisition, disclosure or use of the information occurred through improper means.<sup>81</sup> In the employment context, this can be established by showing a duty to maintain secrecy.<sup>82</sup> The owner's failure to treat the information as confidential was fatal to its claim of a confidential relationship.<sup>83</sup> A confidentiality agreement with only vague secrecy language could not create this duty unless employees were put on notice that the specific information was secret and the employer treated it as such.<sup>84</sup>

The *Electro-Craft* decision set the standard for subsequent Minnesota trade secret cases with respect to interpreting the MUTSA and determining whether information rises to the level of a trade secret.<sup>85</sup>

### III. EMPLOYER VICARIOUS LIABILITY

#### A. Introduction

Oliver Wendell Holmes observed, “[i]n tort, masters are held answerable for conduct on the part of their servants, which they not only have not authorized, but have forbidden.”<sup>86</sup> The Restatement of Agency states, and the United States Supreme Court has confirmed, that a “master is subject to liability for the torts of his servants committed while acting in the scope of their employment.”<sup>87</sup> The general idea is that the employer should bear “the normal risks of doing business.”<sup>88</sup> Under the respondeat

80. *Id.* at 903.

81. MINN. STAT. § 325C.01 subd. 3 (2001).

82. *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 903 (Minn. 1983).

83. *Id.* at 901-03.

84. *Id.* at 903.

85. *See Strategic Directions Group, Inc. v. Bristol-Myers Squibb Co.*, 293 F.3d 1062, 1064 (8th Cir. 2002) (applying *Electro-Craft* three-part trade secret definition); *Widmark v. Northrup King Co.*, 530 N.W.2d 588, 592 (Minn. Ct. App. 1995) (applying the same formula).

86. Holmes, *supra* note 24, at 348. The fact that the employer took steps to forbid certain conduct may actually result in a higher likelihood that the employer will be held liable for such conduct. *See Doe v. United States*, 912 F. Supp. 193, 194 (E.D. Va. 1995) (acknowledging that tortious conduct is foreseeable if the employer has policies prohibiting such conduct).

87. RESTATEMENT (SECOND) OF AGENCY § 219 (1958); *Faragher v. City of Boca Raton*, 524 U.S. 775, 793 (1998).

88. *Faragher*, 524 U.S. at 776 (observing that proper inquiry was whether

superior doctrine, the employer “stands in the shoes” of its employees as long as the conduct in question falls within the limits of the “scope of employment.”<sup>89</sup>

However, the scope of employment has been defined broadly enough to hold employers vicariously liable for intentional torts that were in no sense motivated by any purpose to serve the employer.<sup>90</sup> In the often-cited case of *Ira S. Bushey & Sons, Inc. v. United States*, for example, the Second Circuit charged the Government with vicarious liability for the destruction caused by a sailor who returned to his ship from shore leave after a night of drinking, and in a drunken stupor, inexplicably opened valves that controlled water flow into the dry-dock where the ship was docked.<sup>91</sup> The resulting flood caused the ship to tilt, slide off its blocks and fall against the wall, partially sinking both the ship and the dry-dock.<sup>92</sup> The Government argued that it should not be held liable to the dry-dock owner because the sailor’s actions were not within the scope of his employment.<sup>93</sup> The Government relied on

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sexual harassment was one of the normal risks of doing business and rejecting mechanical application of Restatement factors).

89. Davis, *supra* note 19, at 689-90.

90. *Faragher*, 524 U.S. at 795-96.

Other examples of an expansive sense of scope of employment are readily found, *see, e.g.*, *Leonbruno v. Champlain Silk Mills*, 229 N. Y. 470, 128 N. E. 711 (1920) (opinion of Cardozo, J.) (employer was liable under worker’s compensation statute for eye injury sustained when employee threw an apple at another; the accident arose “in the course of employment” because such horseplay should be expected); *Carr v. Wm. C. Crowell Co.*, 28 Cal. 2d 652, 171 P.2d 5 (1946) (employer liable for actions of carpenter who attacked a co-employee with a hammer). Courts, in fact, have treated scope of employment generously enough to include sexual assaults. *See, e.g.*, *Primeaux v. United States*, 102 F.3d 1458, 1462-63 (CA8 1996) (federal police officer on limited duty sexually assaulted stranded motorist); *Mary M. v. Los Angeles*, 54 Cal. 3d 202, 216-21, 814 P.2d 1341, 1349-52 (1991) (en banc) (police officer raped motorist after placing her under arrest); *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344, 348-49 (Alaska 1990) (therapist had sexual relations with patient); *Turner v. State*, 494 So. 2d 1291, 1296 (La. App. 1986) (National Guard recruiting officer committed sexual battery during sham physical examinations); *Lyon v. Carey*, 533 F.2d 649, 655 (CA9 1976) (furniture deliveryman raped recipient of furniture); *Samuels v. Southern Baptist Hospital*, 594 So. 2d 571, 574 (La. App. 1992) (nursing assistant raped patient).

*Id.*

91. 398 F.2d 167, 168 (1968).

92. *Id.*

93. *Id.* at 170.

the Restatement (Second) of Agency section 228(1) test for scope of employment, which requires that the employee's actions are motivated, at least in part, by a desire to further the employer's purposes.<sup>94</sup> Judge Friendly acknowledged that the sailor's conduct was not remotely motivated by a purpose to serve his employer. However, Friendly rejected the motive test and instead relied on the "deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities." He thus imposed vicarious liability on the ground that the sailor's conduct "was not so 'unforeseeable' as to make it unfair to charge the Government with responsibility."<sup>95</sup>

*B. Rationales for Holding the Faultless Employer Liable for the Misdeeds of its Employees*

Since the Industrial Revolution and the shift in relationships between employers and employees, several rationales for the concept of employer vicarious liability have been advanced, producing erratic and inconsistent results.

Several scholars have provided thorough analyses of the development of vicarious liability and the various attempts to provide justifications from early English and American law through current day.<sup>96</sup> This article will not address these rationales in detail, but it is worth noting that many leading American analysts have expressed doubts about vicarious liability. Professor Thomas Baty, often quoted in vicarious liability analyses, reviewed the various rationales in 1916 and found them deficient and not based on precedent, concluding that vicarious liability can only be explained as a "deep pockets" practice, causing some to note that Baty concluded that the doctrine is perverse.<sup>97</sup>

Oliver Wendell Holmes was "explicit in rejecting the victim's need for compensation as an adequate reason for vicarious liability."<sup>98</sup> Holmes generally supported strict liability when the defendant did know or could have foreseen the risks, but he

94. *Id.*

95. *Id.* at 171.

96. *See, generally*, Hirschfeld, *supra* note 26; Schwartz, *supra* note 27.

97. Schwartz, *supra* note 27, at 1747 (citing Thomas Baty, VICARIOUS LIABILITY 146-54 (1916)); *see also* Hirschfeld, *supra* note 26, at 788 n.109.

98. Schwartz, *supra* note 27, at 1748 n.50 (citing Holmes, *supra* note 24, at 357).

argued vigorously against liability when the defendant's conduct turned out to create unforeseeable risks:

Holmes remained hostile to most employer vicarious liability. According to Holmes, the doctrine marked a triumph of logic over common sense. Common sense, in his view, is "opposed to making one man pay for another man's wrong." The "logic" that Holmes had in mind was a perverse logic: the law's eagerness to take to a logical extreme a legal fiction—drawn from history—that equates the employer and the employee.<sup>99</sup>

Rationales in the vein of "liability without fault makes it unnecessary to prove negligence, an often difficult task" and "principals benefit from agents' wrongful acts, even in cases where neither the principal nor society know it"<sup>100</sup> seem untenable today.

The current rationales fall into two primary categories: fairness justifications and economic justifications. Some popular fairness rationales are:

- (1) Employer should, in fairness, bear the resulting costs of doing business.<sup>101</sup>
- (2) An unjust result would occur if an employer were allowed to gain from the honest and intelligent acts of its employees and yet not be responsible for the wrongful acts of those under its employ, direction and for its benefit.<sup>102</sup>
- (3) Employer should, in fairness, bear the resulting costs of misconduct that arose from or was in some way related to the employee's essential duties.<sup>103</sup>
- (4) Employer should, in fairness, bear the resulting costs

99. *Id.* at 1747-48 (citing Holmes, *supra* note 24, at 345-46 and Oliver Wendell Holmes, *Agency*, 5 HARV. L. REV. 1, 14 (1891)).

100. Hirschfeld, *supra* note 26, at 789 (summarizing Professor Seavey's defenses for expansion of respondeat superior doctrine and citing Seavey, *supra* note 29, at 147, 149).

101. *Petro-Tech, Inc. v. W. Co. of N. Am.*, 824 F.2d 1349, 1358 n.10 (3d Cir. 1987).

102. *See id.* at 1358 (explaining rationale for employer vicarious liability).

103. *See, e.g., Samuels v. S. Baptist Hosp.*, 594 So. 2d 571, 574 (La. Ct. App. 1992) (stating tortious conduct was "reasonably incidental" to the performance of the nursing assistant's duties in caring for a "helpless" patient in a "locked environment"). This doctrine is based in a "deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities." *Ira S. Bushey & Sons, Inc. v. U.S.*, 398 F.2d 167, 171 (2nd Cir. 1968).

of its employee's acts that were foreseeable.<sup>104</sup>

Popular economic rationales include:

- (1) Self-regulation is more efficient than government regulation,<sup>105</sup> at least during the time of service. The master can control the activities of the servant, and the natural conclusion is that responsibility for the harm should rest with the party in control.<sup>106</sup>
- (2) The employer should have a financial incentive to control the servant and to maintain close watch.<sup>107</sup> Related to this is the concept that vicarious liability promotes better hiring and oversight by employers and gives employers strong incentives to shrewdly select and supervise employees.<sup>108</sup>
- (3) The public policy of risk sharing—corporations are deep pockets, providing another source from which a damaged party may recover damages.<sup>109</sup> An injured plaintiff might not recover if only the employee was held liable.<sup>110</sup>
- (4) General distrust of corporate power.<sup>111</sup>

104. See *Ira S. Bushey & Sons*, 398 F.2d at 171-72.

105. Davis, *supra* note 19, at 688 (citing Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1574 (1990)).

106. RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a (1958).

It is true that normally one in control of tangible things is not liable without fault. But in the law of master and servant the use of the fiction that "the act of the servant is the act of the master" has made it seem fair to subject the non-faulty employer to liability for the negligent and other faulty conduct of his servants.

*Id.*

107. See *Lange v. Nat'l Biscuit Co.*, 297 Minn. 399, 403, 211 N.W.2d 783, 785 (1973).

108. See *id.* (observing that "[K]nowing that he is responsible, [employer] will be alert to prevent the occurrence of such injuries."); Schwartz, *supra* note 27, at 1758.

109. See *Lange*, 297 Minn. at 403, 211 N.W.2d at 785 (stating risk-sharing justification for respondeat superior: Employer can and should ensure against such contingencies, or "by adjusting his prices so that his patrons must bear part, if not all, of the burden of insurance. In this way, losses are spread and the shock of the accident is dispersed."); Davis, *supra* note 19, at 688; Bradley J. Haight, *Civil RICO Section 1962(c): Vicarious Liability and Arguments for Expanding its Scope and Elements*, CIV. RICO LITIG. REP. (May 1999), at 11.

110. See *Lange*, 297 Minn. at 403, 211 N.W.2d at 785; Davis, *supra* note 19, at 688; Haight, *supra* note 109, at 11.

111. Davis, *supra* note 19, at 688 (citing Pitt & Groskaufmanis, *supra* note 105, at 1574).

(5) A desire to enforce corporate responsibility.<sup>112</sup>

As a result of these considerations, the courts of today have developed tests to provide guidance in predicting whether such a relation between the parties exists such that liability will be imposed upon the employer for the employee's conduct that is in the scope of employment.<sup>113</sup> Regardless of the rationales, the courts now agree that the conduct must be within the "scope of employment"; however, many of the courts have created legal fictions in order to shoehorn into this definition misconduct that significantly deviates from authorized duties.

### C. *Scope of Employment Test*

The Restatement (Second) of Agency reflects the traditional test to determine whether an employee's conduct falls within the "scope of employment":

- (1) Conduct of a servant is within the scope of employment if, but only if:
  - (a) it is of the kind he is employed to perform;
  - (b) it occurs substantially within the authorized time and space limits;
  - (c) it is actuated, at least in part, by a purpose to serve the master, and
  - (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.
- (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.<sup>114</sup>

The Restatement (Second) of Agency at section 219 also offers ten factors to be considered in deciding whether an employee's conduct has occurred within the scope of employment.<sup>115</sup>

112. *Tennant Co. v. Advance Mach. Co., Inc.*, 355 N.W.2d 720, 723 (Minn. Ct. App. 1984) (noting "[i]f we allow the master to be careless of his servants' torts we lose hold upon the most valuable check in the conduct of social life") (citing Laski, *supra* note 29, at 114).

113. RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a (1958).

114. *Id.* § 228.

115. *Id.* § 229(2).

The United States federal and state courts, however, have diverged on which agency principles to apply and how to apply them. The recent trend has been to expand the situations when an employer is liable while relaxing the requirements that the employee's acts be motivated by a purpose to serve or benefit the employer.<sup>116</sup> As stated above, many courts have defined scope of employment so broadly to include intentional torts that were in no sense motivated by any purpose to serve the employer. Minnesota has generally followed this trend, rejecting any notion that the employee's motivation for his conduct is relevant to the inquiry; but in recent years, Minnesota courts have started requiring proof of some element of foreseeability of the misconduct by the employer. In this legal landscape, the presence or absence of expert testimony as to "foreseeability" often determines the outcome of the case.

*D. Minnesota Case Law—the Importance of Foreseeability and Expert Testimony*

*1. Pre-Lange Landscape*

Prior to 1973, Minnesota courts generally followed the Restatement of Agency in determining the "scope of employment" and imposed liability where the plaintiff demonstrated that the employee's acts were motivated by a desire to further the employee's business.<sup>117</sup> For example, in *Kasner v. Gage* the Minnesota Supreme Court considered whether to hold a magazine sales company liable for its sales agent's misappropriation of a competitor's business records despite the fact that the company did not know of the unlawful acts or ratify them.<sup>118</sup> The court stated that an employer cannot be liable for the tortious or criminal acts

116. *Domar Ocean Transp. v. Indep. Ref. Co.*, 783 F.2d 1185, 1190 (5th Cir. 1986) (finding that "an act may be within the scope of employment although consciously criminal or tortious.") (quoting RESTATEMENT (SECOND) OF AGENCY § 231(1958)); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 (4th Cir. 1995) (stating that even "forbidden" or "consciously criminal or tortious" acts may still be within scope of employment).

117. *Lange v. Nat'l Biscuit Co.*, 297 Minn. 399, 401, 211 N.W.2d 783, 784 (1973).

118. 281 Minn. 149, 150, 161 N.W.2d 40, 41 (1968). In this case, the sales agent was a franchised dealer, rather than an employee, but in light of the nature of the relationship, the dealer was an "agent," and the same vicarious liability principles applied. *Id.* at 152 n.4, 161 N.W.2d at 42.



of an employee without a supported finding that the act “is ‘conduct . . . of the same general nature as that authorized, or incidental to the conduct authorized.’”<sup>119</sup> The *Kasner* court then proceeded to consider the various factors set forth in section 229(2) of Restatement (Second) of Agency<sup>120</sup> and a comment in the Restatement section 248:

A master who authorizes a servant to compete with others and to do such acts as appear to the servant to be reasonably necessary in order to make such competition effective is subject to liability to persons injured by tortious acts committed in the course of such competition if intended for the benefit of the principal or master and if not an extraordinary or outrageous method of conducting such competition.<sup>121</sup>

The *Kasner* court held, as a matter of law, that the sales agent’s conduct in misappropriating competitor’s records was not within the scope of any employment or agency relationship with his company.<sup>122</sup> The court explained that despite the highly competitive nature of the periodical business, there was no evidence that one of the methods of competition in that business contemplated theft of competitors’ business records.<sup>123</sup> In declining to impose liability on the master, the court concluded that the agent’s theft of records was not the result of any instruction or instrumentality furnished by the company and was “plainly a departure from the normal methods authorized for the accomplishment of its business objectives.”<sup>124</sup>

## 2. *The Lange Scope of Employment Test*

In 1973, in *Lange v. National Biscuit Co.*, a case involving the assault of a grocery store manager by a cookie salesman, the Minnesota Supreme Court acknowledged the “majority rule” at the time for determining “scope of employment” involved an inquiry into: (a) whether conduct was motivated by business or personal considerations; or (b) whether the conduct was contemplated by

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119. *Id.* at 151-52, 161 N.W.2d at 42 (quoting RESTATEMENT (SECOND) OF AGENCY § 229 (1958)).

120. *Id.* at 152, 161 N.W.2d at 42.

121. *Id.* at 152-153, 161 N.W.2d at 43.

122. *Id.* at 153, 161 N.W.2d at 43.

123. *Id.* at 154, 161 N.W.2d at 44.

124. *Id.* at 156, 161 N.W.2d at 44.

the employer or incident to employment.<sup>125</sup> However, the court rejected the notion that the employee's motivation, that is, whether or not in engaging in the misconduct the employee was motivated to further the employer's business, should be a consideration and abandoned the motivation test.<sup>126</sup>

The *Lange* court discussed several rationales for imposing vicarious liability on an employer that is not at fault. One justification is that the employer, knowing that it will now be liable for all torts of its servants, can obtain insurance to cover such liabilities or pass along the cost to its customers in the form of higher prices,<sup>127</sup> thus spreading the liability caused by the wrongdoer among numerous innocent third parties. The court also reasoned that the employer, knowing the expanse of his potential liability, would take action to prevent such occurrences in the future.<sup>128</sup>

The *Lange* court formulated the following two-prong test for employer vicarious liability for the intentional torts of its employees, a test still followed today:

- (1) the source of the conduct is related to the duties of the employee; and
- (2) the conduct occurs with work-related limits of time and place.<sup>129</sup>

The second prong, work-related time and place, was satisfied in *Lange*. The court determined that, as a matter of law, the assault was related to the salesman's work duties because the "precipitating cause of the initial argument concerned the employee's conduct of his work. In addition, the employee originally was motivated to become argumentative in furtherance of his employer's business."<sup>130</sup> The court noted that whether the argument at some point becomes personal and not related to the scope of employment was not pertinent.<sup>131</sup>

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125. 297 Minn. 399, 401, 211 N.W.2d 783, 784 (1973).

126. *Id.* at 402, 211 N.W.2d at 784.

127. *Id.* at 403, 211 N.W.2d at 785.

128. *Id.*

129. *Id.* at 404, 211 N.W.2d at 786. Although *Lange* did not expressly overrule *Kasner*, it overruled former decisions to the extent they were inconsistent with its ruling. *Id.* at 405, 211 N.W.2d at 786.

130. *Id.* at 404, 211 N.W.2d at 786.

131. *Id.* at 404, 211 N.W.2d at 785-76.

### 3. *Development of the Foreseeability Requirement*

After *Lange*, the Minnesota Supreme Court considered three employer vicarious liability cases, all involving sexual misconduct by the employee from which it developed the requirement that misconduct must at least be “foreseeable” in order to satisfy the first prong of the *Lange* scope of employment test.<sup>132</sup> An accepted method of proving foreseeability was expert testimony that the tortious conduct at issue was a “well-known [industry] hazard.”<sup>133</sup> In these cases, the decision often turned on whether the plaintiff had offered expert testimony on this issue.<sup>134</sup>

In *Marston v. Minneapolis Clinic of Psychiatry & Neurology*, the Minnesota Supreme Court considered the liability of a clinic for damages caused by an employee-psychologist who made unwelcome and improper sexual advances to patients during and immediately after therapy.<sup>135</sup> In cases brought by two patients and tried separately, the juries found that the clinic was not vicariously liable for the employee’s actions.<sup>136</sup> The court noted that the doctor “intentionally departed from the standards of his profession, not . . . to cause harm . . . but rather to confer a personal benefit on himself.”<sup>137</sup> Although the doctor’s conduct was entirely for his own benefit, a sharp departure from his normal duties, absolutely forbidden, totally unethical and of no therapeutic purpose, the court found persuasive testimony that sexual relations between a psychologist and a patient was “a well-known hazard and thus, to a degree, foreseeable and a risk of employment.”<sup>138</sup> The court concluded that it should be a question of fact whether the psychologist’s acts were “foreseeable, related to and connected with acts otherwise within the scope of employment.”<sup>139</sup>

In *P.L. v. Aubert*, the Minnesota Supreme Court assessed a

132. *Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 911 (Minn. 1999); *P.L. v. Aubert*, 545 N.W.2d 666, 668 (Minn. 1996); *Marston v. Minneapolis Clinic of Psychiatry and Neurology*, 329 N.W.2d 306, 311 (Minn. 1982).

133. *Fahrendorff*, 597 N.W.2d at 911; *Aubert*, 545 N.W.2d at 668; *Marston*, 329 N.W.2d at 311.

134. *Fahrendorff*, 597 N.W.2d at 911; *Aubert*, 545 N.W.2d at 668; *Marston*, 329 N.W.2d at 311.

135. 329 N.W.2d 306, 308 (Minn. 1982).

136. *Id.*

137. *Id.* at 310.

138. *Id.* at 311.

139. *Id.* The court reversed and remanded for new trials based on an error in the jury instructions. *Id.* at 311-12.

school district's liability for the misconduct of a teacher who engaged in sexual contact with a minor student, including sexual relations on the school premises and, at times, during class hours.<sup>140</sup> The court invoked the *Lange* two-prong scope of employment test, but distinguished the case from *Marston* based on the plaintiff's failure to provide an affidavit or other evidence showing foreseeability:

Here we find no evidence that such relationships between teacher and student are a "well-known hazard"; thus foreseeability is absent. While it is true that teachers have power and authority over students, no expert testimony or affidavits were presented regarding the potential for abuse of such power in these situations; thus there can be no implied foreseeability.<sup>141</sup>

The *Aubert* court also concluded that the teacher's actions with the student were unrelated to her duties as a teacher,<sup>142</sup> but provided little explanation of the basis for its determination. The court indicated that the first prong of the *Lange* test now required proof of relationship of the misconduct to the duties of the employee and foreseeability.<sup>143</sup> Interestingly, the *Aubert* court also found relevant the facts that the school district never observed the misconduct, took reasonable measures of supervision, and adequately considered the safety and welfare of students.<sup>144</sup> Although these factors may be relevant to a negligent supervision claim, they form no part of the *Lange* test for vicarious liability.

Next, in *Fahrendorff v. North Homes, Inc.*, the Minnesota Supreme Court considered a case in which a group home counselor sexually assaulted a minor resident of the home.<sup>145</sup> Taking a lesson from *Marston* and *Aubert*, the plaintiff in *Fahrendorff* duly provided expert testimony that "inappropriate sexual contact or abuse of power in these situations, although infrequent, is a well

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140. 545 N.W.2d 666, 666 (Minn. 1996).

141. *Id.* at 668. The Minnesota Supreme Court subsequently noted that since its decision in *Aubert*, the United States Supreme Court stated in a Title IX case that "[t]he number of reported cases involving sexual harassment of students in schools confirms that harassment unfortunately is an all too common aspect of the educational experience." *Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 911 n.1 (Minn. 1999) (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)).

142. *Aubert*, 545 N.W.2d at 668.

143. *Id.* at 667-68.

144. *Id.* at 668.

145. 597 N.W.2d 905, 905 (Minn. 1999).

known hazard in this field.”<sup>146</sup> The trial court granted summary judgment in favor of the group home, and the court of appeals affirmed, based on their determinations that (1) like the teacher in *Aubert*, the counselor was acting for his own gratification and therefore his conduct fell outside the scope of his employment, and (2) the affidavit was insufficient because it did not contain information specific to the counselor and did not conclude that this specific conduct by the counselor was foreseeable.<sup>147</sup>

The Minnesota Supreme Court disagreed. First, the *Fahrendorff* court concluded that a reasonable jury could find that the counselor’s sexual contact with the plaintiff was related to his employment duties, citing *Marston* for the proposition that an employee’s actions may still be within the scope of employment even though motivated by personal gratification and prohibited by the employer.<sup>148</sup> The court did not distinguish, however, the counselor’s conduct from the teacher’s conduct in *Aubert*. Second, the court found that even though the expert affidavit was somewhat conclusory and lacked specific examples, it was exactly what the court relied on in *Marston* and what was lacking in *Aubert*.; therefore it was sufficient to show foreseeability, at least enough to raise a question of fact to be determined by a jury.<sup>149</sup>

The *Fahrendorff* court also took the opportunity to clarify that the standard for “foreseeability” in vicarious liability cases is different than the standard used in negligence cases.<sup>150</sup> In the negligence context, “foreseeable” means “a level of probability which would lead a prudent person to take effective precautions”, whereas in the vicarious liability test, “foreseeability” merely means that “in the context of the particular enterprise an employee’s conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer’s business.”<sup>151</sup>

#### IV. *HAGEN V. BURMEISTER & ASSOCIATES, INC.*—EMPLOYER VICARIOUS LIABILITY FOR MISAPPROPRIATION OF TRADE SECRETS

Against this background, the Minnesota Supreme Court

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146. *Id.* at 909.

147. *Id.*

148. *Id.* at 911.

149. *Id.* at 911-12.

150. *Id.* at 912.

151. *Id.*

approached these two issues, trade secrets and vicarious liability, in *Hagen v. Burmeister & Associates, Inc.*<sup>152</sup> In *Hagen*, an employer sought review of the Minnesota Court of Appeals' decision that the employer was vicariously liable for its employee's theft of his former employer's trade secrets, either on the theory of breach of contract or the tort of misappropriation of trade secret.<sup>153</sup> The Minnesota Supreme Court (1) rejected the notion that vicarious liability is available for breach of contract;<sup>154</sup> (2) determined that the MUTSA and breach of contract theories of recovery are not mutually exclusive—an employer may still be vicariously liable for the intentional tort of trade secret theft even if the same conduct also constitutes breach of contract, for which the employer cannot be vicariously liable;<sup>155</sup> (3) confirmed that the proper test for vicarious liability is the *Lange* scope-of-employment test, with an emphasis on foreseeability of the misconduct;<sup>156</sup> (4) pointedly declined to address the court of appeals' conclusion that vicarious liability for violation of the MUTSA was possible and emphasized that its assumption that there is no legal prohibition to this proposition applied only to the *Hagen* case;<sup>157</sup> and (5) assuming this proposition, held that the plaintiff's failure to introduce evidence of either actual knowledge or foreseeability of the misconduct was fatal to its respondeat superior claim and reversed the court of appeals.<sup>158</sup>

In *Hagen*, the plaintiff, insurance agency Burmeister & Associates, Inc. ("Burmeister") purchased the assets of the Hagen Agency, Inc., which was owned by insurance agent Paul Hagen ("Hagen"). At the same time it hired Hagen, first as a consultant and later as an employee.<sup>159</sup> Hagen signed a confidentiality agreement and a non-compete agreement, in which Hagen agreed not to disclose Burmeister's policyholder information and not to sell or issue property or casualty insurance to Burmeister customers for a period of about ten years.<sup>160</sup>

Hagen subsequently resigned from Burmeister and went to

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152. 633 N.W.2d 497, 499 (Minn. 2001).

153. *Id.* at 499.

154. *Id.* at 503.

155. *Id.*

156. *Id.* at 504-05.

157. *Id.* at 504.

158. *Id.* at 505.

159. *Id.* at 499-500.

160. *Id.* at 500.

work for a competitor, American Agency, Inc. (“American”).<sup>161</sup> Burmeister reiterated its intent to enforce its rights with respect to its clients but stated that Hagen’s close friends and family members, representing about fifty people, could keep their business with Hagen.<sup>162</sup> Burmeister informed American of his non-compete and confidentiality agreements with Burmeister and provided some description of the exceptions Burmeister allowed. American understood that Hagen “had a good exit interview and that he was free to solicit some of the accounts . . . .”<sup>163</sup>

Hagen took customer information for about 1,000 Burmeister accounts and proceeded to send a solicitation letter on American stationery to 250 Burmeister accounts, representing about twenty to thirty percent of the accounts Hagen originally sold to Burmeister.<sup>164</sup> American was aware that Burmeister was sending out a letter, but was not aware of the number of letters sent or the recipients.<sup>165</sup> Burmeister complained to Hagen, prompting an action by Hagen seeking a declaratory judgment that Hagen could compete with Burmeister.<sup>166</sup> At this point, American learned about the controversy, contacted Burmeister, and agreed not to accept business from the customers at issue until the parties could meet to discuss the issue.<sup>167</sup> The parties then met and agreed to a joint letter to the customers at issue, stating that the customers “have a right to select the insurance agent of their choice.”<sup>168</sup> American believed the parties’ decision satisfactorily resolved the dispute and allowed Hagen to proceed with transferring business from some of the customers at issue.<sup>169</sup> Burmeister, on the other hand, apparently viewed the letter as merely damage control while it pursued its legal remedies.<sup>170</sup>

Burmeister asserted counterclaims against Hagen, including breach of contract, unjust enrichment and misappropriation of trade secrets.<sup>171</sup> Burmeister subsequently filed a third-party complaint against American for tortious interference with contract,

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161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 500-01.

170. *Id.* at 501.

171. *Id.*

which evolved into a respondeat superior claim.<sup>172</sup> American did not challenge Burmeister's change in recovery theories, so the court treated the respondeat superior claim as if it were pled.<sup>173</sup>

The trial court found Hagen liable for breach of contract and trade secret misappropriation as defined by the MUTSA. However, it held as a matter of law that American was not vicariously liable for Hagen's actions, reasoning that: (1) the MUTSA does not permit recovery against an employer when its employees misappropriate trade secrets; (2) the applicability of common law respondeat superior tort theory to trade secret misappropriation was not supported by law; and (3) even if respondeat superior were applicable, the claim failed because American "did not know, and had no reason to know" that Hagen's conduct was not permitted.<sup>174</sup>

Burmeister appealed the trial court's holding. In *Hagen I*, the court of appeals affirmed the trial court's decision with respect to the breach of contract claim, reasoning that the doctrine of respondeat superior applies only to tortious conduct committed by an employee, not to an employee's breach of contract in the absence of independent tortious conduct by the employer.<sup>175</sup> However, the court of appeals reversed with respect to the claim for vicarious liability for trade secret misappropriation, holding that an employer can be held liable for an employee's tort of trade secret misappropriation.<sup>176</sup> The court of appeals held that the common law remedy of vicarious liability for intentional torts should be applied to the misappropriation of trade secrets, as with any other tort.<sup>177</sup> The appellate court explained that although the MUTSA does not specifically provide for recovery against an employer for its employee's violation of the MUTSA, the MUTSA remedies are not exclusive, and the MUTSA does not preclude common law vicarious liability claims.<sup>178</sup> The court of appeals remanded the case

172. *Id.*

173. *Id.* (citing MINN. R. CIV. P. 15.02 and *T.W. Sommer Co. v. Modern Door & Lumber Co.*, 293 Minn. 264, 269, 198 N.W.2d 278, 281 (1972)).

174. *Id.* at 501.

175. *Hagen v. Burmeister & Assoc. Inc.*, No. C8-98-864, 1999 WL 31130, \*2-3 (Minn. Ct. App. Jan. 26, 1999).

176. *Id.* at \*4.

177. *Id.* Neither party sought review of the court of appeals' decision to apply the respondeat superior doctrine to trade secret misappropriation. *Id.*

178. *Id.* at \*3 (noting that MUTSA displaces only conflicting remedies). The MUTSA provides that it "displace[s] *conflicting* tort, restitutionary, and other law of this state providing civil remedies for misappropriation of trade secret." MINN. STAT. § 325C.07(a) (2001) (emphasis added).



for further findings as to whether Hagen's conduct fell within the scope of his employment with American, thus rendering American vicariously liable for Hagen's actions.<sup>179</sup>

On remand, American argued that Hagen's conduct fell outside the scope of his employment because it was not reasonably foreseeable that Hagen would misappropriate trade secrets.<sup>180</sup> The trial court agreed and granted summary judgment for American, explaining that American did not authorize or ratify Hagen's actions and no evidence demonstrated that the misappropriation of trade secrets is a well-known industry hazard.<sup>181</sup>

In *Hagen II*, the court of appeals again reversed, holding that Hagen was, in fact, acting within the scope of his employment when he misappropriated Burmeister's trade secrets.<sup>182</sup> The court of appeals stated that there are two vicarious liability tests, one established in *Kasner* and the other in *Lange*.<sup>183</sup> According to the court of appeals, the *Kasner* test applied to situations where the current employer authorized competition by the employee and the competition simply went too far, whereas the *Lange* test applied to other situations.<sup>184</sup> The court of appeals determined that Hagen was acting within the scope of his employment and that American was vicariously liable for the improper solicitations because American authorized the plan to make proper solicitations and assisted with that plan.<sup>185</sup> American appealed that decision.

As a preliminary matter, the Minnesota Supreme Court upheld the court of appeals' decision in *Hagen I* that vicarious liability is not available for breach of contract claims but rejected American's claim that vicarious liability for tortious trade secret misappropriation is not available where the underlying conduct is a breach of contract.<sup>186</sup> The supreme court noted that American did not appeal the court of appeals' decision to extend the doctrine of respondeat superior to trade secret misappropriation and, as a

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179. *Hagen*, No. C8-98-864, 1999 WL 31130, at \*4.

180. *Hagen v. Burmeister & Assoc., Inc.*, 633 N.W.2d 497, 502 (Minn. 2001).

181. *Id.*

182. *Hagen v. Am. Agency, Inc.*, 617 N.W.2d 799, 804-05 (Minn. Ct. App. 2000).

183. *Id.* at 802.

184. *Id.*

185. *Id.* at 804.

186. *Hagen v. Burmeister & Assoc. Inc.*, 633 N.W.2d 497, 500, 503 (Minn. 2001) (noting that American abandoned issue of whether client list was a "trade secret" as defined by MUTSA).

result, that legal conclusion was not at issue.<sup>187</sup> The supreme court declined to affirm this decision and pointed out throughout the opinion that it was only assuming for the limited purposes of the *Hagen* decision that vicarious liability could apply to an employee's MUTSA violation.<sup>188</sup>

The *Hagen* court then proceeded with its analysis of the respondeat superior doctrine and its application to the claim at issue. The court stated that the scope-of-employment test as clarified in *Lange* was the proper test, rather than the earlier test enunciated in *Kasner*, which the district court and court of appeals applied.<sup>189</sup> The proper test for employer liability for an employee's intentional tortious act involves a determination of (1) whether the tort was related to the employee's duties; and (2) whether the tort occurred within work-related limits of time and place.<sup>190</sup> Hagen's conduct clearly occurred within work-related time and place; the only question was whether his conduct was related to his duties as an American employee.

The court followed the *Fahrendorff* court's consideration of whether the employee's acts were "foreseeable, related to, and connected with the acts otherwise within the scope of his employment."<sup>191</sup> The court also relied on the recent line of Minnesota cases emphasizing the importance of the foreseeability factor in determining whether the first prong of the scope-of-employment test is satisfied.<sup>192</sup> The court stated that proof of foreseeability is crucial in order to satisfy the scope-of-employment test and explained that proof can be established in a number of ways, including showing that the type of tortious conduct involved is a well-known industry standard.<sup>193</sup> The court held that in the case at issue, Burmeister failed to prove or even raise a question of fact with respect to the foreseeability issue, which was fatal to its respondeat superior claim.<sup>194</sup> According to the court, American did not know or have reason to know that Hagen did not make appropriate arrangements with Burmeister regarding the letters to customers, and Burmeister failed to introduce any other evidence

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187. *Id.* at 503.

188. *Id.* at 503, 504.

189. *Id.* at 504.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 504-05.

194. *Id.* at 505.

of foreseeability, such as evidence demonstrating that the risk of employees misappropriating trade secrets is a well-known hazard in the insurance industry.<sup>195</sup>

It is clear that if Burmeister had introduced some expert testimony of misappropriation being a common hazard of the industry or some other showing of foreseeability, its claim may have survived.

#### V. MINNESOTA POST-*HAGEN* CASES

The Minnesota Court of Appeals applied *Hagen* in two subsequent cases. In *Wilson v. Stock Lumber, Inc.*, the plaintiff claimed a lumber company was vicariously liable for its driver's "road rage" assault on the plaintiff.<sup>196</sup> The court of appeals affirmed the trial court's decision to grant summary judgment for the employer based on the plaintiff's failure to produce evidence that the employee "could be expected to engage in assaultive conduct or that road rage is a well-known hazard in the delivery business."<sup>197</sup>

In *Boykin v. Perkins Family Restaurant*, the court considered a restaurant's liability for an employee's sexual harassment and battery of another employee on the job.<sup>198</sup> The trial court granted summary judgment in favor of the employer, concluding that the employee's misconduct was not foreseeable by the employer or otherwise related to or connected with acts within the scope of his employment.<sup>199</sup> The court of appeals reversed.<sup>200</sup> The court did not require expert testimony and instead determined that the fact that the employer had policies prohibiting sexual harassment, conducted sexual harassment training and posted a "no-touch" policy at the restaurant were all evidence of foreseeability of the employee's misconduct.<sup>201</sup>

According to the *Boykin* court's reasoning, all activities expressly prohibited by an employer, by definition, satisfy the "foreseeability" requirement because the employer must have anticipated the conduct in order to prohibit it.

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195. *Id.*

196. No. C3-01-623, 2001 WL 1182796, \*1 (Minn. Ct. App. Oct. 9, 2001).

197. *Id.* at \*14.

198. No. C9-01-1100, 2002 WL 4548, \*1 (Minn. Ct. App. Jan. 2, 2002).

199. *Id.* at \*3.

200. *Id.* at \*7.

201. *Id.* at \*4.

## VI. CONCLUSION

The continued expansion of vicarious liability theories has created a legal landscape in which employers are almost always held liable for their employees' actions, no matter how outrageous, deliberate, or insubordinate they are, unless the plaintiff fails to present an expert at trial.

The current policy imposes "foreseeability," and therefore liability in most cases, even where the employer has acted responsibly and forbidden the misconduct. One rationale for vicarious liability is to make employers more responsible. Yet a policy of endless liability discourages employers from acting responsibly because taking precautions does not prevent liability, and as the *Boykin* decision illustrates, could actually increase it.

Fairness is also ill-served. The employer that has no knowledge of or involvement in the misconduct and has taken every precaution to prevent it may still be held liable for an employee's gross misconduct outside the scope of the employer's business. The rationale that other select innocent parties who are unlucky enough to do business with either the employer, the employer's insurers, or the employer's customers, can help defray the costs also does not serve the goal of fairness.

In the context of trade secret theft by employees, the seemingly limitless expansion is especially frightening. Holding a cookie company responsible for its salesman's quarrel with a grocer seems relatively harmless. However, in an era of multi-million dollar trade-secret theft claims against employees by their former employers, an expanded vicarious liability policy could easily destroy an employer, resulting in harm to shareholders, as well as loss of jobs, innovation, and productivity. The original justifications for vicarious liability, fairness and economic goals, are not served by such unjust and economically disastrous consequences.