69278-0

69278-0

NO. 69278-0-I

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION I

Shumet Mekonen, Wondwossen Mersha, Tigabu Lakew, Habtamu Aboye, Yirga Belete, and Selamneh Ambaw,

Appellants / Cross-Respondents,

v.

Dessie Zewdu, Worku Asmare, Worku Melese, Bazazew Birhan, Motbayner Tebeje, Endale Andeno, Melaku Kebede, Nega Wondimagegn, Kassa Derar, Green Cab Taxi & Disabled Service Association LLC.

Respondents / Cross-Appellants.

Appeal from King County Superior Court
No. 10-2-36451-0 KNT

APPELLANTS' REPLY AND RESPONSE BRIEF

Thomas J. Seymour, #39629
Seymour Law Office, P.S.
1200 Fifth Ave. # 625
Seattle, WA 98101
Telephone: (206) 621-2003

ATTORNEY FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. STATEMENT OF FACTS

Respondents provide a somewhat one-sided presentation of the facts in their brief, mostly based on the testimony of the Respondents. Neither the facts in Respondents brief nor those presented here are findings of fact from the trial court. Respondents' presentation should be considered as simply re-argument of a story which the jury largely rejected. Appellants' present here some of the Appellants' testimony, a version largely accepted by the jury. Facts particular to specific arguments in this brief are presented in those sections.

Appellants were original members of Green Cab. The original members each made contributions of $75,000 in cash or cars to become members of the company. **RP 7/23/12**, p.33 (Mekonen testimony). One unit in the company equaled one license for a taxi. **Id.** p.40. Each of the founding members received two units, and thus two licenses. **Id.**

After initial delays related to contests of the award of the RFP, Green Cab began operations in 2008. As a result of the financial difficulties resulting from the delays, the company was not being run per the King County RFP, but more along the lines of a traditional cab company where the drivers owned their own cars and kept the money for themselves. **RP 7/23/13,** p.79:11-21.

Shumet Mekonen was not satisfied with this state of affairs and wanted to bring the company into line with the way it was supposed to

be run under the RFP. **RP 7/23/13** p.86:11-13. In January 2010 Respondent Zewdu became chairman of Green Cab and other Respondents were elected to the Board. **Id.**, pp.87-88. Mr.Mekonen felt they continued to run the company improperly. **Id**.

On September 4, 2012 Mr. Mekonen was elected to the board of Green Cab and was chairman at the time the Respondents held an election on September 25, 2010. **RP 7/24/13** p.90:14-16 Members of both Respondents and Appellants groups were elected to the board in that election. Mr. Mekonen was attempting to have all members renew their insurance in Green Cab. **RP 7/25/13** p.94:20-22. People were unhappy about this. **Id**.

Members of Respondents' group organized a second election for September 25, 2012. **RP 7/30/12**, p.27:7-9, where they elected a board more to their liking. Appellants disputed the validity of this election. Litigation between the two groups began in October, 2010. The parties continued to dispute who was in control of Green Cab and in December 2010 Respondents took control of the Green Cab offices with the help of the police. The police turned control over to Respondents because the lease had been taken out in the name of Dessie Belete, a member of Respondent's group. **RP 7/30/12** p.55-56. Respondents came into possession of all the records of the company as a result. **RP 7/24/12**, p.153:9-11.

Following the takeover of the Green Cab offices, the Respondents changed Green Cab's insurance company and insisted that Appellants change as well. **RP 7/25/13** p.142:7-10. In January 2011, Respondents took over the Green Cab dispatching account ("DDS") and excluded Appellants from the service. **RP 7/31/13**, p.93:11-16.

Respondents worked to get Appellants excluded from the most lucrative taxi stand in King County, which serviced the hotels and malls of downtown Bellevue. **RP 7/24/12** pp.27-29. They had been picking up fares out of that location since 2008. **Id.** Following a meeting in March 2011 between Respondent Kasa Derar, Appellant Mekonen and managers of the taxi stand, Appellants were excluded from the Bellevue location. **Id.**, p.36:16-20. In June 2011, Mr. Derar wrote a letter to the manager of the parking area, attaching a list of the Appellants' group, referring to them as irresponsible and inactive, and telling the manager that they had been terminated from Green Cab. **RP 7/24/12**, p.155; **Ex. 109**. Being excluded from the Bellevue location was crippling to Appellants. **RP 7/24/12**, p.39.

II. ARGUMENT IN REPLY

A. THE STANDARD OF REVIEW FOR THE TRIAL COURT'S FORCED SALE OF APPELLANTS' INTERESTS IN GREEN CAB IS *DE NOVO*.

Respondents don't contest that this court reviews trial court determinations based solely on documentary evidence *de novo*. Appellants' Opening Brief ("A.Br."). p. 10. They do not contest that the meaning of a contract is an issue of law, subject to de novo review. Id. Respondents do not contest that the trial court was not tasked with finding any facts, but was only to make injunctive rulings based on the jury's findings. This is indisputable on the record:

> MR. KOGUT [Counsel for Respondents]: Yes. And this has been a question that I've had throughout, Your Honor, which is basically the Court's equitable role for injunctive relief versus what the jury can
> decide. And so I've been trying to craft these instructions to elicit the facts that the Court would then need to make an injunctive ruling.
>
> JUDGE ANDRUS: Yeah, but because the plaintiffs have a right to a jury trial they have the right to in factual issues to be presented to the jury.
>
> MR. KOGUT: Yes.

RP 7/31/12 p.72:12-21

The trial court simply ruled based on the jury's determinations and the undisputed facts. **Id.**; **CP 421**. Respondents acknowledged this in their post-trial briefing, requesting the court to make conclusions of law, but no findings of fact. **CP 282**. All of these points indicate that the court should employ a de novo standard of review.

Respondents argue that the court's determinations are nevertheless subject to heightened protection on review for two reasons: (1) the court was granting injunctive relief by determining that Appellants had forfeited all their rights under the contract, determining which relief was appropriate under the contract, and determining the value of the LLC units held by respondents; and (2) the determination of the trial court is part of a judgment, and thus may be set aside only if it is irreconcilably inconsistent with the jury's verdicts. Both contentions are mistaken.

1. Characterizing the Court's Rulings as Injunctive Relief Does Not Establish Deference.

While Appellants dispute *infra* that the court's determination of their contract rights is properly characterized as injunctive relief, the abuse of discretion standard does not apply even if the court accepts that characterization. Where a trial court makes purely legal determinations in ruling on an injunction, the appellate court will review that issue just as it would review any other trial court decision

on an issue of law. Rabon v. City of Seattle, 135 Wn.2d 278, 286, 957 P.2d 621 (Wash. 1998). Where a trial court makes equitable determinations following a jury trial, the court is bound by the jury's rulings. Kolstad v. American Dental Ass'n, 108 F.3d 1431, 1440 (D.C. Cir. 1997).

An appellate court is not bound by a trial court's findings in ruling on an injunction if those findings are based entirely upon written and graphic material. In re Request of Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986). Of course the trial court here made no findings, but acted based on the undisputed facts and the jury's determinations. The court thus acted only upon written material.

The appellate court should review the trial court's decision to force the sale of Appellants' membership interests *de novo*.

2. Adjudication of a Breach of Contract Claim and Valuation of LLC Units are not Injunctive Relief.

By finding the Appellants to be in breach (or default) under the contract, determining the appropriate remedy, and making a determination of fact about the value of the Appellants' units to be awarded to plaintiffs, the court was adjudicating a contract claim, not fashioning injunctive relief.

3. The Court's Conclusions are Not Part of the Jury's Determinations and are not Presumed Consistent.

Respondents contend that the court's determinations on "injunctive relief" are part of the judgment, and therefore should be read harmoniously with the jury's special interrogatory responses, and should be reversed only when "an irreconcilable inconsistency exists" R.Br. p. 17. The case law cited by Respondents is not on point—they all address inconsistencies in a jury's interrogatory responses and/or general verdicts. They do NOT extend the rule to a court's determinations based on those rulings. See State v. Evans Engine and Equip. Co., Inc., 22 Wn.App. 202, 204, 589 P.2d 290 (1978) (Interpretation of allegedly inconsistent jury interrogatory answers; no injunctive or equitable relief involved); Van Cleve v. Betts, 16 Wn.App. 748, 757, 559 P.2d 1006 (1977) (No irreconcilable inconsistency in jury's responses to interrogatories on negligence; no injunctive or equitable relief involved).

In fact, the Evans Engine court and other authority establish that interpretation of a jury's verdict and interrogatories is a question of law. Evans Engine, at 205. When interpreting a jury's verdict, the court "is to view the verdict in light of the instructions and the record to see if the clear intent of the jury can be established." Meenach v. Triple E Meats, Inc., 39 Wn.App. 635, 639, 694 P.2d 1125 (1985). The question

is determining the intent of the jury to the extent interpretation is necessary. The appellate court is in an equally good position to make that determination. The authorities cited by Respondents do not support their argument and the court should review the forced sale of the Appellants' interests in Green Cab on a *de novo* basis.

B. THE COURT'S REQUIREMENT OF A FORCED SALE WAS IN ERROR.

As set forth above, the court was obligated to reach its determinations based on the jury's verdicts and interrogatory responses. No determination by the jury was adequate to base a determination that Appellants were required to sell their membership interests. The jury found that Appellants established each of their breach of contract claims and that every individual Respondent breached the contract. **CP 230-233** (Special Verdict Form B). The jury also found against Respondent Green Cab on its breach of contract claims. **CP 221** (Special Verdict Form C). The jury's verdicts, and the undisputed facts do not support the trial court's conclusions.

1. Respondents' Arguments About Special Verdict Form A Fail.

Respondents claim that the court's decision is consistent with the jury's verdict "because the jury's Special Verdict Form A shows that the jury, like the trial court, found that non-payment of weekly fees was a

default." RM, p.18. First, of course, the trial court made no findings and was bound by the jury's determinations. More importantly, the jury made no determination of default in Special Verdict Form A or anywhere else.

a. There are not Findings on Special Verdict Form A to Justify a Forced Sale.

"Special Verdict Form A – Validity of Elections", **CP 222-233**, does not include a finding of default, or even use the term. It does find that some unidentified members were not current in the payment of capital contributions. **Id.** It does not include a finding that any capital contributions were mandatory under paragraph 8.1(b)(ii) rather than voluntary under paragraph 8.1(b)(i). **Ex. 1**, pp.11-12. It doesn't determine if any of the Appellants, or anyone else, had become Defaulting Members under the Operating Agreement. Respondents never asked the court for such an interrogatory. **CP 222-25** (Special Verdict Form A).

b. Notice From Green Cab's Chairman to the Targeted Member is Required for A Forced Sale Under the Operating Agreement.

Under the Operating Agreement, a party may be in default indefinitely, as some members of the Respondents' group are, but becomes a "Defaulting Member" only after 10 days' written notice from the Chairman. **Ex. 1**, p.12, ¶8.1(c). Only a Defaulting Member is subject to the remedy of a forced sale. **Id.**

Respondents do not contest that no such notice was given, but dismiss the necessity of actually complying with the requirements of the Operating Agreement as futile, because Mr. Mekonen had "repudiated" his obligation to pay dues, "which operates to discharge Defendants from any obligation to perform a condition precedent". **R.Br.** p.28. This is contrary to the jury's verdicts. The jury, determined that Appellants, including Mr. Mekonen, did not owe any dues. Respondents must base their arguments on the jury's verdicts and interrogatory responses and the undisputed facts, not argumentative presentation of disputed facts and legal conclusions.

Moreover, Respondents' argument completely misses the point. Respondents' failure to comply with the formal notice provision is very important because until Green Cab took such action it had no right to take action against any member, whether in default or not. The requirements of notice under the agreement are formal, calling for personal delivery or certified or registered mail. **Ex. 1**, p.26, ¶16.1. Notice would have alerted Appellants that Respondents' considered the weekly fees and dues to be mandatory capital contributions and that Appellants needed to take action to protect their interests and investments, including potentially applying to the court for an injunction against Respondents while any dispute was litigated. Or in the current litigation, requiring the issue be submitted to the jury.

Because Respondents never provided such notice, Appellants had no reason to take any preventive measures.

Respondents also argue that this point is not significant because there "is no notice requirement applicable to improper withdrawal under Article 5.6, the other basis for invoking the buy-out remedy." R.Mem. p.29. This is wrong. Article 5.6(a) forbids a member from withdrawing as a Member prior to dissolution "without the written consent of all the other members". **Ex. 50**, p.3.[1] It contains no default provisions. Article 5.8 does provide for "Defaults and Remedies." **Id.**, p.5. Specifically, Article 5.8(b)(iii) authorizes Green Cab to "[r]emove the defaulting Member upon a purchase of his or her membership interest ***pursuant to Section 8.1(c)(v)***." **Id.**, (emphasis added). Section 8.1(c)(v) of the Operating Agreement authorizes action against Defaulting Members. **Id.** p. 13. As that term is defined in the agreement, no member is a Defaulting Member unless they have received written notice of default and failed to cure for 10 days. **Id.**, pp. 12, Definitions Page 1. So removal of a member as a result of a "default" under Article 5.6 requires notice as surely as under Article 8.1.

---

[1] Article 5.6(b) identifies the events upon which a person shall cease to be a member. It is undisputed that none of those events occurred in this case.

2. The Forced Sales were Contrary to the Jury's Verdicts on Breach of Contract.

In order to uphold appellants' breach of contract claim, the jury necessarily determined that appellants were NOT in material breach of the contract, and had performed or offered to perform their obligations under the contract. **RP 7/31/12**, pp. 114:5-116:3, Jury Instruction #14. The Respondents, to the contrary, were found to be in material breach of the Operating Agreement.

Respondents invent a distinction between a default on a contract and a breach of the contract. They argue that a default sufficient to cause appellants to lose all their interest in the company could exist even though there were not sufficient facts to establish a claim for breach of contract. This stands the law on its head. Equity abhors a forfeiture, and conditions of forfeiture must be substantial before they are enforced in equity. Esmesiu v. Hseieh, 20 Wn.App. 455, 460, 580 P.2d 1105 (1978). The requirement of a substantial condition for forfeiture mirrors the jury's finding that Appellants had not materially breached the contract, but Respondents had.

Respondents argue that because the elements of a breach of contract and injunctive relief are not the same, the court was free to make any determination it wished as to the injunctive relief. This ignores that the court needed to base its injunctive relief on the jury's determinations.

Neither the jury nor the undisputed facts provide such a basis. The jury determined that Respondents had materially breached the contract, but Appellants had not. **CP 230-233** (Special Verdict Form B); **CP 221** (Special Verdict Form C). The court was not free to ignore these determinations in fashioning injunctive relief. Because of the similarity of the requirement of substantial conditions of forfeiture and material breach, and the determination of the jury that there was no material breach by Appellants, but there was by Respondents, the court erred by requiring Appellants to sell their licenses.

C. THE COURT'S DETERMINATION WAS NOT APPROPRIATE EVEN AS INJUNCTIVE RELIEF.

The trial court's requirement that Appellants forfeit their membership interests in Green Cab is inappropriate even characterized as injunctive relief. The compulsion to sell membership units required Appellants to take specific acts, and thus would constitute a mandatory injunction. A mandatory injunction is a harsh remedy, and a court will not resort to it unless the right to it is clear. McInnes v. Kennell, 47 Wn.2d 29, 38, 215 P.2d 407 (1950). The jury determined that Appellants had no obligation to make any payments to Green Cab, capital contribution or otherwise, that Appellants had not breached the operating agreement, but all the individual respondents had. There were abundant facts to support the jury's determinations, including the

exclusion of Appellants from the DDS and Bellevue taxi stands. It is hard to understand how Respondents had any right to force Appellants to forfeit their interests in Green Cab, much less a clear right.

An injunction should not be more onerous than is necessary. If the operation of a business is determined to be a nuisance, the decree should be so framed as to restrain its operation until the offense condition has been corrected, rather than to abate the business unconditionally. State ex rel. Tollefson v. Mitchell, 25 Wn.2d 476, 481 171 P.2d 245 (1946) (Trial court's finding of public nuisance from operation of a piggery, and finding that it was impossible to conduct it without creating offensive orders set aside to provide opportunity to take remedial measures). The court ordered several injunctive steps to insure Appellants would no long hold themselves out as the management of Green Cab. The court ordered that Appellants not represent themselves as a part of Green Cab management, open bank accounts in Green Cabs name, initiate or settle litigation, cease filing documents with Washington State agencies. **CP 341-42**.

These restraints prevent Appellants from taking actions inconsistent with the jury's determination that they were not the proper management of Green Cab. There is no reason to conclude that these would not have sufficiently protected Green Cab and respondents from the harms which had flowed from the dispute over management of

Green Cab. Enforcing the determination of the jury was appropriate. The court making its own determination of breach, and compelling the forfeiture of important property rights was both improper and far more onerous than necessary.

Further, a party seeking seeking an injunction must establish that they have an inadequate remedy at law. Kucera v. State Department of Transportation, 140 Wn.2d 200, 210, 995 P.2d 63 (2000). Respondents' clearly have an adequate remedy at law. If in fact at any point in the future Appellants actually are in default of their obligations under the Operating Agreement, Respondents could take the necessary steps to declare them Defaulting Members and commence that process. Ex. 1, ¶8If the Appellants disputed any part of the process, Respondents could enforce their rights at law on a contract claim, subject of course, to the Appellants rights to contest their determinations and compliance with the Operating Agreement.

D. THE COURT ERRED IN DETERMINING THE VALUE OF APPELLANTS' MEMBERSHIP INTERESTS.

Respondents provide no reasonable basis for the court to uphold the court's use of the undisclosed, conclusory, hearsay testimony of the alleged accountant for Green Cab.

1. RCW Chapter 7.40 Does Not Apply to Permanent Injunctions.

Respondents take no contention with the fact that the right to cross-examine witnesses is guaranteed by the Constitution, as pointed out in Appellants' Opening Brief, p.17. They can only point to a statute which they propose excuses them from actually having their expert witness testify. While there is little authority interpreting RCW Chapter 7.40, the provisions appear to be directed at TROs and temporary injunctions, rather than permanent injunctions as part of a judgment after a full hearing on the merits.

RCW 7.40.20 identifies the grounds for the issuance of injunctions under RCW Chapter 7.40, which grounds are limited to possible harm "during the litigation". The statute also specifies the timing, providing that injunctions may be granted any time from the commencement of the proceeding or afterwards, but "***before*** judgment in that proceeding." RCW 7.40.040. This interpretation appears to be proper on its face, but it has the added benefit of bringing the statute in compliance with the Constitution.

2. There is No Good Cause for the Late-Disclosed Evidence.

Respondents argue that the court has discretion to allow late-disclosed evidence for good cause, citing Hough v. Stockbridge, 152 Wn.App. 328, 339, 216 P.3d 1077 (2012). They entirely fail to establish

what the good cause might have been in this case, or otherwise address the failings of the declaration as evidence. In Stockbridge, the trial court allowed late-disclosed experts to testify where they had testified as experts in a previous trial, had been disclosed as witnesses in this trial, without proper disclosure of their opinions, but testified consistently with their testimony in the previous trial. Because of those circumstances, the opposing side knew what they would say, and therefore the court found no abuse of discretion. Stockbridge, 152 Wn.App. at 340.

Here there was no previous trial and no disclosure whatsoever of the witness. While a previous accountant had been disclosed as a possible witness, there was no disclosure of any opinion with respect to valuation of unit shares or of book value of the company, or meaningful disclosure of any opinion whatsoever. **CP 935-941** (Witness List and Evidence List/Green Cab). The inadequate disclosure of a different accountant cannot cure the late disclosure of another.

3. There is no Justification Proffered for the Conclusory Nature of the Declaration.

Respondents also wholly fail to address the conclusory nature of the declaration and lack of foundation. The argument that foundation was established by the fact that the individual identified himself as Green Cab's accountant entirely misunderstands the holding of the

court in Safeco Insurance Co. v. McGrath, 63 Wn.App. 170, 177, 817 P.2d 861 (1991), cited in Appellants' Opening Brief. In Safeco, the fact that the expert was a doctor did not establish adequate foundation. Meaningful disclosure of the foundation of the opinion was required.

Respondents claim that Appellants could have conducted discovery because they were put on notice of the claim in the pleadings is little more than a fiction. They cite a reference to the default provision of the operating agreement in paragraph 4B.7 of their counterclaims, arguing that put Appellants on notice of Respondents' desire to have the sale of Appellants' determined by the court. R.Br., p. 31. What they neglect to point out is that paragraph 4B.7 is in their breach of contract claim, the default alleged is lack of payment, and the very next paragraph requests an award of damages. **CP 929**. Many counts later in their pleading they make specific requests for injunctive relief, not one of which has anything to do with a sale of Appellants' interests or valuation of that interest. **CP 932**.

III. ARGUMENT ON RESPONDENTS' CROSS-APPEAL

A. THE STANDARDS OF REVIEW.

Respondents identify 3 issues on appeal, alleging: (1) the verdicts in favor of plaintiffs are all based on lost profits and should be vacated for insufficient evidence; (2) it was an abuse of discretion for

the court to not sanction Appellant Mekonen by barring his claims for personal damages; and (3) Plaintiffs lacked standing to sue for breach of contract. Respondents do not address them, but the standards for overturning a jury's verdict are well-established.

1. *The Standard of Review of a Jury Verdict is Substantial Evidence.*

"Overturning a jury verdict is appropriate only when it is clearly unsupported by substantial evidence." Burnside v. Simpson Paper Co., 123 Wash.2d 93, 107-08, 864 P.2d 937 (1994). "This court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it. The inferences to be drawn from the evidence are for the jury and not for this court. The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered." Id. at 108, (citations omitted). "In reviewing the evidence, the appellate court does not reweigh the evidence, draw its own inferences, or substitute its judgment for the jury." Westmark Development Corp. v. City of Burien, 140 Wn.App. 540, 557, 166 P.3d 813 (Div. 1 2007).

2. *The Standard of Review for Determinations on Sanctions and the Admissibility of Evidence is Abuse of Discretion.*

"A trial court has 'broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion.'" Cox v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000) (quoting Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997)).

B. RESPONDENTS THEORIES ON LOST PROFITS ARE NOT SOUND.

1 *Respondents Mischaracterize Appellants Damages As Lost Profits.*

Respondents have characterized all damages awarded to Appellants under their breach of contract and tortious interference claims as lost profits. R.Mem. at pp. 35-41. That does not reflect the law, the facts of the case or the jury instructions.

The court instructed the jury as to the proper measure of damages for the different claims. Not one of them tasked the jury with determining "lost profits". Respondents made no request for a jury instruction with respect to lost profits and/or the new business rule. **RP 7/31/12,** pp.100-134. With respect to the contractual damages, the jury was instructed that "you should determine the sum of money that will put that party in as good a position as that party would have been in if

both parties had performed all of their promises under the contract." **RP** 7/31/12 p. 123:21-25. This accurately states the law. With respect to the tortious interference (and fiduciary duty) claims, the jury was instructed to determine the amount of money "that will reasonably and fairly compensate plaintiffs for such damages as you find were proximately caused by the defendants." **Id.**, p. 127:9-12; 131:14-17.

Whether the proper measure of damages is lost profits, lost rents, or lost revenues, costs needlessly incurred, or some other measure depends on the facts of the case, and the jury determined the proper amount of those damages for Mr. Mekonen's claim. Where a party has incurred all costs anticipated in performance of a contract, but is deprived of the revenue, the proper measure of damages is not lost profits, but lost revenue. Here the Appellants incurred many of the costs—car payments, insurance—but were deprived of revenue, incurred additional costs and the loss of property as a result of Respondents misconduct.

Indeed, the fiduciary duty claim was not based on the operation of a business or lost profits at all. As the court noted in her August 24, 2012 Memorandum Decision, Wondwossen Mersha's breach of fiduciary duty claim was based on the conduct of Respondents Zewdu & Melese in buying Mr. Mersha's car after it had been repossessed, refusing to sell it back to Mr. Mersha at the price they paid, or transfer the license

to him, then selling the car with its license to another individual for $14,000 more than they had paid to recover it. **RP 7/25/12** p. 102:17-103:5. Respondents have not appealed from the determination of a breach of fiduciary duty and have not addressed these damages in their argument or claim for relief.

The law provides certain rules to address certainty in the award of damages. Gaasland Co., v. Hyak Lumber & Millwork, Inc., 42 Wn.2d 705, 711-713, 257 P.2d 784 (1953). The concern is more with the fact of damage rather than with the extent or amount of damage. Id. at 712. In the main, the doctrine usually applies to bar recovery for loss of profits in a business which has not been established. Id.

> [I]t is now generally held that the uncertainty which prevents recovery is uncertainty as to the fact of damage and not as to its amount and that where it is certain that damage has resulted mere uncertainty as to the amount will not preclude the right of recovery.
> ...
> The damages must be susceptible of ascertainment...by reference to some definite standard, such as market value, established experience, or direct inference from known circumstances.

Id. at 712-13. The testimony of Appellants and their knowledge of the industry in which they have worked for years provided a standard of established experience that the jury was free to accept or reject, as well as direct inferences from known circumstances. For example, Appellants testified that Respondents worked to get them excluded

from the most lucrative taxi stand, located in Bellevue. **RP 7/24/12**, p. 27 – 36. Respondents themselves testified as to how lucrative the stand was. The jury was free to accept that testimony, both as evidence of breach of contract and breach of fiduciary duty. It establishes the fact of damages without much question.

The testimony also established that Respondents breached the contract by excluding the Appellants from the DDS system (i.e., not dispatching calls to Appellants), not covering them with insurance, keeping the plaintiffs' credit card receipts from fares, and excluding plaintiffs from the company office and business. The fact of damage from each of these is hard to deny. The rules of lost profits are meant to address speculative future profits. For example in B&B Farms, the court refused to allow damages for lost profits based on a crop that took two years to produce fruit, where the land on which it would have been planted had been subject to extensive flooding, make recovery too speculative.

2. *The "New Business" Rule Does Not Apply.*

Respondents argue that the plaintiffs' recovery on the breach of contract and breach of fiduciary duty claims should be barred by the "New Business Rule", which is the main circumstance in which the rule about uncertainty in damages applies. Gaasland 42 Wn.2d at 712. The

new business rule is the proposition that where "a plaintiff is conducting a new business with labor, manufacturing and marketing costs unknown, prospective profits cannot be awarded".[2] Larsen v. Walton Plywood Company, 65 Wn.2d 1, 16, 390 P.2d 677 (1964).

The rule is not applicable here, because appellants were not seeking compensation for prospective profits on a speculative future venture, but for damages from business already conducted. Moreover, this was not a new venture, but rather a business in which Appellants had experience, and had been in actual operation for years. Mr. Mersha, for example, had started driving a cab in 2001. **RP 7/25/12** p.74:15-17. Mr. Belete had been driving a cab more than 10 years at the time of trial. **RP** 7/26/12 p.27:16-17. Shumet Mekonen started driving taxis in 1990 and drove taxis for about 20 years. **RP 7/19/12** pp.52:24-53:20. This specific business had been up and running since 2008, and Respondents were in possession of all records from that time frame until January 2011. **RP 7/24/12**, p.153:9-11 (Mekonen testimony). The expenses were known and testified to, as cited above. Any lack of evidence with respect to records before then was the responsibility of Respondents.

3. *The Best Evidence of Lost Profits was Provided.*

---

[2] Respondents did not request an instruction on the new business rule.

Respondents argue that Appellants' claims should be rejected because the "best evidence" was not provided, because Appellants did not provide trip sheets or tax returns. The testimony of Appellants was that all Green Cab records were taken over by Respondents when Respondents called the police and had Appellants ejected from the Green Cab premises in December 2010. **RP 7/24/12**, p.153:9-11. The Respondents cross-examined the Appellants with respect to the lack of additional documentation, and his revenue and expenses and found the testimony of Mr. Mekonen. Beginning in January, 2011, Respondents excluded Appellants from the DDS system, which would have provided information about Appellants' trips. This lack of documentation at least was caused by Respondents' own actions.

Respondents claim repeatedly that Mekonen only provided evidence of lost revenue, and not lost profits. This is factually wrong. Mekonen testified as to the monthly expenses as well as well as revenue, identifying expenses of $15,050 a month, including $8,000.00 a month for dispatchers and employees, $900.00 a month in rent, $3,600.00 a month for DDS services for the time period of 2009 to 2010. **RP** 7/25/12, pp.30:25-31:11, 45:9-11. He also testified as to the expenses for drivers individually, of daily costs of $85 for their cars, and $18 dollars for insurance. **Id.**, p.69:9-18. There is no basis for describing

these as pro forma, they are based on his personal knowledge and experience.

4. *Respondents Misconstrue Mr. Mekonen's Testimony.*

Respondents argue that Mr. Mekonen provided only "pro forma" evidence of lost revenue and expenses, but they take this testimony out of context. He did testify as to the plans and expectations of the business in preparing the RFP. *See, e.g.*, **RP 7/23/12**, p.58 (anticipated costs of $3500 rent, dispatchers at $264/day). He also testified as to the actual experience and the actual revenue and costs of the business. *See, e.g.* **RP 7/25/12** pp. 30-31. ($3,600/mo DDS; $900/mo rent; $8,000/mo dispatchers and employees); **RP 7/24/12,** p.40 (revenue of at least $300 a day, every day, when operating out of Bellevue taxi stand).

Respondents claim that Mekonen provided pro forma numbers for gross revenue without any deduction for expenses. R.Mem. pp.37-38. This is simply wrong, as cited above.

Mr. Belete testified that he was making approximately $300 a day, working 24 days a month. **RP 7/26/12** p. 28:20-29:3. After the disputed elections, Mr. Belete was able to make only $30 or $40 a day. **RP 7/26/12** p.30:3-17.

Mr. Mekonen testified not only as to damages from the loss of his car, but also to his revenue and expenses following the rupture with

Respondents. He testified that his revenue was $600 a month, and his expenses for insurance ($400) and gas ($200) were $600. **RP 7/25/12**, p.110. Previously he had been making $140 a day net profit. Id., p.119.

Both Mr. Mekonen and Mr. Mersha testified as to the losses they experienced as a result of Respondents repossessing their cars, with the licenses, then selling them to new members of Green Cab. Mr. Mersha's testimony was that the loss of the license was the most damaging part of such transactions. **RP 7/25/12**, p.102:8-14.

C. THE COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO SANCTION APPELLANT MEKONEN MORE SEVERELY.

Respondents complain that the court was compelled to disallow any claim for personal damages by Shumet Mekonen and had no discretion to allow the claim. They argue this is because Mr. Mekonen disclaimed any personal interest in the lawsuit and because they claim Mr. Mekonen had been less than cooperative in discovery. That misconstrues Mr. Mekonen's testimony at the deposition. The court's rulings as to admissibility and sanctions were well within the trial court's broad discretion.

"A trial court has 'broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of

discretion.'" Spangler, 141 Wn.2d at 439 (quoting Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997)).

English is not the first language of any of the parties to this proceeding, and the court was well within its rights to consider that in considering Mr. Mekonen's testimony:

Q. But I'm asking you because you have said that you've been damaged in this lawsuit. You've been damaged because –
A. I haven't damage the loss.
Q. You have been?
A. I haven't.
Q. You have had no damages in this lawsuit?
A. I have damage myself by somebody else, but I haven't damage to anybody.
Q. Okay. But the damages you've received, the alleged damage you've received, part of it is for lost wages, right?
A. Yeah.
...
Q. You haven't asked for any damages in this lawsuit?
A. I haven't ask any money.
Q. So, on Page 7, Paragraph 16 of your counterclaims you valued the transferred business opportunity in excess of $189,000 in monthly revenues.
Does that sound familiar?
A. That we lost.
Q. How do you know you lost that much money?
A. When we stopped not doing any business.

Mekonen Dep. p.63:21-64:15. He also testified that Green Cab had been damaged in an amount exceeding $961,000 and explained that figure was based on estimates. The attorney for respondents didn't ask any further questions as to how the damages were calculated. Id., p65:12-66:11. So while his deposition may have been confusing at times,

he more than clearly stated that he had been damaged by the Respondents, identified ways he had been damaged, and identified how much had been lost by the Appellants as a whole.

Respondents depict the court as initially blocking any claim for personal damages and then changing her mind, but that's not accurate. The court's ruling, both initially and at the time of Respondents later objection, allowed Mr. Mekonen to testify consistently with his deposition testimony. **RP 7/19/12** p.70:22-25. At trial he testified as to his share of the revenue he had testified to in his deposition and related costs. The court was well within its allowing this testimony.

The court also determined the request for sanctions correctly. A trial court has broad discretion in imposing discovery sanctions under CR 37(b). Magana v. Hyundai Motor America, 167 Wn.2d 570, 582, 220 P.3d 191 (2009). The Washington courts have identified the purposes of sanctions orders as "to deter, to punish, to compensate and to educate." *Hyundai Motor*, 167 Wn.2d at 582, *citing* Washington State Physicians Insurance Exchange & Association v. Fisons Corporation, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993). As a general rule, the court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction. Washington State Physicians, 122 Wn.2d at 355-356. The court limited the testimony of Mr. Mekonen to

that consistent with his testimony at deposition. There was no further need for sanctions, and she correctly fashioned the least severe remedy.

D. APPELLANTS DID NOT LACK STANDING.

Respondents argue that Appellants lacked standing to bring a claim for breach of contract for respondents violating terms of the RFP. This is wrong for two reasons. First, Plaintiffs alleged that the defendants orally promised the plaintiffs that they would comply with the terms of King County RFP and award letter, as the court instructed the jury. RP 7/31/12 p.106:4-6. Respondents have not appealed any aspect of the alleged oral agreement or instruction with respect to it. Also, the Operating Agreement made the Green Cab board of directors responsible for "ensuring compliance with King County and other governmental rules, regulations and requirements applicable to the Company or its business." **Ex. 50**, p.6, Article 6.1(c)(i). The RFP was a contract with King County and obviously imposed many requirements on Green Cab. Unjustified failure to comply with that provision constitutes a breach, just like the unjustified failure to comply with any other provision. Finally, Appellants also did not bring a derivative claim on behalf of Green Cab against anyone. Respondents have fundamentally misunderstood the nature of Appellants' breach of

contract claim on these points and provide no basis for overturning the jury's verdicts.[3]

IV. CONCLUSION

For the reasons stated above, Appellants respectfully request that the Court (1) reverse the trial court's judgment directing the sale of Appellants LLC interests; (2) or alternatively remand for discovery and a new trial on valuation of those interests; (3) affirm the judgments for Appellants.

Respectfully submitted,

SEYMOUR LAW OFFICE, P.S.

Thomas J. Seymour, WSBA # 39629
Attorney for Appellants

[3] Respondents assert that the jury rejected the claims of breach of contract by all plaintiffs except Shumet Mekonen. R.Mem. p.49. This is not accurate. The jury found in favor of all plaintiffs with respect to their breach of contract claims, but only awarded damages to Mr. Mekonen. **CP 230-33** (Special Verdict Form B).

CERTIFICATE OF SERVICE

I certify that on the 9th day of August, 2013, I caused a true and correct copy of this Opening Brief to be served on the following by electronic transmission and U.S. Mail:

Michael T. Schein
mschein@sullivanlawfirm.org
Sullivan Law Firm
701 Fifth Ave., Ste. 4600
Seattle, WA 98104

B. Bradford Kogut
Interweb4@comcast.net
215 NE 40th St. Ste C-3
Seattle, WA 98105

By: _____
Thomas J. Seymour