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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By.....

No. 311961

WASHINGTON STATE COURT OF APPEALS
DIVISION III

KASSA INSURANCE SERVICES, INC., a Washington corporation

Respondent,

vs.

RYAN PUGH AND JANE DOE PUGH, a marital community; and
RJC/CAK, INC., a Washington corporation,

Appellants.

APPELLANT RYAN PUGH'S REPLY BRIEF

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I. Reply Argument of Appellant Pugh

Ryan Pugh did not compile any list which included “insurance information” of Kassa Insurance Services, Inc.’s (hereinafter “Kassa”), clients. (Kassa Opening Brief at p. 1). The list that Pugh created contained only the name, address and phone number of his clients, and lacked any other details about the clients.(RP 296; Exh. P-1) Pugh had an honest, at the most mistaken, belief that he owned or had rights to the clients. (Report of Proceedings (RP) 381; 583-84). He believed this due to his subjective understanding that he and Kassa had an oral agreement. At one point an attempt to formalize an agreement was initiated through Kassa’s attorney. Pugh also paid for 50% of the client leads that generated the clients. (RP 67-68; 136; 285-86). Pugh had no express or subjective malice towards Kassa, or its owners. Pugh did not access client information for clients other than those he generated or paid for through the referral service. The court below erred in holding that the evidence supported a finding that trade secrets existed, and that malice was present.

It was further error for the court hold that prejudgment interest could be awarded when the damages were not liquidated, and where the evidence presented was in a large range, from which the trial court had to

interpret, analyze and select what it determined to be the proper amount. It was error to determine that prejudgment interest is applicable in such a situation. Further, the trial court should have determined that waiver Kassa waived its right to damages, in addition to failure to mitigate damages, due to Kassa's conduct in agreeing to explicitly permit income arising from transferred clients to Pugh through RJC/CAK payroll systems. (RP 166-67; 175-76). Finally, the court failed to properly award attorney's fees and costs, and it failed to address Pugh's objections to attorney's fees and costs and make detailed findings of fact and conclusions of law in awarding the fees is error.

II. The Evidence Presented does not Support a finding that the Customer List was a Trade Secret

1. Customer Lists as Trade Secrets

“For trade secrets to exist, they must not be ‘readily ascertainable by proper means’ from some other source, including the product itself.” *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 49-50; 738 P.2d 665 (1987)(citing, RCW 19.108.010(4)(a); *Chicago Lock Co. v. Fanberg*, 676 F.2d 400, 404 (9th Cir. 1982)). “Thus, a customer list of readily ascertainable names and addresses will not be protected as a trade secret.” *Zoecon Industries, a Div. of Zoecon Corp. v. American Stockman Tag Co.*, 713 F.2d 1174, 1179 (5th Cir. 1983). The information cannot be

“available to or...readily obtain[able] by the public or any other individual.” *Haut v. Rossbach*, 128 N.J.Eq. 77, 79; 15 A.2d 227 (N.J.Super.Ch. 1940).

In *Abdallah v. Crandall*, 76 N.Y.S.2d 403, 273 A.D. 131 (NY 1948) the court examined a situation where an employee left his employer, a milk supplier, to join a competing milk supplier, taking a list of clients with him and thereafter soliciting the business of those clients. *Abdallah*, 273 A.D. at 132. The court, in finding that the list of customers did not constitute a trade secret, opined:

In some instances a list of customers may be a trade secret but it would be straining the meaning of the word beyond any reasonable limit to hold that the list transferred in this case came within that category. The plaintiff himself conceded on the trial of the action that every householder in both of the communities involved either bought milk or was a potential customer for it. It was also conceded, and it is a matter of common knowledge, that the delivery of milk from the very nature of the business is open and notorious. A trade secret, like any other secret, is nothing more than private matter; something known to only one or a few and kept from the general public, and not susceptible to general knowledge.

Id. at 133.

In *Town & Country House & Homes Service, Inc. v. Evans*, 150 Conn. 314, 189 A.2d 390 (Conn. 1963), however the court found that a list of customers taken by an ex-employee did constitute a trade secret, as the type of clients that utilized its services were not generally known and

could not be determined by looking in the phone book or other directory.

Evans, 150 Conn. at 321. The court stated that

If in any particular business the list of customer is, because of some peculiarity of the business, in reality a trade secret and an employee has gained knowledge thereof as a matter of confidence, he will be restrained from using that knowledge against his employer. On the other hand, where the identity of the customers is **readily ascertainable through ordinary business channels or through classified business or trade directories, the courts refuse to accord to the list the protection of a trade secret.**

Id. at 320 (emphasis added)(citing a string of cases determining that names that could be easily learned through directories, such as a telephone directory, could not meet the standard as trade secrets.)

The *Evans* view of when a customer list becomes a trade secret was viewed similarly in *Automobile Club v. Zubrin*, 127 N.J.Eq. 202, 12 A.2d 369 (N.J.Super Ch. 1940), wherein the court found that an employer that sold insurance for his ex-employer, and upon finding new employment thereafter solicited his ex-employer's clients, did not violate any trade secrets, as every adult was a potential customer, and the clients could not be viewed as secret or subject to protection. *Id.* at 206-07; *See also, American Welding & Engineering Co., Inc., v. Luebke*, 37 Wis.2d 697, 702; 155 N.W.2d 576 (Wis. 1968)("The customer lists taken by Mueller were not complicated marketing data which had been laboriously compiled by Abbott. These cards contained only the names and

addresses of the customers and the individual to be contacted. There was no complicated marketing data concerning projected market needs of the customer or the customer's market habits.”)

2. The Customer List does not meet the Standard for Trade Secrets

The list created by Pugh does not constitute a trade secret. First, the list contained only the name, address and telephone number of the clients; no valuable marketing or account history was written down, nor were any purchasing habits. (RP 296; Exh. P-1) Second, the clients' names and contact information were available to any person in the insurance industry, as the clients were publicly listed in directories and every adult is a possible customer to an insurance agent. Third, the contact information was available to any insurance agent through NetQuote, the service for which Pugh paid 50% of the cost. The easy availability of the client information undermines and removes any protection as a trade secret. Client information publicly available to any insurance agent that desires it cannot be considered a trade secret.

Kassa cites to *Ed Nowogrowski Ins., Inc. v. Rucker*, 137 Wn.2d 427, 971 P.2d 936 (1999) in support of its position that the contact information of the client constitutes a trade secret. However, that court did not address whether the client list in that case *was* a trade secret, but

instead found that trade secrets may not be misappropriated. However, when addressing in general a customer list as a trade secret, the court stated:

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).

Therefore, *Nowogrowski* follows the majority of cases across the country and in Washington. The ready availability of the client contact information to any person that wishes to look in a directory, such as a telephone book, or to any agent that wishes to purchase the contact information through NetQuote weighs against a finding that it is a trade secret under the *Nowogrowski* standard. Further, Pugh was not subject to a non-competition agreement. Kassa states the court had the discretion to find the contact info was a trade secret, however this is not an issue of discretion, but an error of law. The trial court erred by finding that the contact info was a trade secret, and did not follow the Washington Supreme Court's holding in *Nowogrowski*.

3. Kassa did not keep the information contained in the List Confidential

Kassa did not keep the information confidential, contrary to its representations. Kassa cites to its “informal” structure of hiring friends and family, and that as a “mom and pop” business, their informality should be taken into consideration when determining whether there was an effort to keep information confidential. (Kassa Opening Brief at p. 42-43). Kassa stated that there was daily meetings and discussions about keeping client *financial information* confidential, since it was required to do so by the insurance companies. (Ex. P-23; RP 84-85, 229).

Kassa’s reliance on the meetings and privacy notices is misplaced. The testimony does not evince an effort to keep clients confidential from *competitors*, but rather to keep *financial and private information*, such as *credit card information*, confidential to protect Kassa from action against *it* by its customers and the insurance companies it serviced. The meetings were not intended to protect dissemination and dilution of its customers, but to protect itself from litigation. Further Kassa’s reliance on its protected computer file is also misplaced. (RP 78). Kassa freely disseminated the clients name and contact information on Pugh’s paychecks, *even after he had left Kassa’s employ*. (RP 159; Exh. D-209). All the information Pugh acquired in his search of the filing cabinets was

printed on his commission statements, and Pugh did not even need to search the unlocked file cabinet for the information. (RP 241-42). Kassa's standards did not meet what was necessary:

[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. v. Klinke, 73 F.3d 965, 969 (9th Cir. 1996)(interpreting Washington law).

Kassa did not advise its employees of any trade secrets, or the need to make sure competitors did not acquire the client information. The meetings were regarding privacy required by the insurance companies and credit card companies, in order to protect Kassa from a lawsuit or loss of business. Further, there were no measures to protect information when the client info was printed on every paystub, and voluntarily disseminated by Kassa to Pugh after Pugh joined a competitor. Kassa's reliance on its "mom and pop" status does not justify an exception to the general rule. Kassa's efforts at secrecy were nonexistent or at the very least insufficient.

III. Willful and Malicious behavior was not supported by the evidence presented

1. The Lack of a Malice standard under the Uniform Trade Secrets Act

There is a striking inconsistency in the application of the “willfulness and maliciousness” standard in Washington pursuant to the UTSA compared to other jurisdictions. Further, the application of “willfulness and maliciousness” pursuant to the UTSA, when comparing the application and definition of “maliciousness” under other state laws, is substantially different. The law has tended to be applied in a manner as to make it almost automatic and a matter of course that maliciousness will be found in a trade secrets case, and to make *willfulness* almost indistinguishable from *maliciousness*. The trial court in this case made the same error.

One of the more concerning statements contained within the trial court’s opinion is the statement concerning “malice,” wherein the court states that, “[t]he definition of willfulness and malicious (sic) does not appear to be a term of art.” (CP 30-31). The court’s automatic application of the standard, without citation to any actual finding of malice, and when actually finding good faith, does not meet the standard for malice, and was error by the trial court. By finding that malice exists when an employee violates a “duty of loyalty” to an ex-employer, the

trial court evinced a view that it is perfunctory that “willful and malicious” will always be found when an ex-employee is found to have misappropriated. This is an incorrect view, does not allow for a finding of an employee’s good faith to negate malice, and obliterates any reason for the statutes to apply an exceptional damage clause for malice.

Ryan Pugh believed that he had a right to the clients, through either the oral contract that he believed existed, or by him paying for half of the cost to acquire the clients through NetQuote. (RP 287,290, 292, 381). Further the court specifically found that Mr. Pugh had a subjective belief that he owned the book of business. (CP 27). This subjective belief cannot support a finding of malice on Pugh’s part.

Other courts have held that more is required for a finding of malice than the trial court found in the instant case:

Willful and malicious misappropriation giving rise to punitive damages can arise under varying sets of facts, and the phrase ‘willful and malicious misappropriation’ can include both an intentional misappropriation and a misappropriation resulting from the conscious disregard of the rights of another. The fact that defendant or defendant’s agent knew he was acquiring trade secret information indicates willful and malicious misappropriation, and may justify a punitive damage award. **However, a situation in which the defendant or defendant’s agent did not know but should have known he was acquiring trade secret information lessens the degree of culpability**, which may lessen or eliminate the award of punitive damages.

Monona County Mut. Ins. Ass'n v. Hoffman Agency, Inc., 791 N.W.2d 711 (Iowa App. 2010)(emphasis added).

A Federal Circuit Court, applying Illinois' version of CUTSA, concluded that misappropriation of a trade secret is not willful or malicious unless it is motivated by malice against the plaintiff. *Roton Barrier, Inc. v. The Stanley Works*, 79 F.3d 1112, 1121 (Fed.Cir. 1996).

In Washington State, while examining the Uniform Anatomical Gift Act, the court found good faith to be "honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage." *Morris v. Swedish Health Services*, 148 Wn.App. 771, 777, 200 P.3d 261 (Div. 1 2009). Further 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 *Sierracin Corp.*, 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..." 108 Wn.2d at 62.

2. Pugh's actions do not constitute Malice under any standard

The holdings in Washington State and other jurisdictions support a finding that Pugh did not meet a "malicious" standard, under any iteration of the word. He had no knowledge of "dubious legality," and the court found that he believed he had a right to the contracts, even if he was ultimately wrong. (CP 27). Pugh's good faith belief and lack of actual malice or ill will negates a finding of maliciousness, and the trial court erred in finding that maliciousness was present. There is no evidentiary support for exemplary damages, and the trial court's finding and conclusion of law was in error.

IV. Kassa Insurance Services, Inc., effectively waived any claim as to Pugh

"A waiver is the intentional and voluntary relinquishment of a known right." *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998). "It may result from an express agreement or be inferred from circumstances indicating an intent to waive." *Id.* "An implied waiver may arise where one party has pursued such a course of conduct as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it. A waiver is unilateral and arises by the

intentional relinquishment of a right or by neglect to insist upon it”

Bowman v. Webster, 44 Wn.2d 667, 670, 269 P.2d 960 (1954).

In testimony at trial, Mr. Kassa stated the following:

Q. Mr. Kassa, when we left off we were discussing Exhibit D215 discussing an agreement between you and Mr. Connor: pre-March 1 commissions go to your company, you pay Ryan Pugh; post-March 1 commissions go to Connor & Kelly, he pays Ryan Pugh, correct?

A. Correct.

Q. Now, you totally changed your position on that in this lawsuit, haven't you?

A. I don't think so.

Q. Is it your position now that the post-March 1 commissions are due to you, that you own these commissions, you own this book of business that was generating these commissions and you want those commissions?

A. I owned the confidential information within those files, yes.

Q. Are you asking this Court to enter a judgment against the defendants for the amount of commissions received after March 1?

A. Yes.

Q. That's just the opposite of what you agreed to in this letter, isn't it?

A. Yes.

Q. And at the time of this letter, you didn't say to Joe Connor, "Hey, Joe, when those commissions come, those are mine; send them down here"? You didn't give him any

notice like that, did you, a letter or a demand or something?

A. No.

(RP 16-67).

Kassa acknowledged that he effectively waived his claim, in writing, as to the proceeds of the insurance policies. He agreed that Pugh could retain the funds, and waived any right to them. He never made a demand to return them, until seventeen (17) months later. Kassa has waived its claim against Pugh.

V. The Prevailing Law holds that no prejudgment interest can be awarded

In response to Pugh's argument that the lower court erred in awarding prejudgment interest, Kassa merely states that prejudgment interest was appropriate, as the trial court had opinion evidence which could allow the damages to be "calculated with exactness." (Kassa Opening Brief, at p. 56). Such a blanket statement is belied by the evidence and Kassa's own statement elsewhere in its brief that the damages were in a "range" and the judge had to examine the evidence to determine an approximate amount. (Kassa Opening Brief at p.3).

There is no reported Washington decision regarding trade secrets where prejudgment interest was also awarded. This is due to the fact that

trial courts have to engage in a large amount of discretion when making an award under the UTSA. In the trial court's opinion, the court stated that it weighed the expert testimony offered by both parties, and it found that Kassa's expert's opinion "within the reasonable range of substantial, plausible evidence..." and that from this opinion testimony, the court had a "reasonable basis for estimating the loss..." which was "within the range of competent evidence in the record." (CP 36.) The court recognized that there was no "mathematical certainty" to the damages. *Id.* The court's opinion belies Kassa's assertion that the calculations were made with "exactness."

As this court recently stated in *Hidalgo v. Barker*, 30544-9-II, Court of Appeals of Washington, Division 3 (publ. September 10, 2013), "[a] party's entitlement to prejudgment interest as a question of substantive law turns on whether a claim is "liquidated." *Id.*, citing, *Unigard Ins. Co. v. Mut. Of Enumclaw Ins. Co.*, 160 Wn. App. 912, 925, 250 P.3d 121 (2011). "A liquidated claim is one where the evidence furnished data 'which, if believed, make it possible to compute the amount due with exactness, without reliance on opinion or discretion.'" *Id.*

The amount awarded by the court was certainly not liquidated before the lawsuit was filed, nor before it was considered by the trial

court. The court set forth that there was no mathematical certainty in determining the damages, but instead found damages based on a range between the two opinions set forth. The court's award of prejudgment interest was directly inapposite to what the law requires, a liquidated amount, and was made in error. This Court should reverse the award of prejudgment interest.

VI. The Trial Court Erred When Awarding Attorney's Fees to Kassa Insurance Services, Inc.

Pugh argues first that attorney's fees and costs are not warranted, as malicious and willful misappropriation and the status of the customer lists as trade secrets was erroneously found. However, even if the attorney's fees are allowable, the lack of any findings of fact, conclusions of law, or consideration of Pugh's objections, warrants reversal.

A trial court must make findings regarding the specific challenges to an award of attorney's fees and costs, and where there are none entered, the record does not allow for a proper review of these issues, and warrants remand. *Mayer v. The City of Seattle*, 102 Wn.App. 66, 82-83, 10 P.3d 408 (Div 1 2000). "Trial courts must independently decide what represents a reasonable amount of attorney fees; they may not merely rely on the billing records of the prevailing party's attorney." *Id.* at 80. The

trial court below relied solely on Kassa's billing records, made no independent inquiry, and made no findings regarding challenges to records.

Kassa also had a duty to segregate fees on recoverable claims from non-recoverable claims. As stated in *Sierracin, Corp.*:

In *Nordstrom*, we held that when a number of actions are argued and only some of those allow for recovery of attorney 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 causes of action which allow for fees.
108 Wn.2d at 66.

Kassa's counsel made no effort to segregate their fees, instead awarding fees based on counsel's guess as to how much applied to the claim against Pugh.

Further, the reasonableness of the award, compared to the judgment it's derived from is relevant and should be considered. *Mayer*, 102 Wn.App. at 83. In this case the amount of the underlying judgment is insignificant compared to the sum of the attorney's fees, and is manifestly unreasonable. Such an award shocks the conscience, and merits a review that the trial court failed to address.

VII. Damages were improperly calculated

Kassa fails to address Pugh's contention that the misappropriation damages were improperly calculated, instead sidestepping the issue and stating that the trial court had the discretion to award the amount of damages it did. However, Pugh's appeal addresses the error of law committed by the trial court in applying an incorrect standard to determine damages in a misappropriation case. The court did not have the discretion to apply the wrong legal standard.

The only appropriate amount of damages to consider in a misappropriation case is the *net profit realized in the misappropriation*. *Thola v. Henschell*, 140 Wn.App. 70, 164 P.3d 524 (2007)(emphasis added). 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 only conclusion that can be drawn from the evidence actually presented is that RJC/CAK never made money on the contracts. As such, under the *Thola* test, the only amount that Kassa would be entitled to for any misappropriation would be the net-profit RJC/CAK realized, which was **\$0**.

Kassa fails to address in its brief that RJC/CAK realized no profit from clients that left Kassa due to Pugh's solicitations. The court erred by awarding damages under the wrong legal standard, and instead should have applied the *Thola* standard.

VIII. Conclusion

The Superior Court found that Mr. Pugh had a subjective good faith belief that he owned the clients when he left Kassa Insurance, due to his belief in an oral contract, and by his purchase of 50% of the client records. His good faith belief negates a finding of malice.

The availability of the client information to the public, through directories and client referral services, as used in this case, along with Kassa's failure to safeguard the information, does not support a finding that that the client information constitutes trade secrets.

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. 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*. An award for a misappropriation claim must be based upon the net-profit realized.

Kassa supplies no basis for the prejudgment interest award, and admits that the amount was unliquidated, and based solely on opinion and discretion of the court. The amount was not readily known to Pugh, could not be ascertained prior to the court’s decision, and should be reversed.

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, as it suffered no damages.

Kassa failed to mitigate its damages, and expressly waived any claim to the insurance proceeds, expressly stating that Pugh could retain them.

RESPECTFULLY SUBMITTED this 30th day of September, 2013.

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

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on October 1, 2013, I caused a true and correct copy of the *missing page 7* to be served on the following counsel in the manner indicated:

Chad Freebourn	VIA REGULAR MAIL	<input type="checkbox"/>
Axtell, Briggs & Freebourn	VIA CERTIFIED MAIL	<input type="checkbox"/>
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DATED at Spokane, Washington, on October 1, 2013.



MARY L MYERS