

ORIGINAL

FILED

No. 311961

MAY 31 2013

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

KASSA INSURANCE SERVICES, INC., a Washington
Corporation,

Respondent,

v.

RYAN PUGH AND JANE DOE PUGH, a Marital Community
and RJC/CAK, INC., a Washington Corporation,

Appellants.

OPENING BRIEF OF
APPELLANT PUGH

John F. Bury
Timothy R. Fischer
Murphy, Bantz & Bury, PLLC
818 W. Riverside, Suite 631
Spokane, WA 99201
Attorneys for Appellant Ryan Pugh

TABLE OF CONTENTS

| | Page |
|--|------|
| I. INTRODUCTION..... | 1 |
| II. ASSIGNMENTS OF ERROR | 2 |
| A. Findings of Fact | 2 |
| B. Conclusions of Law | 2 |
| III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR | 3 |
| IV. STATEMENT OF THE CASE..... | 4 |
| V. STANDARD OF REVIEW | 7 |
| VI. ARGUMENT..... | 8 |
| A. <u>The Trial Court Erred in Holding That Prejudgment Interest Should be Awarded Against Defendants Pugh and the Damages Were Improperly Calculated.</u> | 8 |
| 1. Prejudgment Interest in Washington..... | 8 |
| B. <u>The Damages Were Improperly Calculated</u> | 10 |
| 1. The Misappropriation Award..... | 10 |
| 2. The Unjust Enrichment Award | 12 |
| C. <u>The Trial Court Erred in Holding That the Client Information Constituted Trade Secrets</u> | 13 |
| 1. Customer Lists a Trade Secrets, and the Trade Secrets Test in Washington..... | 13 |
| 2. Kassa Insurance’s “Free and Open” Disclosure of Certain Information, Compared to the Non-Accessible Protected Client File, Fails the Trade Secrets Standard | 16 |
| D. <u>The Trial Court erred in Holding That Ryan Pugh Willfully and Maliciously Misappropriated Trade Secrets</u> | 20 |

| | | |
|----|--|----|
| E. | <u>The Trial Court Erred in Deciding That the Pugh Marital Community Was Liable for the Intentional Tort Committed By Ryan Pugh</u> | 27 |
| F. | <u>The Trial Court erred in holding That the Affirmative Defense of Mitigation of Damages Was Not Applicable to Kassa Insurance Services, Inc.</u> | 32 |
| G. | <u>The Trial Court Erred When Awarding Attorney’s Fees to Kassa Insurance Services, Inc.</u> | 35 |
| | 1. Attorney Fees Attributable to the Claim Against Ryan Pugh Constitute Less Than 50% of Time Recorded..... | 36 |
| | a. Axtell and Briggs’ Time Records. | 37 |
| | b. Dunn and Black Time Records. | 40 |
| | c. Washington Law Regarding Award of Attorney’s Fees | 41 |
| | 2. Failure to File a Cost Bill..... | 43 |
| | CONCLUSIONS..... | 45 |

TABLE OF AUTHORITIES

| | Page |
|--|------------|
| Cases | |
| <i>Boeing Co., v. Sierracin Corp.</i> , 108 Wn.2d 38, 738 P.2d 665..... | 22, 41 |
| (1987) | |
| <i>Brown v. Safeway Stores, Inc.</i> , 94 Wn.2d 359, 373, 617 P.2d 704..... | 8 |
| (1980) | |
| <i>Broten v. May</i> , 49 Wn.App. 567, 744 P.2d 1085 (1987) | 42, 43 |
| <i>Buffets, Inc. v. Klinke</i> , 73 F.3d 965 (9 th Cir. 1996) | 19 |
| <i>Buffets, Inc.</i> , 73 F.3d | 19 |
| <i>Cobb v. Snohomish County</i> , 86 Wn.App. 223, 230, 935 P.2d 1384 | 34 |
| (Wash.App. Div. 1, 1997) | |
| <i>Cobb</i> , 86 Wn.App @ 230..... | 34, 35 |
| <i>City of Seattle v. Blume</i> , 143 Wn.2d 243, 252, 947 P.2d 223 (1997) | 33 |
| <i>Clark v. Eltinge</i> , 39 Wash. 696, 83 P. 901 | 44 |
| <i>Clayton v. Wilson</i> , 168 Wn.2d 57, 62, 227 P.3d 278 | 28 |
| <i>deElche</i> , 95 wash.2d, 238, 622 P.2d 835 | 28, 30, 31 |
| <i>DePhillips v. Neslin</i> , 139 Wash.51, 245 p. 749, 751 | 29 |
| <i>Eagle Group, Inc., v. Pullen</i> , 114 Wn.App. 409, 58 P.3d 292 (2002) | 22 |
| <i>Fisher Properties, Inc. v. Arden-Mayfair, Inc.</i> , 106 Wn.2d 826, 726 | 42 |
| P.2d 8 (1986) | |
| <i>Hadley v. Maxwell</i> , 120 Wn.App. 130, 141, 84 P.3d 286 (2004) | 8 |
| <i>Haley v. Highland</i> , 142 Wn.2d 135, 142 12 P.3e, 119 | 30 |
| <i>Hansen v. Rothaus</i> , 107 Wn.2d 468, 473, 730 P.2d 662 (1986)..... | 9 |
| <i>Keene</i> , 131, Wash.2d 834-35, 935 P.2d 588 | 30, 31 |
| <i>Kloss v. Honeywell, Inc.</i> , 77 Wn.App. 294, 301, 890 P.2d 480 (1995) .. | 34 |
| <i>LaFrambroise v. Schmidt</i> , 42 Wash.2d 198, 254 P.2d 485 | 28 |
| <i>Laymon v. Washington State Dept. of Natural Resources</i> , 99 Wn.App. .33 | |
| 518, 525, 994 P.2d 232 (Wash.App. Div. 2 2000) | |
| <i>Manna Funding, LLC v. Kittitas Co.</i> , 295 P.3d 1197 (Wash.App..... | 42 |
| Div. 3, 2013) | |
| <i>McCallum v. Allstate Property and Casualty Company</i> , 149 Wn.App ...14 | |
| 412, 424, 204 P.3d 944 (2009) | |
| <i>McCallum</i> , 149 Wn.App @ 413 | 15 |
| <i>Newbury v. Remington</i> , 184 Wash. 665, 52 P.2d 312, 313..... | 30 |
| <i>Nogrowski v. Southworth</i> , 100 Wash. 336, 170 P. 1011 | 44 |
| <i>Ed Nowrowski Ins. Inc., v. Rucker</i> , 137 Wn.2d 427, | 12, 15, 16 |
| 971 P.2d 936 (1999) | |

| | |
|--|--------|
| <i>Nowogroski</i> , 127 Wn.2d @ 308..... | 17 |
| <i>Nowogroski</i> , 137 Wn.2d @ 442..... | 19 |
| <i>Nowogroski</i> , 88 Wn.App. 350, 360 944 P.2d 1093 (1997)..... | 20 |
| <i>Nordstrom, Inc. v. Tampourlos</i> , 107 Wn.2d 735, 733 P.2d 208 (1987) .. | 41 |
| <i>Petters v. Williamson & Associates, Inc.</i> , 151 Wn.App. 154, 210 P.3d .22 1048 (2009) | |
| <i>Prier v. Refrigeration Engineering Co.</i> , 74 Wn.2d 25, 32, 442 P.2d | 9 |
| 621 (1968) | |
| <i>Quadra Enterprises, Inc. v. R.A. Hanson Co., Inc.</i> , 35 Wn.App. 532 | 8 |
| 526, 667 P.2d 1120 (1983) | |
| <i>Smith v. Retallick</i> , 48 Wn.2d 360, 363, 293 P.2d 745 | 28, 29 |
| <i>Stockland v. Bartlett</i> , 4 Wash. 730, 31 p. 24 (1892) | |
| <i>Tegman v. Accident and Medical Investigations</i> , 150 Wn.2d,..... | 30 |
| 75 P.3d 497 | |
| <i>Thola v. Henschell</i> , 140 Wn.App. 70, 164 P.3d 524 (207)..... | 10, 12 |
| <i>Woo v. Fireman's Fund</i> , 137 Wn.App. 480, 490, 161 Wn.2d 43 | 28 |
| <i>Young v. Whidbey Island bd. of Realtors</i> , 96 Wash.2d, 729, 732, 638.... | 34 |
| P.2d 1235 (1982) | |

Statutes

| | |
|-----------------------------|----------------|
| RCW 4.22.070 | 28 |
| RCW 4.84.010 | 44 |
| RCW 4.84.090 | 44 |
| RCW 4.84.010(1)..... | 44 |
| RCW 4.84.010(2)(B) | 44 |
| RCW 19.86 | 44 |
| RCW 19.108 | 5, 6 |
| RCW 19.108.010 | 22 |
| RCW 19.108.010(2)..... | 6, 27 |
| RCW 19.108.010(4)(a-b)..... | 14 |
| RCW 19.108.030 | 47 |
| RCW 19.108.030(2)..... | 20, 22, 36, 42 |

Books

Black's Law Dictionary (8th ed. 2004).....22
The Community Property Law, Harry M. Cross, 61 Wash.L.Rev. 13, ...30
115 (1986)
Labor and Employment Law, Peter A. Steinmeyer, Vol. 46, No. 4.....14
May 2009
Wash. Pattern Jury Instr. Civ., WPI 351.08 (6th ed.).....20
Claire Been, *A Necessary Break-Up: The Importance of Segregating
Attorney Time*,42
Washington Bar Ass'n Litigation News, Spring 2013, Vol. 25,
No.2 at 1142

I. INTRODUCTION

Appellant Ryan Pugh has worked in the insurance industry since 2003, when he was hired by Respondent Kassa Insurance Services, Inc. (“Kassa Insurance”) to be a “producer” of insurance sales to new clients, as a licensed salesperson. On March 1, 2007, Mr. Pugh began working for Co-Appellant RJC/CAK, Inc. (“RJC/CAK”) in the same type of position he occupied at Kassa Insurance. Before starting employment at RJC/CAK, Mr. Pugh wrote down a list of clients he had serviced at Kassa Insurance, although the information was not sufficient to place [renewal] policies for his clients.

This appeal asks whether a client list that is readily available to the public, and for which no safeguards are in place constitutes a trade secret, and whether when a client list is reconstructed from information readily distributed to Mr. Pugh by Kassa Insurance, misappropriation of trade secrets has occurred? Further, was the misappropriation willful and malicious when the court makes no findings of maliciousness, and where the Defendant had a good faith belief that he had oral contract rights to the contact list and clients?

Further was the amount of damages, including unjust enrichment, attorney’s fees and prejudgment interest awarded in error? And was it error to hold the community liable?

II. ASSIGNMENTS OF ERROR

A. Findings of Fact.

- 1). The trial court erred in making Finding of Fact No. 5.
- 2). The trial court erred in making Finding of Fact No. 6.
- 3). The trial court erred in making Finding of Fact No. 16.
- 4). The trial court erred in making Finding of Fact No. 17.
- 5). The trial court erred in making Finding of Fact No. 18.
- 6). The trial court erred in making Finding of Fact No. 19.
- 7). The trial court erred in making Finding of Fact No. 20.
- 8). The trial court erred in making Finding of Fact No. 22.
- 9). The trial court erred in making Finding of Fact No. 23.
- 10). The trial court erred in making Finding of Fact No. 24.
- 11). The trial court erred in making Finding of Fact No. 25.
- 12). The trial court erred in making Finding of Fact No. 33.
- 13). The trial court erred in making Finding of Fact No. 38.
- 14). The trial court erred in making Finding of Fact No. 23.

B. Conclusions of Law.

- 1) The trial court erred in entering Conclusion of Law No. 1.
- 2) The trial court erred in entering Conclusion of Law No. 3.
- 3) The trial court erred in entering Conclusion of Law No. 4.

- 3) The trial court erred in entering Conclusion of Law No. 5.
- 4) The trial court erred in entering Conclusion of Law No. 6.
- 5) The trial court erred in entering Conclusion of Law No. 9.
- 6) The trial court erred in entering Conclusion of Law No. 12.
- 7) The trial court erred in entering Conclusion of Law No. 13.
- 8) The trial court erred in entering Conclusion of Law No. 23.
- 9) The trial court erred in allowing prejudgment interest on the damage award to Kassa Insurance Services, Inc. against Defendants Pugh.
- 10) The trial court erred in holding that the Pugh Community was liable to Kassa Insurance Services, Inc.
- 11) The trial court erred in awarding attorney's fees and costs to Kassa Insurance Services, Inc.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1) Did the trial court err when it found that the client information was trade secrets?
- 2) Did the record support the trial court's finding of willful and malicious misappropriation of trade secrets by Ryan Pugh?
- 3) Did the trial court err when it relied on evidence that was excluded or improperly admitted?

4) Did the record support the trial court's award of damages against Ryan Pugh?

5) Did the trial court err when it granted prejudgment interest on a damage award based on opinion testimony?

6) Did the trial court err when assessing attorney fees and costs against Ryan Pugh?

7) Did the trial court err when holding the Pugh community liable?

8) Did the trial court error in finding that Kassa Insurance Services, Inc., did not need to mitigate its damages?

IV. STATEMENT OF THE CASE

Following graduation from Whitworth University in June 2003, Ryan Pugh was hired by Kassa Insurance to sell insurance as a "producer" in the new insurance sales business of Timothy Kassa, his neighbor. (Report of Proceedings (RP) 277-78). Pugh worked as a licensed insurance salesman with Kassa until March 1, 2007 when he went to work at RJC/CAK, Inc. ("RJC/CAK"). (RP 277-78, 408-09). RJC/CAK was not interested in Pugh's "personal lines" of insurance, but believed he would be a good agent for RJC/CAK's commercial policy sales. (RP 584-85). Pugh believed he owned the business clients and information he had developed while working at Kassa. (RP 381; 583-84). Tim Kassa and

Ryan Pugh had a joint telephone conversation with Kassa's attorney to draft such a contract, but no follow up occurred. (RP 285-86). However, Kassa believed Pugh took trade secret information with him when he left Kassa. Kassa Insurance took no formal steps to pursue a trade secret claim at the time Pugh left or for nearly 17 months later. (RP 175-76).

On August 11, 2008, and then on August 26 by Amended Complaint, (CP 3; 8), Kassa Insurance filed suit against Ryan Pugh, Jane Doe Pugh, and RJC alleging:

1. Pugh misappropriated trade secrets in violation of the Trade Secrets Act, Chapter 19.108 RCW involving client list information;
2. Pugh breached an employment contract between Kassa Insurance and Pugh;
3. Connor & Kelly (RJC/CAK) misappropriated trade secrets in violation of the Trade Secrets Act, Chapter 19.108 RCW; Connor & Kelly (RJC) tortiously interfered with the business relationship between Kassa Insurance and Continental Western Ins.;
4. Connor & Kelly (RJC) violated the Consumer Protection Act, Chapter 19.86 RCW; and

5. That Connor & Kelly (RJC) was unjustly enriched through clients wrongfully obtained from Pugh. (CP 10-11).

Kassa insurance never initiated suit against Lindsey J. Pugh, Ryan Pugh's wife, nor did it correctly add her at any later point during the State Court proceeding.

A bench trial was held before the Honorable Gregory D. Sypolt, Judge, Spokane County Superior Court on March 26, 27, 28 and 29, 2012. (RP 1-681).

On May 23, 2012, Judge Sypolt rendered a letter Opinion and held, pertinent to Ryan Pugh's appeal, that: 1) The client list Ryan Pugh created constitutes "trade secrets" (CP 29-30); 2) Ryan Pugh misappropriated the trade secret willfully and maliciously (CP 30-31); 3) that Ryan Pugh was unjustly enriched in the amount of \$17,738 (CP 36); and 4) that exemplary damages should be awarded against Ryan Pugh pursuant to RCW 19.108.010(2). The Court awarded \$42, 320 x 2 for willful and malicious misappropriation by Pugh (CP 36). The trial court awarded the damages against Ryan Pugh and Jane Doe Pugh. The trial court then entered its Findings and Conclusions incorporating its prior letter Opinion on June 8, 2012. (CP 861-94).

On June 14, 2012, Ryan Pugh filed Motions for Reconsideration regarding: community liability (CP 963-66, 1021-25); mitigation of damages (CP 1026-28); a Motion for Reconsideration regarding the judgments (CP 74). On September 21, 2012, the trial court orally ruled that Pugh's Motions for Reconsideration were denied.

Kassa Insurance brought a Motion for Attorney Fees, Costs and Prejudgment Interest on its successful claims. On November 16, 2012, the trial court awarded attorney's fees against Pugh in the amount of \$156,338.44, costs in the amount of \$21,482.02, and prejudgment interest in the amount of \$37,949.66 (CP 1038-39), finding that the amount was reasonable in pursuit of the misappropriation award. (CP 1043).

On November 30, 2012, Pugh filed a Notice of Appeal of the orders entered on November 16, 2012, seeking review of the orders denying reconsideration of community liability and mitigation of damages, and granting the judgment and supplemental judgments against Pugh. (CP 1032)

V. STANDARD OF REVIEW

When a trial court hears all the evidence and enters findings of fact and conclusions of law, the scope of review is to determine whether the findings are supported by substantial evidence and, if so, whether the

findings support the conclusions of law and judgment. Substantial evidence is “evidence of sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” Quadra Enterprises, Inc. v. R.A. Hanson Co., Inc., 35 Wn.App. 523, 526, 667 P.2d 1120 (1983) (Quoting Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 373, 617 P.2d 704 (1980)).

VI. ARGUMENT

A. The Trial Court Erred in Holding that Prejudgment Interest should be Awarded Against Defendants Pugh and the damages were improperly calculated.

1. **Prejudgment Interest in Washington.**

Prejudgment interest is only appropriate when damages are liquidated. A trial court’s award of prejudgment interest is subject to the abuse of discretion standard, and a trial court abuses its discretion if it exercises discretion on untenable grounds or for untenable reasons. Hadley v. Maxwell, 120 Wn.App. 137, 141, 84 P.3d 286 (2004).

Prejudgment interest may be awarded in Washington:

- (1) When an amount claimed is ‘liquidated’ or (2) when the amount of an ‘unliquidated’ claim is for an amount due upon a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard contained in the contract, without reliance on opinion or discretion.

- *Prier v. Refrigeration Engineering Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968).

A 'liquidated claim' is "one where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, **without reliance on opinion or discretion.**" *Id.* (emphasis added). The principle behind prejudgment interest is that a "plaintiff should be compensated for the 'use value' of the money representing his damages for the period of time from his loss to the date of judgment." *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986). However a defendant should not be "required to pay prejudgment interest in cases where he is unable to ascertain the amount he owes to the plaintiff."

Prejudgment interest may be applicable to tort claims. "The nature of the claim, not its characterization as sounding in contract or negligence, determines whether prejudgment interest is applicable. *Rothaus*, 107 Wn.2d at 472, 730 P.2d 662. In the instant case, Kassa's claims were for an intentional tort, violation of the Uniform Trade Secrets Act. Thus, what determines whether prejudgment interest should be awarded is whether "the claim is a liquidated or readily determinable claim, as opposed to an unliquidated claim." *Id.*

In the case below, the trial court chose the plaintiff expert's opinion to set the value of the damages award, (CP 36) and therefore the damages were not liquidated and prejudgment interest was inappropriate. (CP 36) However, the damages awarded by the Court were the product of a subjective opinion of average of values of books of business multiplied by commission numbers not known until *two years* after Pugh's Severance, based on the expert's opinion of annual increases in the market. (CP 309 – 15) The expert's opinion was not ascertainable, or a simple computation of numbers known to Mr. Pugh.

B. The Damages were improperly calculated.

1. The Misappropriation Award.

When calculating damages in a misappropriation case, the only appropriate amount to consider is the net profit realized in the misappropriation. *Thola v. Henschell*, 140 Wn.App. 70, 164 P.3d 524 (2007). In *Thola*, the court stated:

But we note that in calculating damages, the jury did not exclude the costs that [the subsequent employer] incurred caring for the patients who they unjustly retained. This omission may have resulted in an unintentionally high award to [the prior employer], who would have incurred similar cost in providing the same treatment to the same patients during that period.

- *Id.* at 89.

Pugh's expert testified that actual gross commissions paid to RJC/CAK and Pugh from former Kassa clients were approximately \$13,000. (RP 511). RJC/CAK's principal Joe Conner (MBA Gonzaga University) testified that his cost of Pugh's receipts was \$1.01 for every dollar received. (RP 607). Tim Kassa confirmed that he had lost money on Pugh for three years. (RP 173-74). So the conclusion is that RJC/CAK never made money on the contracts.

However, in the instant matter the court failed to apply the proper same as Kassa, so "net profit" is zero net income test for damages, instead awarding damages against Ryan Pugh verbatim according to Dan Harper's "expert opinion" of the approximate average of agency sales prices as a multiple of Kassa Insurance's future two years' insurance annual commissions using a blended opinion of the:

- (1) average told to him by a former college friend; (RP 309-10)
- (2) average told to him by an insurance agent; (RP 310)
- (3) average in Florida and the southwestern states; (342-43)
- (4) average reported on an internet site, and; (RP 314-15)
- (5) the price of an agency's real and personal property by a purchaser in Montana. (RP 315)

Mr. Harper multiplied his chosen personal opinion “average of averages” by a combination of (1) commissions received by Connor and Kelly for 24 months after Pugh left Kassa, plus (2) prior Kassa commissions on clients who did not place insurance with Connor and Kelly and former clients who did not buy insurance from either agency after Pugh left, for the twenty-four months after Pugh left Kassa. (RP 309 - 15). Defendant’s expert testified that total commission actually paid to Pugh/RJC/CAK for the next two years was \$13,500. (RP 511).

While the statute allows doubling of “actual” damages, the *Nogrowski* and *Thola* cases identify actual damages as actual commissions received less costs of production, i.e. “net profit.”

Mr. Harper instead used a blend of gross commissions without cost of production times 3.5, which the Court then doubled, resulting in a judgment for *seven times gross* commissions instead of the appropriate *two times net* commissions.

2. The Unjust Enrichment award.

In addition to an award of \$84,640.00 (\$42,320.00 x 2) for misappropriation of trade secrets, the court found that Pugh’s deferred compensation contract at RJC/CAK constituted separate unjust enrichment. The unjust enrichment award of \$17,738 is not readily

ascertainable by computation, because this is a payment actually computed in the future and due to Pugh over a five-year period following the year, in the future, when he retires from Connor and Kelly. (RP 334-37;) *Exhibit P-2, pg 8, para 8.3*. The year of retirement is not yet ascertainable. The amount was based on one times commissions for the calendar year prior to the year of retirement, and thus is not presently ascertainable. *Id. Exhibit P-2*. However, testimony showed that there was a 15% annual depletion of renewals, including clients who file bankruptcy, move out of Spokane, do not afford to buy renewal insurance, change agents, etc. (RP 338). The unjust enrichment award was not ascertainable, was based on faulty or unavailable data, and should be reversed.

C. The Trial Court erred in holding that the client info constituted Trade Secrets.

1. Customer lists as Trade Secrets, and the Trade Secrets test in Washington.

The trial court held that Ryan Pugh misappropriated trade secrets of Kassa Insurance by utilizing contact information of previous clients while employed by RJC. A customer list is a “trade secret” if it:

... is sufficiently secret to derive economic value from not being general know to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts ... to maintain its secrecy or confidentiality.”

Trade Secret Act, 765 ILCS 1065/1, Illinois Trade Secret Act quoted in Labor and Employment Law, Steinmeyer, Peter A., Vol. 46, No. 4, May 2009.

The State of Washington has adopted the Uniform Trade Secrets Act (“UTSA”), and holds a variety of different types of information secret and/or confidential. To substantiate the existence of a trade secret, the secrecy element must exist at the time the trade secret is created and must thereafter be maintained. The statute requires the owner to take reasonable steps under the circumstances to maintain secrecy.

The statute defines a trade secret as “information, including a formula, pattern, compilation, program, device, method, technique, or process that:

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

- RCW 19.108.010(4)(a-b).

In *McCallum v. Allstate Property and Casualty Company*,

149 Wn.App. 412,424, 204 P.3d 944 (2009) the court held that:

a key factor ... under the statute is the effort and expense that was expended in developing the information.

(citing *Woo v. Fireman's Fund*, 137 Wn.App. 480, 490 (rev'd in part on other grounds, 161 Wn.2d 43)). The *McCallum* court considered an appeal by Allstate of a trial court's denial of a protective order regarding discovery of its claim manuals, training manual, and claim bulletins, as Allstate claimed they could be construed as trade secrets. *McCallum*, 149 Wn.App. at 413. The court considered the protective order by reviewing UTSA cases, cited to *Woo* in stating, "... and finally the *Woo* court emphasized that the party seeking to protect documents as trade secrets **must show** that it has made reasonable efforts to maintain the secrecy of the materials." *Id.* at 425 (emphasis added).

The *McCallum* court also cited to the *Nowogroski* case in its opinion, which was the same case cited to by the trial court in the instant matter. *Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wn.2d 427, 971 P.2d 936 (1999). In that proceeding, the Plaintiff brought a trade secrets misappropriation case against former employees, for using confidential information to solicit clients. *Id.* at 429. While holding that an employee may not "an employee may not use or disclose trade secrets belonging to the former employer to actively solicit customers from a confidential customer list," the court's holding was based on the fact that the client lists were trade secrets was unchallenged on review. *Id.* at 450. However

while the *Nowogroski* court spent much time explaining how a client list *could* qualify as a trade secret it did not hold that such a list instantly qualified.

2. Kassa Insurance’s “Free and Open” disclosure of certain information, compared to the non-accessible protected client file, fails the Trade Secrets standard.

Citing to *Nowogroski*, the underlying trial court held that Tim Kassa’s informal staff meetings, where he reminded staff that client files were to be kept confidential, established that the client contacts was a trade secret. (CP 30). However, that was the extent of Kassa Insurance’s effort, as there was no other attempt to restrict access to the sensitive information in any way. *Id.* The admonition by Tim Kassa that client files should be confidential is no different from any other business instructing employees to keep files confidential, as such is a prudent business strategy to avoid customer anger or legal exposure. In fact Tim Kassa explained such in his testimony, explaining that his instructions to employees was to protect Visa card numbers and Social Security information. (RP 65-66). The trial’s court holding that such instructions to employees creates a “trade secret” would make it almost impossible for an ex-employee to *ever* solicit a former employer’s customers.

However, as *Nowogroski* explains:

Trade secret protection will not generally attach to customer lists where the information is readily ascertainable. If information is readily ascertainable from public sources such as trade directories or phone books, then customer lists will not be considered a trade secret and a prior employee, not subject to a noncompetition agreement, would be free to solicit business after leaving employment.

- *Nowogroski*, 137 Wn.2d at 308 (internal citations omitted).

Customer lists therefore do not instantly qualify as trade secrets from a simple instruction to keep client files confidential, and instead demand a more intensive inquiry. Whether a customer list is protected as a trade secret “depends on three factual inquiries: (1) whether the list is a compilation of information; (2) whether it is valuable because unknown to others; and (3) whether the owner has made reasonable attempts to keep the information secret.” *Id.* at 442. While (1) may apply, parts (2) and (3) do not, preventing the information from being a trade secret. The Washington Pattern Jury Instructions (“WPI”) with regard to reasonable attempts to maintain secrecy provides that:

In determining whether information is “the subject of efforts that are reasonable under the circumstances to maintain its secrecy,” you may consider, among other factors, the following:

- (1) The extent to which the information is known outside the plaintiff's business;
- (2) The extent to which employees and others in the plaintiff's business know the information;
- (3) The nature and extent of the measures the plaintiff took to guard the secrecy of the information;

- (4) The existence or absence of an express agreement restricting disclosure; and
- (5) The extent to which the circumstances under which the information was disclosed to others indicate that further disclosure without the plaintiff's consent was prohibited.

- WPI 351.08

The names of clients Mr. Pugh solicited are not unknown to others in the industry. As a beginner insurance agent, a large part of Mr. Pugh's clients were his friends and relatives—the genesis of every agent's business. Afterwards, Mr. Pugh utilized client marketing services to obtain potential client data, such as the service NetQuote, discussed at trial. (RP 67-68; 136; Exhibit D213). Mr. Pugh even paid 50% of the cost of acquiring names, so it is entirely reasonable for him to believe that he had ownership of these clients, independent of any oral contract beliefs held by Pugh. *Id.* These names, addresses and telephone numbers are obviously not exclusive trade secrets, but rather a publicly sold commodity. The purchasing of the names previously by Pugh from a commercial marketing vendor establishes that the clients solicited by Pugh after leaving Kassa Insurance could be easily determined by any insurance sales agent with access to NetQuote, or a related service.

Further, Kassa Insurance did not make reasonable steps to safeguard the information. Each client's name and information was printed

on Mr. Pugh's commission statements, which were delivered to him monthly. (RP 150; Exhibit D208). While the testimony of Julie Kemink states that Mr. Pugh would have to search through customer files to create his spreadsheet, she admits that all of the client information is printed on Mr. Pugh's commission statements. (RP 241-42). Mr. Kassa even acknowledges that Mr. Pugh would be free to disperse his commission statement to the public; his wife, his accountant, etc. (RP 152). Kassa Insurance even sent a commission statement, with client information, to Mr. Pugh *after he left Kassa Insurance*. (RP 159; Exhibit D209). Kassa Insurance was certainly not worried about client policy information getting into the public arena, even sending the information to an ex-employee. The actual protected client content was never accessed by Pugh, and was stored, password-protected, on Tim Kassa's computer. (RP 22; 152).

There was no written policy or procedure at Kassa Insurance Services for any safeguards. (RP 66). Under the facts, Kassa Insurance did not make "reasonable attempts to keep the information secret." *Nowogroski*, 137 Wn.2d at 442; *see also, Buffets, Inc. v. Klinke*, 73 F.3d 965, (9th Cir. 1996):

"[r]easonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, [and]

limiting access to a trade secret on a 'need to know basis.'" "general [protective] measures" may not be enough if they are not "designed to protect the disclosure of information."

Buffets, Inc., 73 F.3d at 969(interpreting Washington law)

Further, contrary to the WPI, Kassa Insurance did not have an "express agreement restricting disclosure," and there were insignificant measures taken to guard the secrecy. Wash. Pattern Jury Instr. Civ. WPI 351.08 (6th ed.). Instead, Kassa Insurance was free, open and reckless with Pugh's client information, and there is no substantial evidence to support a finding that the client information provided with each paycheck, available to the public and sent to an ex-employee, constitutes a trade secret.

D. The Trial Court erred in holding that Ryan Pugh Willfully and Maliciously Misappropriated Trade Secrets

The trial court awarded exemplary damages to Kassa Insurance under RCW 19.108.030(2) and RCW 19.108.040, and such a decision can be reversed only if clearly erroneous. *Nowogroski*, 88 Wn. App. 350, 360, 944 P.2d 1093 (1997). The trial court made insufficient findings to support its holding that Ryan Pugh willfully and maliciously misappropriated trade secrets, as he breached his "duty of loyalty" to his ex-employer, Kassa Insurance. However, the court's finding is merely conclusory, without detailed facts sufficient in the evidence to support

such a conclusion. As the court made no factual findings that Mr. Pugh *acted out of malice*, and there was no duty of loyalty owed to Kassa Insurance, the court's finding should be reversed.

In the Findings of Fact and Conclusions of Law, under the "Misappropriation of Trade Secrets" findings of fact, which began at paragraph 4 and proceed through 25, the facts do not support a finding that Mr. Pugh undertook any actions that would satisfy maliciousness. (CP 863-67). Rather, at paragraph 24, the court states that Mr. Pugh's transfer of his clients to RJC/CAK "constituted a violation of the duty of loyalty to which defendant Mr. Pugh owed to Kassa Insurance..." (CP 867). At paragraph 25, under the heading for "Willful and Malicious Misappropriation – Kassa v. Pugh", the finding of fact for alleged "malicious and willful" behavior was that Mr. Pugh "used the trade secrets embodied in the client lists to his own advantage, purposefully soliciting Kassa customers." *Id.*

No finding of fact evidences any behavior that reaches the level that Mr. Pugh had either a *subjective* intent to harm, or a *subjective* belief that harm is substantially certain." Instead, the superior court found that "Mr. Pugh used the trade secrets embodied in the client lists to his own advantage—purposefully soliciting Kassa customers." (CP 867).

Further, the court placed no importance on findings regarding willfulness and maliciousness, stating that under state law, “the definition of willful and malicious does not appear to be a term of art.” While it is true that willfulness and maliciousness are not defined in RCW 19.108.010, the trial court is still required to make a factual finding that demonstrates maliciousness and willfulness exists to make an award of exemplary damages. RCW 19.108.030(2). A blanket statement that it exists is insufficient. *Eagle Group, Inc. v. Pullen*, 114 Wn.App. 409, 58 P.3d 292 (2002)(specific factual findings demonstrating maliciousness and willfulness must be made to award exemplary damages).

There is no set standard for finding willfulness and maliciousness, but in *Petters v. Williamson & Associates, Inc.*, 151 Wn.App. 154, 210 P.3d 1048 (2009), the court utilized the Black’s law Dictionary (8th ed.2004) to define “malicious” as: “1. Substantially certain to cause injury. 2. Without just cause or excuse.” *Id.* at 173. In *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 738 P.2d 665 (1987), the court found that the defendant “knew its actions to be of dubious legality” and the “trial court did not believe that [the defendant] entertained any honest doubt as to the legality of its conduct...” *Id.* at 62.

The contrary is present in the instant case, as Pugh had just cause or excuse, Pugh believed that he was able to solicit former clients (as there was no written agreement not to do so), and the trial court did not find that Pugh intended to do any harm to Kassa Insurance. During said trial the court heard the testimony of fifteen witnesses, and admitted numerous exhibits offered by the parties. *Id.* One such item admitted into evidence was the DVD deposition of Donna Larson taken on March 21, 2012. (Exh. P40). In her deposition, Ms. Larson states that Mr. Pugh was concerned about getting a written contract, “because he was concerned if he didn’t have something in writing that he may not be able to have [the client files] if he did go somewhere else. He wanted some assurance that if he for any reason was going to leave, that he had some interest on those policies that he brought to the business.” (Exh. P40, pg. 18).

Mr. Pugh’s testimony during trial expounded on his belief that he had an oral contract, which would be made into a written contract, and that he believed that it would include ownership of clients obtained:

Q. And it had been previously represented to you by Mr. Kassa that he was going to produce a contract; is that right?

A. Yes.

Q. And that contract was going to relate, among other things, to your ownership of your book of business?

A. Yes.

(RP 287)

....

Q. All right. And what was the upshot of that conversation? What did you leave the room understanding?

A. I left the room understanding that a contract was going to be written by Brian Meck [Kassa's Attorney] with whatever information Tim

Kassa and I were going to send him regarding that agreement.

Q. And what information were you going to send Mr. Meck regarding that agreement?

A. The information that I produced to Mr. Kassa based on the points.

Q. And did that -- what did that information include as to the nature of your ownership of book of business?

A. That I would be entitled to the book of business. I would have ownership in that.

(RP 290)

Mr. Pugh also testified that after Mr. Kassa told him that there would be no written contract, the following took place:

Q. Did you ask him, "Well, then what's going to happen to my book of business if you go back to adjusting?"

A. That was another scenario; what if he -- I came to work and he decided the agency's no longer going to exist, we're going to go back to adjusting; what happens to the book of business then. I asked him what happens if I go to another agency, what happens to it then. And his response was, "You have the right to that book. You would have to take them over in a Broker of Record." At that point I went up and told Don Sagendorf that that was the resolution.

Q. All right. Further discussions after that between you and Mr. Kassa about that?

A. No.

Q. Why not?

A. I believed what he said.

(RP 292).

As to why he formed the client list, Mr. Pugh testified as follows:

Q. And why would you prepare a client list?

A. I wanted to organize the clients' information in the event that I did leave the agency.

(RP 296).

As to beginning work at his new employer, RJC/CAK, Inc., Mr. Pugh testified as follows:

Q. Did he talk about being a producer, what differences there would be? You talked about how you were going to be paid. What else did you talk about at Linnie's?

A. I believe he asked me if I had a covenant not to compete.

Q. What did you tell him?

A. "No."

Q. What did he say?

A. "Okay."

(RP 375).

Q. What did you tell Mr. Connor about buying the book of business?

A. I told him not to.

Q. Told him not to?

A. There wasn't a reason to. I own the book.

Q. Did you tell him that?

A. Yes.

Q. You told Joe Connor at the second meeting you owned your book of business?

A. Yes.

(RP 381).

After he moved to his new agency, Mr. Pugh testified as to how he used his constructed client list:

Q. Now, when you came to the office on March 1, did you have Exhibit P1 with you?

A. Yes.

Q. You had it with you?

A. The client list, yes.

Q. Yes. And how did you use it? What did you do with it?

A. I started calling people that were on the list.

Q. Call them on the telephone?

A. Yes.

Q. What did you say to them?

A. Told them that I had changed agencies, thought that it was a good move for both me and my family, thought that it was a good opportunity. I asked them if they would come to my new agency with me. I told them I thought it was a good opportunity for them too. Talked about having some availability, more markets, that sort of thing, and then asked them if they would do that, if they would stay with me.

Q. And what did they say?

A. Some said yes; some said no.

(393-94).

As to his state of mind when leaving employment, Mr. Pugh stated the following:

Q. And, Mr. Pugh, you had testified, you heard Tim Kassa testify and Tonya Kassa testify that, when you left employment there, that they were supportive of you?

A. Yeah. I testified to that too.

(RP 468).

The Superior Court later held that the Defendant did not have an oral contract for the book of business, stating in the Written Opinion that although Ryan Pugh had a subjective belief that he owned the book of business, he did not have an oral contract. (CP 27).

Unlike in *Sierracin Corp.*, there was no evidence that the defendant “knew its actions to be of dubious legality” and the “trial court did not believe that [the defendant] entertained any honest doubt as to the legality of its conduct” to support a finding of maliciousness. Instead, the trial court in the instant matter found that *Pugh had a subjective belief that he owned the clients, or that a contract existed.* 108 Wn.2d at 62; (CP 27).

E. **The Court Erred in Deciding that the Pugh Marital Community was Liable for the Intentional Tort Committed by Ryan Pugh**

The Court found that “Ryan Pugh,” solely, acted willfully and maliciously in misappropriating trade secrets and that this misappropriation was willful and malicious pursuant to RCW 19.108.010(2) because it was done without regard to his duty of loyalty to his employer and in breach of his fiduciary duty and statutory duty.

“Mr. Pugh intentionally took trade secrets” (CP 30). “Further, Pugh was not acting within ... scope of employment ... when he

misappropriated” (CP 31). Defendant Pugh [singular] is consequently liable” *Id.* “Attorney fees and exemplary damages (2 times) are assessed vs. Mr. Pugh” (CP 37).

RCW 4.22.070 and Intentional Acts:

We hold that under RCW 4.22.070 the damages resulting from negligence must be segregated from those resulting from intentional acts. *Tegman v. Accident and Medical Investigations*, 150 Wn.2d 102, 75 P.3d 497.

Intentional actors are 100% liable for their own acts. *Id.* at 125. Just as Pugh’s acts were not vicariously imposed on RJC/CAK, Inc., for the same reason his acts should not be imposed on the marital community. In *Smith v. Retallick*, 48 Wn.2d 360, 363, 293 P.2d 745, and other cases, the rationale for imposing community liability was *respondeat superior*. The Clayton court rejected that reasoning, holding that “[w]hether a marital community is liable for an intentional tort of one of its members is a mixed question of fact and law. *Clayton v. Wilson*, 168 Wn.2d 57, 62, 227 P.3d 278.

LaFrambroise v. Schmidt, 42 Wash.2d 198, 254 P.2d 485, “is still good law” after *deElche, infra*. *Id.* at 64. The *LaFrambroise* two-prong test determines community liability; as a distinct matter, *deElche*

determined whether a spouse's liability for a separate tort can be collected from her one-half community property.

The two-prong *LaFramboise* test provides that:

It is the law of this state that the community is not liable for the torts of the husband, unless the act constituting the wrong either (1) results or is intended to result in a benefit to the community, or (2) is committed in the prosecution of the business of the community.

The Court in Pugh's case made Findings that Pugh did "not" commit malicious acts "within ... the scope of employment" and that his intent was to benefit himself individually. (Findings of Fact Nos. 25 and 26).

The tort of a spouse, with regard to community liability, must be placed in one of three categories. In one category are those torts which are clearly in derogation of the community, i.e., the extra-curricular activities of a husband in alienating the affections of another's wife. The second category is composed of those torts that are committed by a spouse for the protection or benefit of the community, i.e., a fraud perpetrated in the management of the community business. Between these two extremes is the third or "neutral" category. *Smith v. Retallick*, 48 Wn.2d 360, 363, 293 P.2d 745.

The question of liability of a marital community for the tortious acts of the husband

was considered and the rule for its determination set out in the case of *DePhillips v. Neslin*, 139 Wash. 51, 245 P. 749, 751, wherein, upon a discussion and review of the authorities, it was said:

The controlling consideration is, was the tortious act of Neslin, the husband, committed by him in the management of the community property or for the benefit of the community? If so committed, the community must be regarded as having committed the act, and thereby rendered itself liable therefor. *Smith, supra* at 364 quoting from *Newbury v. Remington*, 184 Wash. 665, 52 P.2d 312, 313.

Prior decisions in *deElche* and *Keene* answer the basic policy questions presented by this case. *Haley v. Highland*, 142 Wn.2d 135, 142, 12 P.3d, 119.

Prior to *deElche*, Washington case law had shielded community property, both personal and real, from execution to satisfy nearly all separate obligations of either spouse, incurred both before and during marriage. See, e.g., *Stockland v. Bartlett*, 4 Wash. 730, 31 P. 24 (1892) (separate debt); (citations omitted). The landmark decision in *deElche* signified a major departure from this line of authority. Harry M. Cross, *The Community Property Law*, 61 Wash. L.Rev. 13, 115 (1986). *Id.*, at 142.

In *deElche*, a married tortfeasor was found separately liable to a victim for a tort committed while married. *deElche*, 95 Wash.2d at 238, 622 P.2d 835. The tortfeasor had no separate property and under then-existing law all community assets were shielded from collection for judgments based on the separate torts of either spouse. In *deElche*, the court changed this rule. The court noted that *deElche* was a case dealing with torts, not debts and that “[d]istinction can be made between debts and torts, and it is not necessary that the rules regarding them be parallel.” *Id.* at 246 n. 3, 622 P.2d 835. As a natural derivative of these conclusions, the Court held that a tortfeasor’s one-half interest in community personal property may be executed upon to satisfy a separate tort judgment against that spouse, for a tort committed during marriage, if they possess insufficient separate assets to satisfy the claim. *Id.* at 246, 622 P.2d 835. *Keene* extended *deElche* to allow recovery from a tortfeasor’s one-half interest in community real property. *Keene*, 131 Wash.2d at 834-35, 935 P.2d 588.

The trial court erred in holding that the marital community was liable, and that Ms. Pugh’s one-half share of community property was liable, to Kassa Insurance.

F. The Trial Court erred in holding that the Affirmative Defense of Mitigation of Damages was not applicable to Kassa Insurance Services, Inc.

As his fourth affirmative defense Mr. Pugh plead that Kassa Insurance "failed to mitigate damages." As evidenced in Exhibit D209 and D215, Kassa agreed with Pugh and Joe Connor that commissions earned by Pugh after his employment at Kassa Insurance on policy renewals were properly payable to RJC/CAK.

While Kassa knew by March 5, 2007, four days after Pugh began employment with RJC/CAK, that Pugh was soliciting existing clients, Kassa agreed with Ryan Pugh and Joe Connor, by letter, that Pugh was entitled to commissions earned post March 2007 and then stood by silently. (RP 158-59; Exhibit D215, para. 2). Kassa sent no demand letter or notice to the Defendants to turn over profits from former Kassa Insurance clients, instead waiting until August 2008 to file suit. Why did Kassa stand by silently while Defendants paid Pugh's overhead, processing, servicing, etc., watching commissions continuing to accrue?

Per the Plaintiff:

Q. So you sat by for what, a year and a half while Joe Connor collected the commissions and paid the overhead and then popped up for the first time and said, "I've changed my mind now; I want those commissions back"; isn't that right?

A. I think it was a little over a year, correct.

Q. It was from March to August, wasn't it, March '07 to August of '08?

A. From when I decided. The filing was in August, yes.

Q. You could have stopped the damages way sooner if you would have started a lawsuit in March, April, or May, couldn't you?

A. The damage was done as soon as Ryan e-mailed that to his house.

Q. Exactly. You could have filed the lawsuit right then and stopped any further damage, couldn't you?

A. It was family.

Q. Why did you wait that long?

A. It took a full year to finally figure out our entire loss with the information that Ryan took. The policies are 12 months. You get paid on them once every 12 months or six months on autos. And so it took 12 months to figure out exactly how much of a loss we were taking.

(RP 175).

However, all loss of clients stopped after three months.

Q. After three months you never received any more Change of Agent of Record letters, did you?

A. No. If I recall, I think they sent out 160 of the 260 within the first week and a half.

(RP 175-76).

"Legal causation rests on policy considerations determining how far the consequences of a defendant's acts should extend." *Laymon v. Washington State Dept. of Natural Resources*, 99 Wn.App. 518, 525, 994 P.2d 232 (2000)(citing, *City of Seattle v. Blume*, 143 Wn.2d 243, 252, 947 P.2d 223 (1997)). "A court 'must decide based on traditional principles of

proximate causation whether or not a defendant was the cause of the injuries suffered and whether the duty to mitigate was met.” *Id.* “Consequently, a plaintiff’s failure to employ available legal remedies to avoid resulting damages is analogous to a failure to mitigate damages. “ *Id.*

“The doctrine of avoidable consequences, also known as mitigation of damages, prevents recovery for damages the injured party could have avoided through reasonable efforts.” *Cobb v. Snohomish County*, 86 Wn.App. 223, 230, 935 P.2d 1384 (1997)(citing, *Kloss v. Honeywell, Inc.*, 77 Wn. App. 294, 301, 890 P.2d 480 (1995)). “The injured party’s duty is to ‘use such means as are reasonable under the circumstances to avoid or minimize the damages.’” *Cobb*, 86 Wn.App. at 230 (citing, *Young v. Whidbey Island Bd. of Realtors*, 96 Wash.2d 729, 732, 638 P.2d 1235 (1982)).

In *Cobb*, the plaintiff’s application for preliminary plat approval was denied, a result the appeals court later found to be arbitrary and capricious. *Id.* at 225. On remand for damages, the trial court found that “a reasonable developer in [the plaintiff’s] position would have paid the County \$10,000 under protest to allow its development plans to go forward while it appealed the County’s decision.” *Id.* Because the

plaintiff failed to reasonably mitigate its damages by paying the \$10,000, the plaintiff was not entitled to the damages resulting from lost profit in the real estate market. *Id.* at 233-234.

In the instant case, Kassa received all the written notices of the changes in Broker of Record letters, from the carriers, in March, April and May, 2007. However, Kassa failed to file any lawsuit until August 2008. Kassa should have, and could have, minimized his losses if he would have made his claim in March, April or May 2007, when all the notices of Change in Broker were received. Since Kassa failed to pursue his damages as a “reasonable person” should have, he is not entitled to the later damages that result from failure to act. *Cobb*, 86 Wn.App. at 230. Kassa’s actions could not be claimed as a “reasonable means to avoid or minimize the damages, however, as it [did] not do so.” *Id.* at 233. Tim Kassa’s testimony clearly evidences that the Plaintiff failed to mitigate damages, and there was no justifiable reason for Kassa Insurance to sit on its claims while potential damages accrued.

The trial court’s denial of Pugh’s affirmative defense that Kassa Insurance failed to mitigate damages was in error and should be reversed.

G. The Trial Court erred when awarding Attorney’s Fees to Kassa Insurance Services, Inc.

Ryan Pugh assigns error to the trial court's award of attorney's fees to Kassa Insurance. "The amount of a fee award is discretionary, and will be overturned only for manifest abuse." *Sierracin Corp.*, 108 Wn.2d at 65. Ryan Pugh asserts that the trial court improperly calculated attorney's fees owed to Kassa Insurance in making the award of attorney's fees.

1. Attorney fees Attributable to the Claim Against Ryan Pugh Constitute less than 50% of time recorded.

Kassa Insurance alleged nine separate and substantial claims in its Amended Complaint (CP 8-12):

1. Misappropriation of trade secrets by **Ryan Pugh**; *Amended Complaint, para 3.1.*
2. Breach of Kassa – **Pugh** Employment Agreement; *Amended Complaint, para 3.2.*
3. Vicarious liability of RJC/CAK, Inc.; *Amended Complaint, para 3.3.*
4. Unjust enrichment by RJC/CAK Inc.; *Amended Complaint, para 3.6.*
5. Tortious interference with contract by RJC/CAK, Inc.; *Amended Complaint, para 3.4.*
6. Connor and Kelly violation of Consumer Protection Act; *Amended Complaint, para 3.5.*
7. Quantum meruit claims against **both Defendants**, *Amended Complaint, para 3.7.*
8. Exemplary damages against **both Defendants**.

9. Attorney fees against **both Defendants.**

The Court awarded attorney fees only on claims one and two, pursuant to RCW 19.108.030(2). The Court awarded Judgment on the first and second claims and one-half of claims eight and nine.

a. **Axtell and Briggs' Time Records.**

With regard to time spent on tortious interference claim, Plaintiff's attorney states that he: "went through the fee statement line by line and subtracted the charges relating to tortious interference.... I came up with a total of \$7,622.50." (CP 904-05). Of the fifteen time entries itemized on page 4 of the Affidavit (total \$25,077.50) "specific charges that I could absolutely attribute to claims that were separate and apart from misappropriation ... came up with a total of \$7,662.50." *Id.*

The deposition of John Mallery of Continental Western Insurance Co. related solely to the tortious interference claim. The deposition, in Boise, actually lasted from 11:00 to 11:08 according to the Court Reporter's Transcript, pgs 2 and 20. Just the 9/27/09 and 9/27/10 time entries alone total 20 hours for "Deposition of John Mallery in Boise", ten hours per day, at a charge of \$5,000. Further, of the \$25,077.50 in entries

alleged to whole or partially relate to the vicarious liability claim and tortious interference claim, less the \$5,000 Mallary deposition fees, nets \$20,077.50 against a total allowance from that by Mr. Freebourn of \$7,622.50, less \$5,000 for Mallary depositions, or \$2,622.50 for the three entire vicarious liability claim and tortious interference claim and unjust enrichment claim against RJC/CAK, from complaint through trial,- that conclusion is not reasonable.

Alternatively, Mr. Freebourn estimates without computation, that all claims, except misappropriation by Pugh, amounted to 10% of the firm's total time over four years on the entire case. (CP 905, fn. 1).

However, as examples of Defendant's argument here that more than 50% of the law firm's time was spent on two of the *RJC/CAK* three main claims,

- RJC/CAK brought a motion to produce insurance company commission statements and Judge Eitzen entered an order compelling Kassa to produce the documents; Kassa brought a motion to exclude Lees as an expert (November, 2010) and Judge Eitzen awarded attorney fees to Murphy, Bantz & Bury, P.S. (August 5, 2011 – Order Granting Sanctions), yet Plaintiff's attorney claims 8.5 and 17.4 hours respectively, in his fee request on these two motions. (CP 908-22)

- No allocation of time is given to the RJC/CAK claims for the following:

8/19/09 Fax from Continental
9/22/09 Travel and deposition arrangements
9/26/09 Fax emails to Mallary
9/28/09 Teleconference re Continental
9/28/09 Review of fax from Mallary
10/8/09 Subpoenas to Continental
10/12/09 Prep for Joe Connor depo (5.0 hours)
10/13/09 Joe Connor deposition prep
10/14/09 Joe Connor deposition prep (7.0)
10/15/09 Deposition of Joe Connor (3.0 of 7.0 hour day?)

These alone totals another 17.6 additional hours.
(CP 912-13).

- RJC/CAK's motion to move the case to mandatory arbitration involved the three claims against RJC/CAK. Mr. Freebourn spent 16.5 hours on the arbitration motion from 8/10/09 through 8/19/09, but allocates no time to RJC/CAK claims. (CP 912).
- Drafting Interrogatories and Requests for Production directly solely to RJC/CAK were 1.3 hours on 12/8/08, as well as the following Motion to Compel against RJC/CAK and the claims of confidentiality and portion of Kassa's Summary Judgment Motion against

RJC/CAK on the vicarious liability issue (17.2 hours on the summary judgment alone). (CP 909-11).

- 7 hours preparing for summary judgment argument (against RJC/CAK two claims and Pugh claim) not including 9.0 hours on motion for reconsideration. (911-12).
- Every trial management report and trial brief dealt with the two claims against RJC/CAK, Inc. Some portion of 3/13/2012 - 1.0 hr; 7/13/11 - .5 hrs; 3/29/11 – 4.5 hrs; 3/21/11 – 4.5 hrs.

All of the above 70.5 hours add up to the better allocation of one-third time on each of the three main claims. However, in any event, they definitively demonstrate that selected samples above amount to over \$16,000 in fees, added to the original \$25,077 equals more than \$42,000 plus trial time on these three claims against RJC/CAK, Inc.

b. Dunn and Black time records

Plaintiff's attorney estimates 10-15% of its recorded hours on all claims except the Pugh misappropriation claim. (CP 939). This is an "estimate" without any quantitative analysis. Mr. Roberts' Affidavit claims total 133.9 hours on all claims, thus allocating 13-19 hours on vicarious liability and tortious interference claim and unjust enrichment of RJC/CAK, Inc.

Overall review of the actual entries shows:

6/8/12 – 3.5 hours just on segregation of fees. (CP 947).

3/24 - 3/25/12 – Portion of 14.0 hours on preparation of cross exam of Connor. (CP 945).

5/5/12 – Some portion of 5.5 hours on trial brief.

5/25/12 – Combined 1.0 hour on letter/motion to Judge Sypolt re Exhibit 38 and Continental Western related evidence, plus some part of 2.0 hours on 5/25 and 5/29 reviewing Judge Sypolt’s letter response. (CP 946).

Roberts’ estimate of 13-19 hours amounts to little more than one-half of just the sample entries listed above. Again, including trial preparation, exhibit preparation, drafting the judgment against RJC/CAK, Inc. and Findings and Conclusions, in addition to the 40 hours referenced above, supports an educated estimate of at least one-third (40+ of 133 hours) of Roberts’ time on RJC/CAK claims.

c. Washington Law Regarding Award of Attorney’s Fees

The process by which the Court determines an award of attorney fees in a trade secrets case is described in *Boeing Co. v. Sierracin Corp.* “[W]hen a number of actions are argued and only some of those allow for attorney’s fees, it would give the prevailing party an unfair benefit to award attorney fees for the entire case. Rather, attorney fees should be awarded only for those services related to the cause of action which allow for fees.” *Sierracin Corp.*, 108 Wn.2d at 66 (citing, *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987)). The Boeing court further stated that, “the trial court should not determine a reasonable attorney fee merely by reference to the number of hours which the law

firm representing the prevailing party bills.” *Sierracin Corp.*, 108 Wn.2d at 65.

The *Nordstrom, Inc.* case involved a claim of attorney’s fees under the Consumer Protection Act. When the Plaintiff filed a claim for \$40,000 in attorney’s fees the *Nordstrom* court held that it was “a grossly exaggerated amount and remand[ed] to the trial court to determine what constitutes a reasonable award.” *Id.* at 743. In reaching its decision, the court held that:

Finally, the determination of what constitutes reasonable attorney fees should not be accomplished solely by reference to the number of hours which the law firm representing the successful plaintiff can bill. In a case such as this one, in which settled case law indicated that an unfair trade name infringement constitutes a Consumer Protection Act violation, there is a great hazard that the lawyers involved will spend undue amounts of time and unnecessary effort to present the case. Therefore, **the trial court, instead of merely relying on the billing records of the plaintiff's attorney, should make an independent decision as to what represents a reasonable amount** for attorney fees. The amount actually spent by the plaintiff's attorney may be relevant, but it is in no way dispositive.

- *Nordstrom, Inc.*, 107 Wn.2d at 744 (emphasis added).

“The party claiming an award of attorney fees when fees are recoverable for only some claims has the burden of segregating the lawyer’s time.” *Manna Funding, LLC v. Kittitas Co.*, 295 P.3d 1197 (Wash.App. Div. 3, 2013). By law, Kassa Insurance is only entitled to fees and costs with

regard to the time actually spent to litigate the claims against Ryan Pugh under claims one and two, pursuant to RCW 19.108.030(2). A party's unwillingness, or the difficulty or complexity of attempting segregation of fees (see the Kevin Roberts affidavit cited above), does not relieve a party of its burden to segregate non-recoverable fees. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 726 P.2d 8 (1986); *Brotten v. May*, 49 Wn.App. 567, 744 P.2d 1085 (1987). The Plaintiff knew from the very beginning of the case that they would be entitled to request attorney fees if they were successful on the misappropriation claim. The time to begin segregating fees and costs among the various claims was when the case first began:

If an award of fees is even a remote possibility in your case, the time to start thinking about segregating fees is now. It is nearly impossible to go back at the end of a case and attempt to segregate between claims. Contemporaneous billing should reflect not only the task performed, but the claims worked on, if the task is non-specific.

- Claire Been, *A Necessary Break-Up: The Importance of Segregating Attorney Time*, Washington Bar Ass'n Litigation News, Spring 2013, Vol. 25, No.2 at 11.

The Plaintiff's own hourly billings belie the statement, and it is incredulous to set forth that 90% of the Plaintiff's attorney fees relate to

the misappropriation claim against Pugh when the tortious interference claim comprised a large amount of Plaintiff's time, resources and court proceedings. Further, the amount of attorney's fees awarded in this case is entirely unreasonable, as in *Nordstrom, Inc.*, and the court should make an independent decision as to what is reasonable, rather than relying solely on billing records. *Nordstrom, Inc.*, 107 Wn.2d at 744.

2. Costs, and Failure to file a Cost Bill.

Kassa Insurance did not file or offer a cost bill. Instead, Kassa Insurance by general motion seeks "costs" of \$20,887.94, according to the total shown in Freebourn's Memorandum, page 7, line 19. Nowhere is this total related to statutory costs, but it is apparently itemized on the unidentified last page of the attachments to the Affidavit.

Costs allowed to a prevailing party are defined in RCW 4.84.010. Only seven "costs" shall be allowed. The two identifiable costs here are filing fees, RCW 4.84.010(1), and service of process fees, RCW 4.84.010(2)(b). Kassa apparently claims costs under RCW 4.84.090. That statute requires the disbursements to be stated in detail and verified by affidavit, filed and served within ten days of judgment. RCW 4.84.090. A Cost Bill not served within ten days of judgment should be disregarded. *Clark v. Eltinge*, 39 Wash. 696, 83 P. 901; *Nogrowski v.*

Southworth, 100 Wash. 336, 170 P. 1011. Further, although “witness fees” are allowed by law for one day’s attendance, plus mileage, the Plaintiffs’ Memorandum cites no authority for expert Dan Harper’s fees for his report and testimony, exceeding \$22,000. RCW 5.56.010. *See also, Nordstrom, Inc.*, 107 Wn.2d at 743 (“Costs have historically been very narrowly defined, and RCW 4.84.010, which statutorily defines costs, limits that recovery to a narrow range of expenses such as filing fees, witness fees, and service of process expenses”). Award of costs for Mr. Harper was unwarranted by law.

The trial court’s awarding of attorney’s fees and costs should be reversed.

CONCLUSIONS

The Superior Court found that Mr. Pugh had a subjective good faith belief that he owned the clients when he left Kassa Insurance. Although the court determined that he was wrong in his belief, the record does not support that he acted willfully and maliciously. Further, the availability of the client information to the public, along with Kassa Insurance’s reckless and free and open disclosure of the client information, especially after Pugh left Kassa Insurance, does not support a finding that that the client information constitutes trade secrets.

Should the court's decision be upheld, there is no substantial evidence to support the misappropriation damages against Pugh, as the court failed to use the "net-profit" test. Further, the damages found by the court for the misappropriation and unjust enrichment were based on an inappropriate standard, speculation and conjecture. In fact, as stated above, RJC/CAK made no money from the prior clients that Pugh solicited after being employed. The net profit test would evidence Kassa's damages as *\$0*.

There was no basis for the prejudgment interest award, as the amount was unliquidated, and based solely on opinion and discretion of the court. The amount was not readily known to Pugh, was disputable, and should be reversed.

The judgment against the community should be reversed, and any affirmed judgment be solely against Ryan Pugh.

The attorney fees and costs awarded by the court were excessive, unreasonable, not segregated properly, and/or unwarranted. The award should be reversed. If the misappropriation damages are determined to be \$0 by the net profit test, then Plaintiff should be awarded zero attorney's fees.

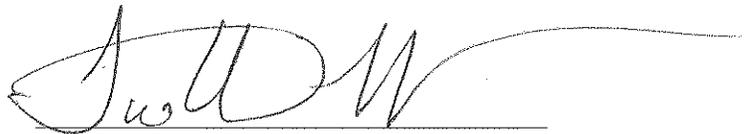
Kassa Insurance knew for over seventeen months that Pugh was soliciting clients, but took no action to stop him, or file suit and enforce an injunction. Kassa Insurance's principal's reasoning that he had to wait until the damages were done before filing suit is nonsensical. A plaintiff suffering damages cannot allow damages to continue to accrue, in order to increase a damages award. Kassa Insurance failed to mitigate its damages, which it could easily have done, and the damages awards against Pugh should be reversed.

The previous separate appeal of RJC/CAK, Inc., was consolidated with this appeal. Accordingly, Pugh hereby adopts and incorporates the arguments presented by RJC/CAK in its appeal.

Pugh seeks appropriate fees and costs for this appeal under RAP 18.1 and RCW 19.108.030.

RESPECTFULLY SUBMITTED this 31st day of May, 2013.

MURPHY, BANTZ & BURY, PLLC.

A handwritten signature in black ink, appearing to read 'Timothy R. Fischer', written over a horizontal line.

Timothy R. Fischer, WSBA No. 40075
Attorney for Appellant Pugh